Court File No. 39084

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JOAQUIN ALFREDO CORTES RIVERA

Appellant (Appellant)

and

HER MAJESTY THE QUEEN

Respondent (Respondent)

FACTUM OF THE APPELLANT, JOAQUIN ALFREDO CORTES RIVERA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

DEBORAH R. HATCH
Deborah Hatch Law Office
1740, 10123 – 99 Street
Edmonton, Alberta T5J 3H1
Tel: (780) 474-2888
Fax: (780) 665-1059
Email: dhatch@hatch.law

Counsel for the Appellant

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, Ontario, K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Appellant

ALBERTA JUSTICE
Appeals Branch, Criminal Justice
3rd Floor, 9833-109 Street
Edmonton, Alberta T5K 2E8

Keith A. Joyce
Tel: (780) 422-5402
Fax: (780) 422-1106
Email: keith.joyce@gov.ab.ca

Counsel for the Respondent

GOWLING WLG (CANADA) INC.
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent

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PART I: STATEMENT OF FACTS

A. OVERVIEW

1. The Appellant faced a charge of sexual assault. This was a case where the Crown relied on evidence of anal fissures as critical evidence which it argued was the "key corroborating feature of this case".[1] The Crown presented medical evidence at trial which established that the anal fissures could have been caused up to five days prior to them being observed. They were observed in an examination said to have taken place within hours of an incident, according to the complainant, between she and the Appellant. The complainant had acknowledged to a nurse upon examination that she had had consensual vaginal intercourse within the last seven days. She also indicated that she had not engaged in "consensual rectal penetration" within the last two days prior to the alleged sexual assault.[2]

2. A motion pursuant to section 276 was advanced by the Defence prior to trial, with the requisite application and affidavit being duly filed. The Defence sought to cross-examine the complainant in relation to the fissures which "could have come from the prior sex she had with another person…which could explain the tears." The Crown argued that the evidence did not warrant an evidentiary hearing under section 276.2 of the *Criminal Code* as it was not even "capable of being admissible," and that the application ought to be dismissed, as the proper evidentiary foundation to proceed to a hearing was not established "because he simply wouldn't have recourse to that information. He wouldn't have knowledge of it."[3]

3. The Trial Judge ruled, relying on section 276.1(4) of the *Criminal Code*, that the accused had not even established a basis for a section 276 hearing to be held, finding that "evidence of prior consensual vaginal sexual intercourse within seven days prior to the alleged incident does not assist the accused in explaining the anal fissures and injuries,"[4] relying also on the complainant's statement that "she did not engage in consensual rectal penetration two days prior to the alleged sexual assault."[5]

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[1] Trial Transcript ("TT") p. 561, l. 11, Appellant's Record, Vol V, TAB 23.
[2] TT p. 25, ll. 7-13, Appellant's Record, Vol II, TAB 13.
[3] TT p. 17, ll. 28-38, Appellant's Record, Vol II, TAB 13.
[4] TT p. 25, ll. 38-41, Appellant's Record, Vol II, TAB 13.
[5] TT p. 25, ll. 9-10, Appellant's Record, Vol II, TAB 13.

4. While the Court of Appeal of Alberta was unanimous in finding that the Trial Judge erred in declining to permit the Defence to adduce evidence or to cross-examine the complainant on this issue, as full or partial anal intercourse or aspects of vaginal penetration, within the five days leading up to the examination might have caused the tears, and that subject was specific enough to support such an application,[6] the majority and the dissenting Justice differed as to what remedy ought to flow.

5. The majority found that the curative proviso within section 686(1)(b)(iii) of the *Criminal Code* was applicable, even though the Defence had abided by the Trial Judge's ruling and did not engage in any cross-examination nor adduce any evidence relative to activity with others which may have caused the injury which the Crown relied heavily upon. Mr. Justice Slatter, in dissent, recognizing that the complainant was not certain whether the Appellant had penetrated her vaginally, anally, or at all,[7] held that a "more appropriate remedy" would be to invoke section 683(1) of the *Criminal Code*.[8] He opined that a formal inquiry at the appellate level under section 683 would allow the complainant's evidence to "be supplemented" by cross-examination and that the appeal could be resolved once that occurred.[9]

6. It will be argued that where a Trial Judge prevents the accused from embarking on relevant cross-examination and thereby from challenging critical evidence relied on by the Crown, and where counsel properly abides by the Trial Judge's ruling and cross-examination thus does not occur, the only appropriate remedy is for a new trial to be ordered where permissible, relevant, and fulsome cross-examination is permitted and the right to make full answer and defence is thus afforded.

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[6] Majority Judgment of the Court of Appeal (*R. v. Cortes Rivera*, 2020 ABCA 76 (CanLII), at para 26, Appellant's Record, Vol I, TAB 6.
[7] Dissenting Judgment of the Court of Appeal, para 64, Appellant's Record, Vol I, TAB 6.
[8] Dissenting Judgment of the Court of Appeal, paras 55-68, Appellant's Record, Vol I, TAB 6.
[9] Dissenting Judgment of the Court of Appeal, para 67, Appellant's Record, Vol I, TAB 6.

B. FACTS

i. Trial Evidence

7. The Appellant was charged with sexual assault. He stood trial in the Court of Queen's Bench sitting in Edmonton, Alberta. The trial was heard by The Honourable Madam Justice Goss sitting alone.

8. The Crown called a number of civilian witnesses and police officers, the adult complainant, the nurse who examined the complainant, the civilian police employee who provided some interpretation to the Appellant at the police station, a DNA expert, and Dr. Catherine Carter-Snell, a nurse who was qualified as an expert and permitted to provide opinion evidence in relation to the forensic assessment and treatment of alleged sexual assault patients, including injury identification and interpretation.

9. Several *voir dires* were held. In the first *voir dire*, section 276.1 of the *Criminal Code* was considered. In the second *voir dire*, the admissibility of some of the expert evidence of Dr. Carter-Snell was addressed. In the third *voir dire*, the admissibility of a statement taken from the accused approximately 7 hours after his arrest and of DNA seized from a penile swab taken from the Appellant (10 hours after the alleged incident and approximately 5 hours after his arrest) were addressed.

10. The complainant, J.T., testified that on January 12, 2014, she had been drinking heavily at a house party throughout the night and early morning hours. She became ill and went to the bathroom. She testified that the Appellant came in to assist her while she was vomiting and that she thought he pulled her pants down and penetrated either her vagina or her anus. The following exchange occurred in examination-in-chief:

> Q What makes you think that he might have been penetrating you?
> A Because I could feel him moving.
>
> Q What could you feel?
> A His hands on me, his body against me.

Q Anything else?
A No.[10]

She testified that she told him to stop three times and he didn't stop until the third time. She had a recollection of him moaning behind her and thought that he was masturbating or ejaculating. When she was done in the bathroom, she pulled her pants up and went into the living-room where she laid on the couch. She was crying and the police were called. She first noticed stinging and burning to her anus when she was in the hospital later that day. She was still vomiting when she was examined at the hospital.

11. She acknowledged that she had little independent memory of January 12, 2014.[11] She did not remember how she became sore.[12] She acknowledged having memory blanks during the evening in question and further that she did not remember all of what had occurred in the bathroom. Once she was advised that she had tears in her anus, however, she concluded she had been anally penetrated.[13] She acknowledged telling Cst. Murphy that she was 90% sure that the Appellant had penetrated her and that she wasn't really sure whether he had penetrated her vaginally, anally, *or at all*.[14]

12. Raelene Miller, a nurse, testified that she examined the complainant on January 12, 2014. The complainant was hunched over and was vomiting during part of the examination, which took place some six hours after the alleged incident. No injuries were noted to the complainant's vagina when a genital examination was conducted. Five lacerations were observed on the complainant's anus. They were not measured. A laceration is a "break in the skin where the skin is stretched to the point that it can no longer be - - remain intact, so either from blunt force, pressure."[15]

13. Both external and internal genital swabbing were done of the complainant's vaginal wall and cervix. An anal swab was done as well. *None* of the Appellant's DNA was located on or

[10] TT p. 63, ll. 17-24, Appellant's Record, Vol II, TAB 14.
[11] TT p. 78, ll. 31-33, Appellant's Record, Vol II, TAB 15.
[12] TT p. 104, ll. 38-39, Appellant's Record, Vol II, TAB 15.
[13] TT p. 105, ll. 8-23, Appellant's Record, Vol II, TAB 15.
[14] TT p.108, ll. 6-15, Appellant's Record, Vol II, TAB 15.
[15] TT p. 498, ll. 23-25, Appellant's Record, Vol IV, TAB 21.

within the complainant's body, although she was examined that very morning. Decreased rectal tone was noted.

14. Dr. Cathy Carter-Snell was qualified as an expert and permitted to provide opinion evidence in the area of forensic assessment and treatment of alleged sexual assault patients including injury identification and interpretation.[16] She had obtained her PhD in nursing. Her evidence was relied on by the Crown, and ultimately by the Trial Judge as well, as being "highly probative".[17]

15. She testified that genital areas, including the anal area, heal in "3 to 5 days",[18] and that "typical lacerations are normally about a quarter of an inch to half an inch."[19] She testified that the "presence of two or more injuries in the genital, anal region was predictive in their studies of who was in their sexual assault group versus who was in their consensual group" and that "all-in-all, the patients were more likely to have more injuries if they were in the sexual assault group rather than a consensual group."[20] Further, the "consensual groups" tended to have either no injury or up to two injuries. She acknowledged that it was possible that there was no penetration notwithstanding the injuries, as the lacerations were on the outside of the entrance to the rectum. She acknowledged that there was no bleeding around the lacerations.[21]

16. With respect to the recency of the lacerations, based on the report she reviewed, the injuries would be "consistent" with penetration within the last seven hours and within the last five days.[22] She further testified that if the complainant had anal intercourse within the last three days she could still have injuries from that activity as those injuries could last up to five days.[23] She acknowledged that the lacerations appeared to be "the tiniest little things"[24] based

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[16] TT p. 210, ll. 14-17, Appellant's Record, Vol III, TAB 17.
[17] TT p. 563, ll. 5-6, Appellant's Record, Vol V, TAB 23; TT p. 593, ll. 1-6, Appellant's Record, Vol V, TAB 24.
[18] TT p. 213, ll. 20-22, Appellant's Record, Vol III, TAB 17.
[19] TT p. 215, ll. 19-20, Appellant's Record, Vol III, TAB 17.
[20] TT p. 216, ll. 1-9, Appellant's Record, Vol III, TAB 17.
[21] TT p. 220, ll. 28-30, Appellant's Record, Vol III, TAB 17.
[22] TT p. 221, ll. 32-36, Appellant's Record, Vol III, TAB 17.
[23] TT p. 230, ll. 23-26, Appellant's Record, Vol III, TAB 17.
[24] TT p. 232, ll. 31-32, Appellant's Record, Vol III, TAB 17.

on the diagram drawn by the nurse who had observed them, and that even if they were the size of the head of a pin, they would still be considered lacerations.

17. DNA evidence was tendered. None of the Appellant's DNA was found upon or within the complainant. DNA consistent with that of the complainant was found on the penile swab taken from the Appellant. That DNA could have come from saliva or skin. The DNA expert doubted that it would just be from skin contact due to the number of cells involved. It would be consistent with skin cells from inside the mouth and it was possible, though not the most likely scenario, that the female DNA could have come from vomit.[25] (The Appellant had been assisting the complainant while she was vomiting as well as holding the "puke bag" she was vomiting into). The DNA expert noted that it was a possible scenario that saliva from the complainant could be transferred to the Appellant's penis, and he could not rule out that a transfer of vomit could have occurred.[26] The Appellant had been seen at the police station to be urinating in his cell and to be touching his penis with his hand prior to the penile swab procedure.[27]

18. There were stains on the complainant's tank top which were tested. No traces of sperm were found, notwithstanding that every stain was tested, whether on the front or the back of the shirt.

19. The Appellant was arrested at the residence where the party occurred. He was sleeping when he was awoken by the police. A number of other adult individuals were asleep throughout the residence as well.

20. When arrested at 11:47 a.m., the Appellant was read his *Charter* rights. When asked if he understood, he responded "Not really. I don't understand English, I need a translator." He agreed he could try having the information re-read again, if it was read to him slowly. The officer read it slowly to him and the Appellant again asserted that he needed a translator.[28] It was quickly recognized by the police that he did indeed require a translator.

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[25] TT p. 257, l. 34 to p. 258, l. 5, Appellant's Record, Vol III, TAB 17.
[26] TT p. 258, ll. 24-37, Appellant's Record, Vol III, TAB 17.
[27] TT p. 440, ll. 11-20, Appellant's Record, Vol IV, TAB 20.
[28] TT p. 278, ll. 34-41, Appellant's Record, Vol III, TAB 18.

21. When asked if she had any discussion with the Appellant in the police vehicle on the way to the police station, Cst. Bosse responded "I don't have anything noted that I recall."[29] Cst. Maynes testified that she had directed Cst. Bosse to take the accused from the residence to Northeast Division where his rights would be read to him in Spanish or a Spanish interpreter would be arranged. When the Appellant was removed from the residence he had not said anything in English and had only spoken in Spanish. Cst. Maynes advised Det. Reule, the primary investigator, that the accused was under arrest and that he spoke Spanish. The Appellant appeared to understand the few things which were said to him in Spanish and did appear to understand when told to stand up in English, because he stood up. At no time did the police make a specific request for a male translator, even once it was determined that a penile swab would be taken from the Appellant.

22. At the police station, the Appellant was placed in a dry cell (a cell with no toilet or sink), although he had indicated at approximately 12:07 p.m. that he needed to use the washroom. He was told he could not, as the police needed to obtain some evidence from him first.[30] He urinated once, early on in the detention, at approximately 12:40 p.m., into a drain in the floor of his cell.[31] Subsequent to that, the Appellant made at least three requests to use a washroom after the translator became involved, during the following five hours, while he was detained prior to the strip search and penile swabbing procedure (which was followed by an interrogation and a statement being obtained).[32] He was finally permitted to use a washroom after providing a statement at approximately 7:46 p.m., seven hours after he had last urinated, after a night of alcohol consumption.[33]

23. Recognizing that the Appellant spoke little English, a request was made for a translator, who arrived at approximately 1:20 p.m. At 1:24 "the *Charter"* was read to him and he indicated that he understood, stating "Yes, I don't know how", in reference to using a lawyer.[34] The police had determined that they were going to obtain a penile swab from the Appellant and

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[29] TT p. 281, ll. 15-17, Appellant's Record, Vol III, TAB 18.
[30] TT p. 283, ll. 23-26, p. 284, ll. 20-25, Appellant's Record, Vol III, TAB 18.
[31] TT p. 286, ll. 9-13, Appellant's Record, Vol III, TAB 18.
[32] TT pp. 353-354, 342, Appellant's Record, Vol III, TAB 18.
[33] TT p. 452, ll. 5-12, Appellant's Record, Vol IV, TAB 20.
[34] TT p. 284, ll. 34-37, Appellant's Record, Vol III, TAB 18.

the female translator was advised that "we required our ident unit to come out and take some evidence off of him and that it related to a sexual assault." At 1:27 p.m. the translator translated the caution to the Appellant. He responded "No, he did not wish to say anything."[35]

24. The Appellant was walked to the phone room. He stated that he was concerned about a lawyer not being able to speak Spanish. The Appellant spoke in Spanish the entire time. He requested to look in his wallet for a card for a lawyer. He was permitted to do so. The officer was aware that the Appellant had tried, but was unable to find the lawyer's card. Mr. Cortez Rivera then asked if he could call a friend. The officer told him that the phone was to contact counsel only and not to call a friend. From outside the phone room, Cst. Bosse could hear the Appellant speaking. She was not able to understand what he was saying due to the language being used.[36] The translator told Mr. Cortes Rivera that he could make *one call* to counsel.[37]

25. After being told that he could not call a friend and that he could only use the phone to contact counsel, when asked whether the Appellant expressed "any other concerns *about wanting to speak to a Spanish lawyer*, the Appellant told the translator that he was not being treated fairly and that his rights were "not given".[38] The translator waited outside of the phone room, *where she had been told to wait*.

26. Cst. Bosse acknowledged that when asked if he wanted a lawyer, the Appellant had responded that he did, but stated "do not know how". She testified that *her standard practice* would to be inform detainees how to use the phone, the phone books, and contact Legal Aid. She acknowledged that her notes did not reflect any such conversation and reflected simply that the accused had asked "Can I use the washroom?"

27. She further acknowledged that when Mr. Cortes Rivera indicated he wanted a Spanish-speaking lawyer, she did not assist him with that, and testified that it is "up to him to use the phone book and phone numbers."[39]

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[35] TT p. 286, ll. 33-35, Appellant's Record, Vol III, TAB 18.
[36] TT p. 288, ll. 17-41, Appellant's Record, Vol III, TAB 18.
[37] TT p. 342, ll. 34-35, Appellant's Record, Vol III, TAB 18.
[38] TT p. 289, ll. 14-23, Appellant's Record, Vol III, TAB 18.
[39] TT p. 305, ll. 15-19, Appellant's Record, Vol III, TAB 18.

28. Alexandra Penaloza, a translator for the Edmonton Police Service, testified that she was brought in to translate for the Appellant at the police station. She was asked by the police to "read him the *Charter of Rights*" and did so from a translation card. She testified that Mr. Cortes Rivera kept asking to use the bathroom.[40] He was ultimately allowed to go and make a phone call. After reading him the *Charter* in the cell, she "stepped outside. I was told to wait. They were waiting for evidence". She knew that she had "told him that he could go make his phone call." When asked what was told to the accused about the phone room or the phone call, she testified "*that he was allowed to make one phone call to whomever he wanted*". That was information which she provided to him in Spanish.[41]

29. He asked her at least three times during the course of his detention to go to the bathroom. She communicated that to the police but was told that he could not use a bathroom until they had "gathered evidence".[42] *She communicated that to the Appellant.* She was asked to wait while the swabbing was done. She did not translate for the Appellant during this process. She was never asked to tell him that he could do the swabbing himself.[43]

30. The Appellant was *Chartered* and Cautioned shortly after 4:45 p.m. prior to the penile swab and strip search being conducted. Prior to the penile swab being taken, the Appellant was advised of his right to counsel again. He "immediately responded with saying if he could call a lawyer again". Det. Reule testified that he did not record exactly how he responded to the Appellant but that he "would have told him absolutely, you will have an opportunity to call a lawyer again if you want". He testified that he asked the Appellant if he wanted to call a free lawyer or any other lawyer. The Appellant responded that he had already spoken to a lawyer.[44] No *Prosper* waiver was read (although the translator had earlier advised the Appellant that he could make *one call* to a lawyer).

31. When he was told about the strip search and penile swab, the Appellant "asked if this was legal". The officer advised him that it was as it would be a search incident to lawful arrest

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[40] TT p. 342, ll. 8-9, p. 353, ll. 28-37, p. 354, ll. 33-41, Appellant's Record, Vol III, TAB 18.
[41] TT p. 242, ll. 1-37, Appellant's Record, Vol III, TAB 17.
[42] TT p. 353, l. 28 to p. 354, l. 41, Appellant's Record, Vol III, TAB 18.
[43] TT p. 390, ll. 10-36, Appellant's Record, Vol IV, TAB 19.
[44] TT p. 436, ll. 10-40, Appellant's Record, Vol IV, TAB 20.

and for the collection of evidence. Det. Reule was unable to tell the Court exactly what he had told the Appellant as he "didn't record exactly what I told him". He testified that he then "offered him an opportunity", stating:

> A And then I offered him an opportunity again to contact counsel. He declined. And then I stated - - what I have here is, I again stated if he changed his mind, he could call one later as well. I know he had said he would comply with it and then the next thing I would have read to him was the standard caution.[45]

32. The police took virtually no notes in relation to the strip search and the penile swabbing process. The translator was not present for these procedures and the police spoke about what they were doing in English. The Appellant was never asked whether he wished to take the swab himself because "it was easiest" for the police to collect the evidence themselves. The Appellant was fully naked for several minutes during the course of the swabbing process.[46] Three police officers were present during the process. One of the officers held the Appellant's penis with one hand while he swabbed it with the other hand.

33. The third officer who was present during the strip search and penile swab procedure, Cst. Illner, was present only because Cst. Wilson had asked him to be there, as Cst. Wilson had not taken into account that Det. Reule would already be there for officer safety.[47]

34. The protocol at the time was to audio record the *Charter* and Caution procedure as well as the entire interaction of the swab. None of that occurred in this case, however. As with the strip search procedure, the protocol was that the individual should not be fully naked all at once and that they were to be offered the opportunity to swab themselves. The Appellant was not offered either of those options. Normally the opportunity to swab oneself is provided to a detainee in order to preserve their dignity, however that did not occur in this case due to "the language problem".[48]

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[45] TT p. 437, ll. 33-36, Appellant's Record, Vol IV, TAB 20.
[46] TT p. 374, ll. 14-22, Appellant's Record, Vol IV, TAB 19.
[47] TT p. 442, ll. 4-8, Appellant's Record, Vol IV, TAB 20.
[48] TT p. 475, l. 37 to p. 476, l. 10, Appellant's Record, Vol IV, TAB 20.

35. Det. Reule had advised the Appellant that he would be "interviewing him shortly" following the penile swab and he was retrieved from the dry cell for that purpose.[49] No bathroom had yet been provided to the Appellant.

36. An interrogation commenced, shortly after the penile swab and strip search was completed, at 6:46 p.m. The Appellant's statement was gathered by the translator, who at times provided "*a summary of what he said.*"[50] Prior to the interview, when being advised that he could still exercise his rights, the officer could not "recall offhand what (the Appellant) would have said" in response to that.[51]

37. Det. Reule acknowledged that the Appellant's comments when being *Chartered* prior to the interrogation were equivocal in that he indicated he wanted a lawyer and then indicated that he had already spoken to a lawyer.[52]

38. After the interrogation (which was deemed admissible at trial) was completed, the Appellant was finally allowed to use the washroom,[53] and was placed in the phone room further to his request. The Appellant used the phone several times in the course of the next hour.[54]

39. The trial commenced with a section 276 application advanced by the Defence. The Defence had filed a motion and affidavit seeking to adduce evidence of prior sexual activity on the part of the complainant given that minute fissures were seen on her anus, the Crown relied on those injuries as probative of intercourse and lack of consent, and those injuries could have occurred during sexual activity with others in the days prior to the date in question. The complainant had advised the examining nurse that she had engaged in consensual vaginal penile intercourse within seven days prior to the alleged assault, and that she had not engaged in consensual rectal penetration "within two days" prior to the alleged sexual assault. Evidence in relation to prior sexual activity within the last seven days would be relevant, it

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[49] TT p. 445, ll. 37-41, Appellant's Record, Vol IV, TAB 20.
[50] TT p. 449, ll. 24-28, Appellant's Record, Vol IV, TAB 20.
[51] TT p. 449, ll. 34-41, Appellant's Record, Vol IV, TAB 20.
[52] TT p. 461, ll. 1-20, Appellant's Record, Vol IV, TAB 20.
[53] TT p. 452, ll. 5-12, Appellant's Record, Vol IV, TAB 20.
[54] TT p. 452, ll. 5-21, Appellant's Record, Vol IV, TAB 20.

was argued, to the cause of the injuries relied upon by the Crown, and the identity of the party who may have caused them. The Crown opposed this part of the motion.[55]

ii. Rulings of the Trial Judge

40. The Trial Judge ultimately ruled that the evidence sought to be adduced (in relation to prior sexual activity within the last seven days which could have caused the injuries) was not relevant to an issue at trial and was therefore not even *capable* of being admissible in accordance with section 276.1(4). Accordingly, she declined to hold a section 276.2 hearing pursuant to section 276.1(4) of the *Criminal Code*.[56]

41. The Trial Judge found that the testimony of Dr. Carter-Snell was admissible and fell within the parameters of her qualification as an expert.[57]

42. The Trial Judge found that the Appellant's section 10(b) rights were not breached as he had not said why he wanted to call a friend, and the authorities were not obliged to infer that he wished to contact a friend in order to facilitate the exercise of his right to counsel. The Trial Judge further found that the Appellant's comment that he had not been treated fairly and had not been given his rights did not raise a reasonable inference that the request to contact a friend was to facilitate access to counsel. She concluded that the comments did not create a "special circumstance", notwithstanding cases such as *R v Evans*, *R v Bartle*, and *R v Baig*.[58] Because the police had provided a translator, the Appellant's difficulty with English did not give rise to a requirement for the police to inquire further. The Trial Judge further found that the Appellant's statement later, prior to the penile swab, that he *did* wish to contact a lawyer

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[55] The Defence also sought permission to cross-examine the complainant about whether she had consensually performed fellatio on the accused and kissed him on the date in question. The Crown consented to such questioning.

[56] TT pp. 23-26, Appellant's Record, Vol II, TAB 13; TT pp. 29-32, Appellant's Record, Vol II, TAB 14.

[57] *R v Cortes Rivera*, 2017 ABQB 275, Appellant's Record, Vol I, TAB 3.

[58] *R v Evans*, 1991 CanLII 98 (SCC), [1991] 1 SCR 869; *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173; *R v Baig*, 1987 CanLII 40 (SCC), [1987] 2 SCR 537; see *R v Cortes Rivera*, 2017 ABQB 275, at paras 89-92, paras 101-104, Appellant's Record, Vol I, TAB 3.

again and his subsequent statement that he had already spoken to a lawyer were not contradictory.[59]

43. In relation to proof of voluntariness, the Trial Judge stated only that "despite the Appellant's difficulties with English, I find that the Crown has established the voluntariness of the accused's statement beyond a reasonable doubt. Nothing in the evidence before the Court raises a doubt in this regard."[60]

44. With respect to the strip search and penile swab, the Trial Judge found that the swab process did not comply with the guidelines set out in *Saeed* in several respects, and that the seizure breached the Appellant's section 8 *Charter* rights in several respects.[61] She concluded, however, that the evidence obtained ought not to be excluded pursuant to section 24(2) of the *Charter.*[62]

45. The Trial Judge ultimately convicted the Appellant of sexual assault, placing substantial reliance on the injuries relied on by the Crown, the opinions (relating to injuries) which were provided by Dr. Carter-Snell, and the Appellant's statement.[63] Dr. Carter-Snell's evidence was found to be "highly probative".

iii. Judgment of the Court of Appeal of Alberta

46. The majority noted that the Crown relied in its case on the injuries, and had been permitted to adduce expert opinion evidence suggesting that such injuries could be present for up to five days after they were caused, and that the complainant had indicated to the nurse that there had been prior consensual intercourse within the last seven days. The majority noted that:

> The subjects of possible full or partial anal intercourse in the prior 5 days that might have caused the tears, or aspects of vaginal penetration that might have

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[59] *R v Cortes Rivera,* 2017 ABQB 275, Appellant's Record, Vol I, TAB 3.
[60] *Ibid,* at para 107.
[61] *Ibid.*
[62] *R. v. Cortes Rivera,* 2017 ABQB 405 (CanLII), Appellant's Record, Vol I, TAB 4.
[63] Reasons of the Trial Judge: TT pp. 587-596, Appellant's Record, Vol V, TAB 25; *R. v. Cortes Rivera,* 2017 ABQB 593 (CanLII), Appellant's Record, Vol I, TAB 5.

> caused the tears during that period were specific enough to support such an application.[64]

47. The majority further recognized that an inquiry under section 276.1 into whether an accused should be permitted to cross-examine a witness on prior sexual activity involves only a facial consideration and a tentative decision, and that any doubts that exist at that preliminary stage ought to be resolved at the section 276(2) hearing. The majority agreed that such targeted cross-examination as in this case was sought, and for which counsel had a good faith basis, ought to have been allowed. They held that the Trial Judge erred in failing to hold an evidentiary hearing and ultimately in not permitting such targeted and relevant cross-examination. They concluded, however, that notwithstanding such error, no substantial wrong or miscarriage of justice occurred as a result. They arrived at this conclusion because other evidence, in the majority's view, "was sufficient" to convict upon, and they observed that it was "highly unlikely" that cross-examination would have revealed anal intercourse within a five-day period.[65] They concluded that the Trial Judge would not have had a reasonable doubt in any event.[66]

48. The majority relied on the interrogation of the Appellant, the testimony of the complainant, and evidence of the complainant's DNA found on the Appellant's penis, in finding that the curative proviso ought to be applied to the erroneous dismissal of the section 276.1 application, as the evidence presented "was sufficient" to convict upon. The majority relied upon the anal injuries in finding that in addition to the Appellant's equivocal statement (obtained after his access to a washroom had been denied)[67] his conviction rested also on features including the anal fissures which were "sufficient in themselves" to support conviction.[68]

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[64] Majority Judgment of the Court of Appeal (*R. v. Cortes Rivera*, 2020 ABCA 76 (CanLII)), at para 26, Appellant's Record, Vol I, TAB 6.
[65] *Ibid,* paras 28-29.
[66] *Ibid,* para 30.
[67] Which statement was found, by the majority, to be voluntary (*Ibid*, at para 45).
[68] *Ibid,* para 44.

49. The majority held, inter alia, that:

> "While it would have been preferable for him to have been given access to a washroom after the swab was taken and before he made his statement, he made no reference in that statement, or otherwise offered evidence, suggesting that he gave the statement only because he was motivated by a need to use the washroom. While the Supreme Court of Canada described limiting access to a washroom as one of the means by which a statement could become involuntary in *Oickle*, the evidence simply does not suggest that this was one of those situations."

50. The dissenting Justice agreed that the Appellant was improperly denied an opportunity to cross-examine the complainant about prior sexual activity.[69] He observed that the section 276.1 application was dismissed in error due to a misunderstanding of the application. He recognized that the test subsequently confirmed in *R.V.*[70] was met, that the proposed evidence was not focused on any stereotypes or myths, and that it was potentially probative,[71] especially given that the complainant "was highly intoxicated at the time of the assault, and was not sure if she had been penetrated vaginally or anally, or at all."[72] His Lordship noted that the proposed cross-examination "might have raised a reasonable doubt" about the finding of the Trial Judge that the complainant was sexually assaulted by penetration of her anus.[73]

51. His Lordship concluded, however, that the Court should address the error with a "more appropriate remedy" by directing the inquiry that should have taken place at trial. He concluded that questions could be put to the complainant in a formal examination pursuant to section 683(1) of the *Criminal Code*, noting that the Appellant should be given a "substantive response" to the error which occurred. He held that the complainant's evidence should be supplemented within the appeal process, and that the appeal should be resolved only once that had occurred, with the "inquiry that should have taken place at trial" occurring at the appellate level, pursuant to section 683(1) of the *Criminal Code*.[74]

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[69] *Ibid*, para 55.
[70] *R v R.V.*, 2019 SCC 41 (CanLII).
[71] *Ibid*, paras 62-63.
[72] *Ibid*, para 64.
[73] *Ibid*, para 64.
[74] *Ibid*, paras 65-68.

PART II – STATEMENT OF ISSUES

WHERE A TRIAL JUDGE HAS UNDULY RESTRICTED THE RIGHT TO CROSS-EXAMINE THE CROWN'S PRINCIPAL WITNESS, AND THE DEFENCE ABIDED BY THAT RESTRICTION, WHAT REMEDY IS WARRANTED?

PART III – STATEMENT OF ARGUMENT

WHERE A TRIAL JUDGE HAS UNDULY RESTRICTED THE RIGHT TO CROSS-EXAMINE THE CROWN'S PRINCIPAL WITNESS, AND THE DEFENCE ABIDED BY THAT RESTRICTION, WHAT REMEDY IS WARRANTED?

52. In addition to providing for substantive rules governing admissibility of prior sexual activity evidence, the section 276 regime contains procedural components. The Defence sought to adduce evidence in two areas. First, that the complainant performed consensual oral sex on the accused on the date in question[75] and second, that the complainant had engaged in other sexual activity within the last seven days with another individual which may have caused the anal lacerations observed on the complainant. Defence Counsel noted that the tears on her anus "could have come from the prior sex she had with another person…which could explain the tears".[76] The Crown consented with respect to the first area.[77] The Crown objected with respect to the second area on the basis that the proper evidentiary foundation to *proceed to a hearing* was not established "because he simply wouldn't have recourse to that information. He wouldn't have knowledge of it…"[78] The Crown acknowledged that the complainant had testified previously that it was possible that it was vaginal intercourse that she had with the accused.[79]

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[75] Which cross-examination the Crown consented to and which was permitted, without a fulsome section 276 hearing.
[76] Application filed on behalf of the Defence, Appellant's Record, Vol II, TAB 9.
[77] TT p. 16, ll. 34-40, Appellant's Record, Vol II, TAB 13.
[78] TT p. 17, ll. 28-38, Appellant's Record, Vol II, TAB 13.
[79] The application was addressed at TT p. 16-32, Appellant's Record, Vol II, TAB 13.

53. With respect to the cross-examination sought in relation to prior sexual activity within the seven days before the allegation, the Trial Judge ruled that cross-examination would not be permitted as the accused *had not even established a basis for a section 276 hearing to be held* (s. 276.1(4) Criminal Code).[80] She held that the complainant had stated that "she did not engage in consensual rectal penetration within two days prior to the sexual assault"[81] and that "evidence of prior consensual vaginal sexual intercourse within seven days prior to the alleged sexual activity does not assist the accused in explaining the anal fissures and injuries."[82] The Trial Judge concluded that the complainant's prior sexual activity "would not assist the accused in explaining the anal injuries."[83]

54. The evidence was crucial to the Defence as it bore on a critical prong of the Crown's case. The Crown relied on the complainant's injuries to corroborate the complainant's conclusion that the accused had penetrated her, notwithstanding that none of his DNA was found on her anus, or, for that matter, on or within her vagina. In final argument, the Crown recognized the critical nature of the anal lacerations, arguing that these injuries were the "*key corroborating feature* of this case".[84] The Crown further relied on the evidence of Dr. Carter-Snell that the injuries were "recent" and that the number of injuries "is highly unusual for someone that is consenting…"[85] The Crown argued that the evidence of the complainant was "corroborated by injuries"[86] and that Dr. Carter-Snell's evidence relating to injuries was "highly probative".[87]

55. The Defence too, recognized the critical nature of the proposed cross-examination, stating with respect to the section 276 application that this was "an important application for my client".[88] Following the Trial Judge's ruling that the Defence would not be permitted to

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[80] TT p. 23, ll. 37-38, p. 24, ll. 28-29, p. 25, l. 27 to p. 26, l. 38, Appellant's Record, Vol II, TAB 13.
[81] TT p. 25, ll. 9-10, Appellant's Record, Vol II, TAB 13.
[82] TT p. 25, ll. 38-41, Appellant's Record, Vol II, TAB 13.
[83] TT p. 30, ll. 24-30, Appellant's Record, Vol II, TAB 14.
[84] TT p. 561, l. 11, Appellant's Record, Vol V, TAB 23.
[85] TT p. 561, ll. 31-37, Appellant's Record, Vol V, TAB 23.
[86] TT p. 563, l. 41, Appellant's Record, Vol V, TAB 23.
[87] TT p. 563, ll. 4-10, Appellant's Record, Vol V, TAB 23.
[88] TT p. 30, ll. 34-35, Appellant's Record, Vol II, TAB 14.

adduce the impugned evidence, the Defence noted that he would have to "…consider my options - - and get my client's instructions…"[89]

A) The Right to Cross-Examine Without Unwarranted Constraint is Fundamental and is an Essential Component of the Right to Make Full Answer and Defence

56. The right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is fundamental and is an essential component of the right to make full answer and defence.[90] As noted by Justice McLachlin (as she then was) in *R v Seaboyer,*[91] the denial of the right to call and challenge evidence is tantamount to a denial of the right to rely on a defence to which one is legally entitled.

57. Cross-examination is the ultimate means of demonstrating truth and of testing the reliability and veracity of evidence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused and is closely linked to the presumption of innocence.[92] Cross-examination may be the *only way* to get at the truth, and has long been recognized as being an essential component of the right to make full answer and defence.[93]

58. Commensurate with its fundamental importance, the right to cross-examine is recognized as being constitutionally protected by both sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms.*[94]

59. As this Court noted in *R v Lyttle,* the right of cross-examination must be jealously protected and construed broadly.[95] While there can be no dispute that restraint is warranted and that the right to cross-examination must not be abused, wide latitude is afforded to cross-

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[89] TT p. 32, ll. 21-26, Appellant's Record, Vol II, TAB 14.
[90] *R v Lyttle*, 2004 SCC 5 (CanLII); *R v R.V., supra*.
[91] *R v Seaboyer*, 1991 CanLII 76 SCC.
[92] *R v Osolin*, 1993 CanLII 54 (SCC).
[93] *R v Lyttle, supra*; *R v R.V., supra.*
[94] *R v Osolin, supra; R v Lyttle, supra,* para 33; *R v R.V., supra,* para 39.
[95] *R v Lyttle, supra,* para 44.

examiners within the adversarial process in recognition of the presumption of innocence and the right to a fair trial.[96]

60. As this Court observed in *Lyttle*:

> Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> That is why the right of an accused to cross-examine witnesses for the prosecution — without significant and unwarranted constraint — is an essential component of the right to make full answer and defence.[97]

B) The Right to Conduct a Full Cross-Examination of the Principal Crown Witness and the Right to Make Full Answer and Defence Were Breached

61. The Court of Appeal found that the Trial Judge unduly restricted the right of the Appellant to conduct a full and proper cross-examination of the principal Crown witness. The judgment was unanimous in finding that the Trial Judge was in error in preventing cross-examination of the complainant in relation to sexual activity within a week prior to the date in question and in relation to whether the injuries *relied on by the Crown as a key corroborating feature* could have been caused by sexual activity with others during that time. The majority recognized that permission should have been granted and cross-examination permitted "in relation to prior anal or vaginal intercourse of such a nature to have caused J.T.'s anal area injuries."[98]

62. The dissenting judgment observed as well that the Appellant was "improperly denied an opportunity to cross-examine the complainant." [99] Mr. Justice Slatter observed that given the evidence of Dr. Carter-Snell regarding injuries, the cross-examination was potentially

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[96] *R v Shearing*, 2002 SCC 58(CanLII); *R v Lyttle*, *supra*, para 44; *R v Wallick*, 1990 (CanLII) 11128 NBCA; *R v Anandmalik* (1984), 6 O.A.C. 143 (cited at paras 69-70 of *Lyttle, supra*).
[97] *R v Lyttle, supra*, paras 1-2.
[98] Majority Judgment of the Court of Appeal, Appellant's Record, Vol I, TAB 6.
[99] Dissenting Judgment of the Court of Appeal, para 55, Appellant's Record, Vol I, TAB 6.

probative.[100] That the cross-examination was at least potentially probative was underscored by the fact that the complainant was uncertain as to whether she had been penetrated vaginally, anally, or at all on the date in question. As noted by the dissenting Justice, the Trial Judge concluded that the Appellant had assaulted the complainant by penetration of her anus. The proposed cross-examination may have raised a reasonable doubt about that finding.[101]

63. Effective cross-examination was forestalled by virtue of the Trial Judge's determination. For the Appellant to be prevented from challenging what the Crown recognized to be the "key corroborating feature" of the case,[102] evidence which was relied upon by the Trial Judge in convicting, and evidence which the Crown expert (whose evidence was accepted and relied heavily upon by the Trial Judge) had founded her opinions on, amounts to a fundamental breach of the right to make full answer and defence and the right to a fair trial.

64. Furthermore, as noted by Justices Brown and Rowe in *R.V.*, it is not just the potential evidence which may have been elicited in relation to the cross-examination which was denied, but the *critical process* of cross-examination itself which was denied the Defence.[103]

C) A New Trial Ought to be Ordered

65. This Court recognized in *R.V.* that it is difficult to predict what lines of questioning counsel might pursue and what evidence may have emerged where cross-examination is restricted. Accordingly, a failure to allow relevant cross-examination will *almost always* be grounds for a new trial.[104] Other authorities recognize, too, that a failure to permit cross-examination which was not precluded by section 276 creates an unfair trial, the remedy for which is a new trial.[105]

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[100] *Ibid,* para 63.
[101] *Ibid,* para 64.
[102] TT p. 561, l. 11, Appellant's Record, Vol V, TAB 23.
[103] *R v R.V., supra,* at paras. 101-139.
[104] *R v R.V., supra,* para 86, *R v Shearing*, para 151, *R v Crosby*, 1995 CanLII 107 (SCC), [1995] 2 SCR 912, para 20, *R v Osolin*, *supra*, pp. 674-675.
[105] *R v H.L.M.*, 1999 CanLII 12362 (SK CA).

66. Recently, this Court emphasized in *R v Barton,*[106] that where a section 276 hearing ought to have proceeded but did not, appellate courts ought not to speculate on what outcome would be warranted and a new trial should be ordered.

67. Beyond cases involving section 276, other authorities have recognized that denial of a *Charter* right within the trial constitutes an error of law which by its very constitutional nature amounts to a serious error of law and not one which supports the application of section 686(1)(b)(iii).[107] A new trial is the appropriate remedy in such circumstances.

68. While the majority of the Court of Appeal of Alberta relied on this Court's decision in *R.V.,* it is of note that the only reason that a majority of this Court declined to direct a new trial in that case was that the Defence had skirted the ruling of the Trial Judge, asking certain questions in cross-examination which permitted the Defence to advance its ultimate theory. The majority in *R.V.* concluded that "the scope of permissible cross-examination would not have been any broader than the questioning that actually occurred."[108] Further, the Defence was not prevented from advancing its position.[109]

69. In the instant case, however, the Defence was prevented from pursuing cross-examination which was relevant, probative, and not based on any stereotype or myth. Unlike the situation in *R.V.,* the Defence abided by the Trial Judge's ruling, and was thereby prevented from exploring other circumstances which may have caused the injury relied upon by the Crown. That cross-examination may well have disclosed temporally relevant anal or vaginal intercourse with another individual, attempted or completed, which may have been the source of the injury in question. Further, as recognized by Justices Brown and Rowe in *R.V.,* prohibiting cross-examination on a legitimate theory can also be compounded by the denial to an accused of an entire process of questioning, which has reverberating effects on all aspects of the Defence.[110]

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[106] *R v Barton,* 2019 SCC 33 (CanLII) para 84.
[107] *R v Tran,* 1994 CanLII 56 (SCC), [1994] 2 SCR 951.
[108] *R v R.V., supra,* para 96.
[109] *Ibid,* para 97.
[110] *Ibid,* para 106.

70. Where an accused is precluded from adequately testing relevant evidence, however, this Court was unanimous in recognizing in *R.V.* that a new trial would be the appropriate remedy in such circumstances, differing only on the question of whether it was "clear that *R.V.* was able to adequately challenge the inference that the pregnancy confirmed his participation in the assault."[111] The fundamental question in *R.V.* was whether whatever cross-examination occurred in contravention of the Trial Judge's ruling was a fair substitute for the cross-examination which ought to have been allowed.[112]

71. In the instant case, there was no fair substitute for the cross-examination which was denied and which was, properly (in accordance with the ruling of the Trial Judge) not pursued. The Crown did not argue before the Court of Appeal that there was; instead the Crown argued that the section 276.1 application was properly dismissed based on the way in which it was advanced and as such, no error occurred. There was no fair substitute in this case, however, for the cross-examination which was denied.

D) The Majority was in Error in Finding that the Curative Proviso Applied

i. A Miscarriage of Justice Occurred

72. Where error, whether procedural or substantive, leads to a denial of a fair trial, the Court may properly characterize the matter as one in which there was a miscarriage of justice. In such a case, "no remedial provision is available, and the appeal must be allowed."[113] As this Court recognized in *Lyttle*, the curative proviso is inapplicable where cross-examination of the principal Crown witness is wrongly curtailed. Such error results in a substantial wrong and an unfair trial. The curative proviso cannot have application in such circumstances.[114]

73. As noted by Justice Lebel in his concurring reasons in *Khan*, a miscarriage of justice can include depriving the accused of a fair defence.[115] A miscarriage of justice does not require an Appellant to demonstrate that but for the issue in question, the verdict would have been

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[111] *Ibid*, para 87.
[112] *Ibid*, para 87.
[113] *R v Khan*, 2001 SCC 86 (CanLII) at para 27.
[114] *R v Lyttle*, *supra*, para 69-75.
[115] *R v Khan*, *supra*, para 74.

different.[116] For the reasons noted above, under this and preceding headings, the unwarranted curtailment of relevant cross-examination amounts to procedural and substantive unfairness and a miscarriage of justice.

ii. The Majority Applied the Wrong Test in Finding that the Curative Proviso was Applicable

74. As noted in *Wildman v The Queen*,[117] once an error in law has been found, in order for the curative proviso to apply, the Crown must satisfy the Court that the verdict would *necessarily have been the same* if the error had not occurred. The satisfaction of this onus is a condition precedent to an appellate court's application of the terms of the curative proviso. The Court in *Wildman* noted that the *trier of fact* must assess the question of whether guilt is proven beyond a reasonable doubt, and this assessment ought not to be shifted to the appellate court. The dissenting justice correctly recognized that the cross-examination might have raised a reasonable doubt about whether penetration occurred.[118]

75. The role of the appellate court is merely to consider the effect evidence could, within reason, possibly have had. Any reasonable effect the evidence could have had must enure to the benefit of the accused.

76. The default is of course that an accused is entitled to a new trial or an acquittal if errors of law were made.[119] An exception exists where the evidence is so overwhelming that a trier of fact would "inevitably convict". Where the evidence is so overwhelming that any other verdict but conviction *would be impossible*, the curative proviso may be applied.[120]

77. The judgment of the majority of the Court of Appeal, in finding that notwithstanding the error, other evidence "was sufficient" to convict upon[121] appears to resurrect the approach rejected clearly and explicitly by this Court in *Sarrazin.*[122] *Sarrazin* held that the Crown's

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[116] See for example: *R v Baharloo*, 2017 ONCA 362 (CanLII) at para 30.
[117] *Wildman v R*, 1984 CanLII 82 (SCC); [1984] 2 SCR 311.
[118] Judgment of the Court of Appeal, at para 64, Appellant's Record, Vol I, TAB 6.
[119] *R v S(P.L.)*, 1991 CanLII 103 (SCC); [1991] 1 SCR 909.
[120] *R v Van*, 2009 SCC 22 (CanLII); [2009] 1 SCR 716; *R v Khan*, *supra*, para 31.
[121] Judgment of the Court of Appeal, Appellant's Record, Vol I, TAB 6.
[122] *R v Sarrazin*, 2011 SCC 54 (Can LII); [2011] 3 SCR 505.

burden under section 686(1)(b)(iii) must not be lightened from a requirement to demonstrate an "overwhelming" case to the lesser standard of a "very strong" case, or to tolerate errors that are "highly unlikely to have affected the result". This Court noted that the Crown's burden to demonstrate an overwhelming case or a harmless error of law should not be relaxed. This Court declined to find that the proviso could be applied where an appellate court is satisfied that evidence of guilt is very strong, though not quite overwhelming, and the legal error was highly unlikely to have affected the result.[123]

78. Significantly, the majority in this case did not state that the evidence was overwhelming, or that had the error not occurred, no other verdict was possible. Instead, they relied on a conclusion that other evidence "was sufficient" and a speculative conclusion that the Trial Judge would not have had a reasonable doubt. Such findings negate the exacting onus on the Crown under section 686(1)(b)(iii) of the *Criminal Code*.

79. The stringent test under section 686(1)(b)(iii) does not allow an appeal court to dismiss an appeal simply because it would conclude that the Crown has proven the guilt of the accused beyond a reasonable doubt. That, however, was the approach taken by the majority in this case when concluding that "…no miscarriage of justice occurred here because the Trial Judge would not have found a reasonable doubt existed…"[124] This Court noted in *R v Trochym*[125] that the "overwhelming" standard is a *substantially higher* one than the requirement that the Crown prove its case beyond a reasonable doubt. As Justice Deschamps observed in *Trochym*, that substantially higher standard reflects the difficulties that appellate courts face when considering retroactively the effect that evidence could reasonably have had at trial.

80. The Court of Appeal is not to substitute itself for the Trial Judge and determine guilt or innocence. The appropriate inquiry was not whether this particular Judge would have convicted, but whether there was any possibility that a Trial Judge would have a reasonable doubt on the admissible evidence.[126]

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[123] *Ibid*, para 16.
[124] Majority Judgment of the Court of Appeal, Appellant's Record, para 30, Vol I, TAB 6.
[125] *R v Trochym*, 2007 SCC 6, at para 82.
[126] *R v S.(P.L.), supra*.

iii. Even on a Proper Application of Section 686(1)(b)(iii), the Evidence was Not "Overwhelming"

81. When determining whether the Crown has met its onus to demonstrate that section 686(1)(b)(iii) applies, an appellate court must consider whether the evidence is so overwhelming that reaching any other verdict would be impossible.[127]

82. The evidence in this case consisted of an interrogation[128] which on its face reflects incomplete translation, and a denial (followed by an equivocal statement by the Appellant). The interrogation followed a six-hour detention during which bathroom facilities were denied the Appellant until after he provided a statement,[129] and he had indicated that he needed a bathroom at least three times. The majority pointed to the statement in applying 686(1)(b)(iii), finding that "he made no reference in that statement, or otherwise offered evidence, suggesting that he gave the statement only because he was motivated by a need to use the washroom".[130] Such a finding reversed the Crown's heavy onus to prove voluntariness beyond a reasonable doubt.

83. Further, even the lead investigator recognized that at times the interpreter was only summarizing what was said.[131] It is notable as well that the transcript demonstrates, on its face, that the translator was not even translating all that the Appellant was saying.[132]

84. The interrogation followed inaccurate information being provided to the Appellant (that he was only entitled to one phone call), time in the phone room without the assistance of an

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[127] *R v Sarrrazin, supra; R v Khan, supra*.

[128] Interrogation Transcript, p. 14, ll. 397, 402; p. 15, l. 418; p. 16, l. 445, 456, 461; p. 19, l. 561, Appellant's Record, Vol II, TAB 10.

[129] While the Appellant urinated into a grate an hour after being taken into custody, at approximately 12:40 p.m., he *thereafter* requested to use a bathroom on *at least three* separate occasions but was told he could not until evidence was obtained from him.

[130] Judgment of the Court of Appeal, para 45, Appellant's Record, Vol I, TAB 6 & TT p. 108, ll. 6-15, Appellant's Record Vol II, TAB 15.

[131] TT p. 449, ll. 24-28, Appellant's Record, Vol IV, TAB 20.

[132] See, for example, Interrogation Transcript (fn 128) at p. 14, ll. 397, 402; p. 15, l. 418; p. 16, l. 445, 456, 461; p. 19, l. 561, Vol II, TAB 10.

interpreter (the interpreter having been told to wait outside), and his indication to the police *in these circumstances* that *he felt his rights were not being given to him*.

85. The Trial Judge's finding with respect to voluntariness was conclusory[133] and the judgment of the majority of the Court of Appeal in that regard failed to apply the spirit of this Court's judgment in *R v Oickle*[134] that withholding a bathroom may render a subsequently obtained statement involuntary. In this case, the Appellant made *at least* three requests to use a washroom *after* the interpreter arrived at 12:40 p.m. He was not given access to one until after he provided a statement at 7:45 p.m.

86. None of his DNA was found on or within the body of the complainant, whom he was found to have penetrated anally. The Trial Judge's finding was based in part on injuries which *could have* been caused by another individual (though the Appellant was not permitted to explore that). It was also based on expert evidence relating to injury, which the Trial Judge notably found to be "highly probative".

87. While the complainant's DNA was found on the Appellant's penis, the DNA expert *could not rule out* the DNA being from the complainant's vomit or saliva. There was evidence that he was touching a bag into which the complainant was vomiting and that he was subsequently seen at the police station touching his penis. The conviction stemmed from a finding that the complainant's evidence was reliable, a finding which could have been influenced by fulsome and relevant cross-examination. This was a case where, as noted by the dissenting Justice, the complainant was not certain if she had been penetrated anally, vaginally, or indeed at all.

88. Further, in cases where there is a real possibility that an Appellant may have conducted his defence differently had probative and relevant questioning been permitted, a Court cannot with any degree of confidence assess the worth of the evidence. The Appellant's trial counsel stated, after the Trial Judge's ruling that the section 276 application could not proceed further, that he would have to "consider (his) options" and take instructions.[135] Those comments indicate that the conduct of the Defence was affected by the Trial Judge's ruling.

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[133] *R v Cortes Rivera*, 2017 ABQB 275, at para 107, Appellant's Record, Vol I, TAB 3.
[134] *R v Oickle*, 2000 SCC 38 (CanLII), paras 2, 86.
[135] TT p. 32, ll. 16-26, Appellant's Record, Vol II, TAB 14.

As noted in *Seaboyer* and *R.V.*, evidence which may point to another source of an injury relied on by the Crown may be of "critical relevance to the Defence". The majority was in error in concluding otherwise, in a case where the evidence was not overwhelming.

iv. The Cross-Examination Sought to Challenge "Key" Evidence Relied on by the Crown

89. As this Court noted in *R.V.*, "uncertainty of result does not deprive a line of questioning of its probative value".[136] Just as this Court held that the application Judge should not have considered the probability that *R.V.*'s questioning would be successful, but instead whether the answers would be probative, the Court of Appeal majority in this case erred in finding that section 686(1)(b)(iii) was applicable because it was unlikely that another possible source of the injuries would be probative.[137] As in *R.V.*, because the answers had the potential to undermine important Crown evidence, the probative value of the evidence was high.[138] The Crown would not have referred to the injury evidence as "key" corroborating evidence, nor needed to point to *any* evidence to corroborate other evidence, had the case been overwhelming without it.

90. It is clear that the Appellant's trial counsel saw this as a critical issue given his indication following the Trial Judge's ruling, that while he respected the Court's ruling, he was "struggling" with it, and it was "an important application for my client".[139] The trial Crown also considered the application significant, evidenced by the vigorous objection mounted to the admissibility of the impugned evidence, reference to the injury evidence as "key", and presentation of several witnesses, including an expert, in relation to the injury evidence. This confirms that the Crown, too, saw the evidence as an important plank within the Crown's case.

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[136] *R v R.V., supra,* at para 62.
[137] Judgment of the Court of Appeal, para 30, Appellant's Record, Vol I, TAB 6.
[138] *R v R.V., supra,* at para 62; See also: *R v Nkemka,* 2013 ONSC 2121 (CanLII); *R v Akumu*, 2017 BCSC 533 (CanLII); *R v Seaboyer*, *supra; R v SL*, 2018 ABQB 889 (CanLII).
[139] TT p. 30, ll. 34-38, Appellant's Record, Vol II, TAB 14.

91. Further, even evidence which does not confirm or corroborate critical evidence can still have an impact on the verdict, as this Court has observed.[140]

92. Section 686(1)(b)(iii) will be inapplicable where it is difficult to predict what lines of questioning counsel might have pursued and what evidence may have emerged had cross-examination been permitted.[141] The proviso will be inapplicable where the effect of an error of law cannot be traced into the verdict.[142] As in *Dinardo*,[143] the Court of Appeal erred in stating that there was no prejudice as the Trial Judge had relied heavily on the corroborating value of the impugned evidence. The Defence was left unable to challenge the Crown's injury evidence, which was fortified by expert opinion evidence in relation to the interpretation of it. This was highly probative evidence, which the Defence was entitled to examine and explore.

E. Section 683 is Not Applicable

i. Where a Section 276 Hearing is Warranted, the Complainant is Not Compellable

93. Courts have not previously applied section 683 in circumstances such as this. While there are a number of reasons for this, significantly, Parliament has made clear in explicit terms that a complainant is not compellable within any part of the section 276 hearing.[144] The remedy proposed by the dissenting Justice (for the error of denying a section 276(2) hearing) would make the complainant compellable, albeit at the appellate level. Section 276 could not be clearer in stating that the complainant will not be compellable within a section 276 hearing. An examination under section 683(1) can only be ordered for a witness who would have been compellable *at trial.*[145] While the complainant was compellable within the trial proper, she was not compellable on the section 276 hearing which was denied to the Appellant. The remedy proposed by the dissenting Justice is neither warranted nor "more appropriate" than the application of section 686(2)(b) and the ordering of a new trial.

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[140] *R v D'Amours*, 1990 CanLII 154 (SCC); [1990] 1 SCR 115.
[141] *R. v. Shearing*, *supra*, at para 151; *R v Crosby*, *supra*, at para 20; *R v Osolin*, *supra*, pp. 674-675; *R v R.V.*, *supra*, at para. 86.
[142] *R v Sarrazin*, *supra*, at para 31; *R v Barton*, 2019 SCC 33 (CanLII) at para. 9.
[143] *R v Dinardo*, 2008 SCC 24 (CanLII); [2008] 1 SCR 788.
[144] Section 276.2(2) *Criminal Code*.
[145] *R v Hobbs*, 2010 NSCA 32 (CanLII), at para 4.

ii. Where a Section 276 Hearing is Warranted, the Trial Court has Jurisdiction

94. Further, it is the Trial Court which has jurisdiction to hear section 276 applications, not Appellate Courts. As recently noted by this Court in *Barton*,[146] it is wrong to speculate about the outcome of a section 276(2) hearing where such a hearing did not take place at trial. In this case, a section 276(2) hearing did not take place. Beyond *Barton*, *Ecker*[147] is authority for the proposition that, where evidence was capable of being admissible under section 276, a *Trial Judge* is required to hold a hearing and make the requisite determinations. The Court there noted that if evidence was *capable* of being admissible, then the Appellant had a valid complaint that he was denied the necessary evidentiary hearing and determination to which he was entitled. Such a complaint will merit a new trial.[148] In such circumstances, where evidence was potentially admissible, "it cannot be said the verdict was unaffected by the error of the trial judge".[149]

95. As in *Ecker*, the Trial Judge was obliged to have granted the application for a hearing, to have addressed the evidence sought to be adduced, and to have determined whether and to what extent the evidence was or was not admissible. The Judge was obliged to make that determination, and the Appellant was entitled to it. It could not be inferred that the outcome of another trial would inevitably have been the same, and the determination was one to be made by the Trial Judge. It is not appropriate to speculate at the appellate level as to the outcome of such applications.[150]

96. The application ought to be heard at the trial level, and any permissible cross-examination should occur in conjunction with other cross-examination and with other evidence, and not in isolation on appeal.

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[146] *R v Barton, supra*, para 84.
[147] *R v Ecker,* 1995 CanLII 3910 (SK CA).
[148] *Ibid,* pp. 21-22.
[149] *Ibid,* at p. 22.
[150] *R v. Barton, supra,* para 84; *R. v. Ecker, supra; R v R.V., supra,* para 86.

iii. Section 683(1) Applies to Appeals Which Cannot be Decided Without Hearing Further Evidence

97. Further, it is important to note that commission hearings are only applicable to cases in which appeals *cannot be decided without hearing further evidence*. This appeal could and should have been determined by the Court of Appeal by an order of a new trial being made. It was clear that a section 276 hearing ought to have been permitted within the trial process. The Court of Appeal was unanimous that this ought to have occurred, and the appeal could have been determined without further evidence being heard. As such, and for that reason alone, section 683(1) was inapplicable.

iv. Truncated Appeal Process Would Further Delay Trials

98. Further, the value of the work that this Court has done in cases such as *Jordan* is not appreciated by the remedy proposed within the dissenting judgment. A truncated appeal process whereby cross-examination which ought to have been permitted at trial is allowed on appeal, and appeals are heard and adjourned for this purpose, with a further appellate hearing scheduled subsequent to the inquiry directed under section 683, adds further delay to both the appellate process, and to the scheduling of a retrial in the event one is ordered. Such a process undermines the laudable goal and constitutional imperative of trials being heard within a reasonable time.

v. Where Error the Default is a New Trial

99. As recognized in *Wildman*, and many subsequent cases, the default remedy where an error of law occurs is a direction of a new trial. The only basis offered by the dissenting Justice for proposing an inquiry under section 683(1) is that it would be "a more appropriate remedy" than invoking section 686(1)(b)(iii) of the *Criminal Code*. Recognizing that the Appellant identified an error leading up to his conviction and ought to be given a "substantive response" to that error, the dissenting Justice found that section 683(1) provided "another more suitable remedy". Section 683, however, amounts to an "extraordinary remedy[151] and the inquiry which results requires far more than a finding that it is a "suitable" remedy.

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[151] *R v Hobbs*, *supra*, at para 40.

vi. Neither Party Sought nor Advanced the Application of Section 683 as an Appropriate Remedy

100. While an appellate court has jurisdiction to raise new issues and invite submissions on issues which neither party has raised, this discretion should be exercised very rarely.[152] Procedurally, an appellate court must make the parties aware that it proposes that an issue be addressed and must ensure that they are sufficiently informed so that they may prepare and respond. In this case, neither the Appellant nor the Respondent raised the potential application of section 683 as an appropriate remedy, either in written or oral argument. In fact, section 683 was not raised by the Court during the hearing of the appeal. It was simply proposed by the dissenting Justice within the judgment rendered six weeks after the appeal was argued.

101. It is submitted that, just as the onus in establishing under section 686(1)(b)(iii) that conviction was inevitable rests on the Crown and is stringent, similarly in these circumstances, the Crown would have been obliged to satisfy the appellate court that section 683 ought to apply.[153] No argument was presented in that regard (nor was any requested by the Court). Where an appellate court finds that legal error has occurred, natural justice and fairness require that any remedy, including one beyond the parameters of section 686, be fully and fairly canvassed before a determination is made. The determination by the dissenting Justice *ex proprio motu* that section 683(1) ought to be applied in order to provide a "substantive response" to the error resulted in procedural prejudice and unfairness to the parties.

Conclusion

102. Cross-examination, the primary vehicle by which an accused can make full answer and defence, was restricted in a manner not consistent with nor permitted by section 276 of the Criminal Code. One cannot speculate as to how the trial would have proceeded had the application been allowed and cross-examination been permitted. The Appellant was thereby denied his right to a fair trial. The remedy for that is a new trial, with appropriate cross-examination permitted, and with the Defence permitted to adduce relevant evidence. It is not

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[152] *R v Mian*, 2014 2 SCR 689 (CanLII); [2014] 2 SCR 689.
[153] *R v Hobbs, supra*.

the application of section 686(1)(b)(iii) based on a determination that the evidence "was sufficient", nor the application of section 683(1) with an inquiry at the appellate level, based upon the application of a section not urged nor argued by either of the parties to be applicable.

103. Where cross-examination was unduly restricted and the Defence abided by that restriction, the only available remedy is a new trial at which the accused may test the Crown's evidence and challenge a critical part of the case presented against him.

PART IV – COSTS

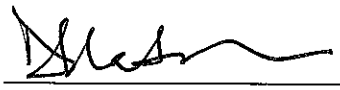
104. The Appellant does not seek costs, and makes no submissions as to costs.

PART V – NATURE OF ORDER SOUGHT

105. The Appellant respectfully requests that this appeal be allowed, that the decision of the Alberta Court of Appeal be set aside, and that a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 8th day of May, 2020.



DEBORAH R. HATCH
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTORY PROVISIONS

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The Constitution Act, 1982, being schedule B to the *Canada Act 1982 (UK), 1982, c 11, Part 1, Canadian Charter of Rights and Freedoms*, ss. 7, 8, 10(b), 11(d), 24(2) *Loi constitutionnelle de 1982*, Référence: *Loi constitutionnelle de 1982 (R-U)*, constituant l'annexe B de la *Loi de 1982 sur le Canada (R-U), 1982, c 11, Partie I, Charte Canadienne Des Droits et Libertés*, ss. 7, 8, 10(b), 11(d), 24(2)	20, 23, 28, 30, 34, 37, 42, 44, 58, 67