File Number: 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 RESPONDENT

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: FACTS

Overview:

1. One evening, while attending a family party at which the Appellant was also a guest, the Complainant began feeling the effects of her alcohol consumption. She began to get ill and eventually found herself in the bathroom, bent over the toilet vomiting.

2. As this was going on, the Appellant entered and consoled her for a few minutes. Without warning, he took down her leggings and anally penetrated her with his penis. She felt a terrible pain and was crying. She could feel the Appellant moving and told him to stop, a request with which he complied, only after she repeated it three times.

3. Thereafter, the Complainant went to the sofa and cried hysterically. She continued to be sick and the Appellant brought her a bag. Her sister came to investigate and eventually the Complainant was able to describe what had happened. An examination revealed five lacerations to her anus.

4. Prior to trial, the Appellant brought an application to cross examine the Complainant about other sexual activity as a means of challenging the relevance of the lacerations. However, because his written application suggested he wished to cross examine about a specific reported act of vaginal intercourse that occurred about a week prior, the application was denied without holding a *voir dire*.

5. An appeal was brought, *inter alia*, on this issue. The Alberta Court of Appeal[1] unanimously found that cross examination should have been permitted, in keeping with this Court's recent decision of ***R. v. R.V.***[2] That said, the Majority felt the lack of cross caused no prejudice, and given the remaining evidence, including the Complainant's DNA on a penile swab taken from the Appellant, the curative proviso could be applied.

6. The dissenting justice felt a different approach should be taken. In short, the curative proviso should only have been considered once the record was supplemented by having the

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[1] ***R. v. Cortes Rivera***, 2020 ABCA 76
[2] 2019 SCC 41

Complainant provide further information by virtue of s. 683(1)(b). This "more suitable" remedy[3] was not broached by counsel, or the Court, before or during the hearing.

7. The present appeal has little to do with the novel approach suggested by the dissent. Rather, the matter turns on whether the curative proviso should apply. The Appellant suggests the case is not overwhelming enough. Conversely, in the Respondent's submission, given the essential elements to be proven, and the remaining evidence, the inferences and verdict overall were inevitable.

Facts

Civilian evidence:

8. On January 12, 2014, the Complainant attended a birthday party at her sister's home, where the Appellant was also a guest.[4] She had previously met the Appellant on one prior occasion.[5] At the party, the Appellant attempted to flirt with her, and she kindly ignored or rebuffed his advances.[6] Like many others in attendance, the Complainant consumed alcohol over the course of the evening and into the morning. Subsequently feeling the effects, she began to get ill and eventually found herself in the bathroom, bent over the toilet vomiting repeatedly.

9. As this was going on, the Appellant (and only the Appellant) entered (uninvited) and consoled her for a few minutes. Without warning, conversation or consent, he stood behind her, took down her leggings and underwear with both hands, and anally penetrated her with his penis. She felt his hands on her, and his body against hers as he moved up and down. Still hunched over needing to vomit, she felt a terrible pain and was crying. She tried pushing his hands away, told him it hurt and to stop, a request with which he complied only after she repeated it three times. She felt something come out of her, and heard the Appellant moaning and thought he might be

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[3] As it was described
[4] Trial transcript of proceedings, Appellant's Appeal Record ("AAR") Vol. II page 47 line 37 to page 49 line 1
[5] AAR Vol. II., page 49 line 33-37, page 50 line 1-3
[6] AAR Vol. II., page 50 line 5-21, page 50 line 5-21, page 53 line 1-5, page 88 line 9-22

masturbating.[7] She did not know if a condom was used or if he ejaculated.[8] During the course of the assault she did not turn around or look at the mirror to see who was behind her.[9]

10. Thereafter, the Complainant went to the sofa and cried hysterically. She continued to be sick and the Appellant brought her a bag.[10] Her sisters, X.H., and J.S., came to investigate and eventually she indicated the Appellant had taken down her pants.[11] Police were called and she was taken for examination.

11. In cross examination, she spoke of the effects of alcohol, admitted she had little independent memory,[12] and that some things of which she spoke may be inaccurate,[13] nevertheless, she maintained she had been assaulted. Further, she denied performing oral sex on the Appellant,[14] or any other consensual sexual encounter between them.[15]

12. The pain she experienced was described as a 9/10, (although she was unclear on precisely where in the genital region the pain emanated)[16] lasting a few days,[17] and not present before she went to the bathroom and the Appellant joined her.[18]

13. She confirmed having reported to police and medical personnel that she was 90% sure she had been penetrated, but was unclear on whether it had been anal or vaginal penetration. It was only later, after police mentioned it, that she concluded it was anal.[19]

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[7] AAR Vol. II., page 50 line 33 to page 51 line 10, page 57 line 2-10, page 59 line 16-30, page 61 line 10 to page 62 line 5, page 62 line 39 to page 64 line 25, page 65 line 21-29, page 73 line 9-11, page 93 line 7-17, page 94 line 18-20
[8] AAR Vol. II., page 66 line 20-24
[9] AAR Vol. II., page 94 line 32-37
[10] AAR Vol. II., page 68 line 1-20
[11] AAR Vol. II., page 60 line 27-38
[12] AAR Vol. II *bid*., page 78 line 31 line-38
[13] AAR Vol. II., page 87 line 14-34, page 105 line 19-23
[14] AAR Vol. II., page 90 line 8-16
[15] AAR Vol. II., page 105 line 25-30
[16] AAR Vol. II., page 60 line 38 page 61 line 8
[17] AAR Vol. II., page 72 line 37 to page 73 line 7
[18] AAR Vol. II., page 69 line 27-29
[19] AAR Vol. II., page 108 line 6-15, page 104 line 38 page 105 line 11

14. Other partygoers testified as well. The Complainant's sister, J.S, who had not been drinking, was upstairs sleeping when she woke about 5:00 a.m. She heard voices downstairs and laughing. She was sending some texts, and thereafter was in and out of sleep. [20] She recalled hearing the Complainant ask the Appellant to dance.[21]

15. About an hour later, she woke again and could hear the sound of the Complainant in the bathroom beneath her vomiting. She also heard a male voice that sounded like it was consoling the Complainant.[22] She heard the Complainant making gagging sounds, as well as crying, which started out as a whimper and got louder.[23]

16. After that, she heard the Complainant crying hysterically and her older sister, X.H. asking what was wrong.[24] She went downstairs to investigate, found the Complainant on the couch, and asked what happened. The Complainant really wouldn't say anything, but kept pointing at the Appellant saying "*he knows*". She asked the Appellant and he claimed he did know what was going on. She asked the Complainant if she wanted police called, and the latter agreed.[25]

17. The Complainant's other sister, and host of the party, X.H., said the Complainant had been drinking heavily[26] and had briefly danced with the Appellant a few times.[27] The group were in the kitchen playing poker and eventually, the Complainant said she had to throw up and went into the bathroom. She saw the door was open and the light on. She continued talking with others at the party. Subsequently, the Appellant asked her for a bag, she asked why, and he said it was to give to the Complainant because she wanted to throw up. The Appellant retrieved a bag and went to the living room. She went to see what was happening; the Complainant was in the living room, on the couch and the Appellant was there with the plastic bag. [28]

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[20] AAR Vol. II., page 115 line 29-41
[21] AAR Vol. II., page 118 line 22-35, page 133 line 1-14
[22] AAR Vol. II., page 123 line 32-41
[23] AAR Vol. II., page 124 line 4-8, 20-21
[24] AAR Vol. II., page 116 line 1-50
[25] AAR Vol. II., page 116 line 24 to page 117 line 7
[26] AAR Vol. III., page 141 line 15-28
[27] AAR Vol. III., page 143 line 13-18, 30-35
[28] AAR Vol. III., page 145 line 7-21

18. The Complainant was crying; she asked what was wrong, and the Complainant said "*nothing, nothing*."[29] J.S. came down to inquire as well.[30]

19. In cross she indicated she did not hear, or did not notice the Complainant crying in the bathroom or saying "*stop*".[31]

20. Two others, R.M. (the Complainant's nephew) and N.B. (her brother in law) had no information about the assault, but described the interactions between the Complainant and the Appellant. Both said there was friendly, even flirty, behaviour, but nothing physical.[32]

Arrest, penile swab and interview.

21. The Appellant was arrested on scene, and when it became apparent he didn't understand English, arrangements were made for a Spanish interpreter to be brought in.[33] Once at the station, the Appellant was provided his rights in Spanish, which he understood, and was told the translator was there to interpret for him.[34] Although he expressed minor confusion about the process of reaching a lawyer, and concern that counsel would not speak Spanish, he spent about 30 minutes in the phone room. He did not utilize the translator but exited in accordance with his instructions to do so when he was finished. [35] The translator testified to telling the Appellant he could make one call. [36]

22. Subsequently, investigators informed the Appellant of their intention to take a penile swab. Prior to doing so, however, the detective in charge repeated the (standard) *Charter* rights including the ability to contact a lawyer. [37] The Appellant interrupted to ask about calling a

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[29] AAR Vol. III., page 145 line 35-38
[30] AAR Vol. III., page 146 line 27-33, page 160 line 39 to page 161 line 25
[31] AAR Vol. III., page 159 line 31-35
[32] Evidence of R.M. AAR Vol. III., page 169 line 19-27, page 170 line 9-23, page 173 line 3-10, Evidence of N.B., page 183 line 25 to page 184 line 11, page 184 line 13-15, page 185 line 11-22, page 188 line 28-32, page 191 line 16-25
[33] Cst. Bosse AAR Vol. III page 273 line 27 to page 274 line 14, page 276 line 40-41
[34] AAR Vol. III., page 284 line 6-11, 21-28, page 302 line 22-41
[35] AAR Vol. III, page 284 line 35-37, page 287 line 1-5, 34-39, page 302 line 22-41, page 288 line 17-26, 38-41, page 289 line 26-38, page 288 line 29-35, page 306 line 8-10
[36] AAR Vol. III, page 342 line 31-34,
[37] Det. Reule AAR Vol. IV, page 433 line 6-7, page 435 line 18-26

lawyer again, [38] but when the detective reached the end of the rights, and directly inquired if the Appellant wanted to contact counsel, the Appellant indicated he had already done so. [39] Further, after explaining the actual penile swab procedure, the detective again asked if the Appellant wished to call a lawyer; the Appellant declined. He was told that if he changed his mind, he could call one later. [40]

23. Because the interpreter was female, and therefore could not be in the room to provide contemporaneous explanation and instruction to the Appellant, the ident officer performed the swab himself.

24. Once the swab was completed, the detective and interpreter were involved in a formal interview, at the outset of which, the Appellant was again reminded his rights to counsel remained in effect throughout.[41] The statement provided little new information; although he admitted to going into the bathroom and bringing her a bag in which to vomit, he indicated he did not remember any of the assault allegation.

DNA, medical and expert evidence.

25. Four thousand of the Complainant's epithelial (i.e. skin) cells were collected from the penile swab. There was 14x more female DNA than male DNA on the swab. The DNA expert, Michael Westecott, testified the source appeared to be "internal" and was unlikely to be just from skin to skin contact given the number of cells. He indicated the DNA could have come from cells in saliva, or possibly blood, though no staining was seen on the swab, so the latter was unlikely.[42] As to vomit, there was nothing on the swab that appeared to be vomit. Also, to have vomit on the penis and the amount of DNA found made this an unlikely scenario.[43] However, he

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[38] AAR Vol. IV, page 436 line 1-24, page 460 line 9-11, he interpreted the Appellant's initial request as merely confirming that he could call another lawyer later if he wanted, not that he was asking to do so now. page 461 line 8-28

[39] AAR Vol. IV, page 436 line 36-40

[40] AAR Vol. IV, page 437 line 21-36, 40 to page 438 line 2, 32 to page 439 line 7

[41] AAR Vol. IV, page 449 line 34-37

[42] AAR Vol. III, page 248 line 25 to page 249 line 35, page 252 line 25-30, page 254 line 10-16, page 257 line 20-25, 30-32

[43] AAR Vol. III., page 257 line 41 to page 258 line 8

did confirm it was possible the DNA could have transferred secondarily, i.e. he had DNA on his hand and subsequently touched his penis.[44]

26. As to the swabs taken from the Complainant, there was blood detected, however, since no semen was detected, "*… the swab was not submitted for DNA analysis at that time*."[45] He explained, if there was a lack of penetration, or sexual contact but no ejaculation, or use of a condom, then he would not expect to find spermatozoa, nor might there be male DNA even if the swab was properly taken.[46]

27. Raelene Miller, SART nurse, examined the Complainant at the hospital[47] and located five small lacerations on the anus, four of which she was able to see with the naked eye. One further laceration was observed once she applied a dye.[48] She also noticed decreased rectal tone, i.e. the Complainant's rectum/anus was visibly not closed as it would normally be. Instead, an opening could be seen.[49] Swabs were taken of the vagina and anus.[50] When asked about whether large bowel movements might account for the decreased rectal tone, she indicated she had not seen it, even in patients whom she had to disimpact.[51]

28. Dr. Carter Snell was qualified in the area "forensic assessment and treatment of alleged sexual assault patients, including injury identification and interpretation."[52] Given her experience and educational background,[53] she testified to the risk factors,[54] both for contributing and detracting, of certain types of injury, as well as the recency and mechanisms of injury (given the elasticity of the tissues and blood flow to the genital region). Dr. Carter Snell gave testimony about various studies and statistics examining the presence and absence of injuries in general, the

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[44] AAR Vol. III., page 258 line 29-32, page 260 line 25-31
[45] AAR Vol. III., page 255 line for-12
[46] AAR Vol. III., page 261 line 27-30, page 261 line 32 to page 262 line 3
[47] AAR Vol. II., page 49 line 1-20
[48] In the 5, 6, 7,8, and 12 "o'clock" position, AAR Vol. IV., page 494 line 32 to page 495 line 7, page 503 line 12-17
[49] AAR Vol. IV., page 496 line 24-40, page 503 line 38 page 504 line 7
[50] AAR Vol. IV., page 496 line 9-14
[51] AAR Vol. IV., page 504 line 9-25
[52] AAR Vol. III., page 196 line 1-4
[53] AAR Vol. III., page 198 line 21 to page 203 line 29
[54] AAR Vol. III, page 207 line 18-40

significance of the number of injuries, as well as studies which directly compared those reporting a consensual vs. non-consensual encounter. [55]

29. In keeping with proper limits, she refrained from opining as to what type of object penetrated the Complainant. Indeed given the locations of the injuries (on the outer area), it was possible there had merely been an attempt at penetration.[56] Similarly, while the literature seemed to support that more than two injuries is what separated the consensual and nonconsensual encounters, Dr. Carter Snell specifically left any such inferences about this case up to the court.[57]

30. In cross examination she was asked about other possible sources of the injury, including pre-existing conditions, insertion of fingers, hard stool, diarrhea, or rough but consensual anal sex.

31. She indicated hard stool may cause injuries, but such would be unusual in a person as young as the Complainant who displayed normal elasticity in her tissues.[58] Likewise, a laceration was inconsistent with diarrhea,[59] and the blunt force required to make the injuries would require more than a couple of fingers, or a lot of pressure, and in such cases, one or two injures were typically seen.[60] Similarly, she felt a preexisting condition was highly unlikely because the Complainant had no redness or signs of excoriation (wearing or chafing) which would be more typical.[61] Finally, it was possible that rough consensual sex would produce lacerations, but the literature suggested it was not common to result in so many.[62] Finally, she did note that if the Complainant had anal intercourse with the last three days, there may have been a pre-existing injury, however typically injuries to that area are gone within three to five days maximum.

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[55] AAR Vol. III., page 215 line 39 to page 216 line 9, page 218 line 12-28, page 219 line 8-14, page 221 line 6-22, 27-30, page 237 line 20-31
[56] AAR Vol. III., page 219 line 36 to page 220 line 10
[57] AAR Vol. III, page 237 line 33-36
[58] AAR Vol. III., page 231 Line 23-39
[59] AAR Vol. III., page 229 line 3-19
[60] AAR Vol. III., page 231 line 13-20
[61] AAR Vol. III., page 230 line 35 to page 231 line 8
[62] AAR Vol. III., page 231 Line 23-39

Furthermore, her last stated sexual intercourse was vaginal, not anal, and reportedly had occurred about a week before.[63]

Argument and decision:

32. The closing arguments were mirror images of each other. The Crown suggested the Complainant was credible and reliable; there was no discernable motive to lie, she had to compose herself on the stand while recounting the assault, she was candid in admitting the limitation of her own memory, her story was corroborated to a certain extent by J.S. who heard vomiting and crying from the downstairs bathroom, and the Appellant's statement which put him in the bathroom.[64]

33. The Crown went on to say "*now, ultimately the key corroborating feature of this case of the injuries that we have before the court*." The location of the injuries around the anus, and the fact that they could be seen without the dye was relevant; Dr. Carter Snell suggested these were indicative of penetration. Similarly, there was the presence of decreased rectal tone.[65] Finally, the Crown suggested there was no actual, alternate explanation for how the Complainant's DNA got onto the Appellant's penis.[66]

34. Conversely, the Appellant argued the Complainant's intoxication and resulting memory gaps meant the Court could not be satisfied of guilt beyond a reasonable doubt. For example, the Complainant's evidence about ignoring or rebuffing advances was contradicted by the other witnesses at trial; she was not sure exactly if, or where, she was penetrated; she admitted to not turning around while in the bathroom to see who was there; her sister, X.H. did not report hearing the Complainant cry out or say stop while in the bathroom; there was no reported DNA from the Appellant on the swab taken from the Complainant and no semen was identified on her shirt; the DNA located on the penile swab could have been transferred in a secondary fashion

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[63] AAR Vol. III., page 230 line 23-30
[64] AAR Vol. V., page 557 line 17 to page 558 line 21, page 559 line 14-33
[65] AAR Vol. V., page 561 line 11-24, 31 to page 562 line 33, page 563 line 29-35, page 564 line 3-7
[66] AAR Vol. V., page 564 line 3-7

(i.e. if he got it on his hand and then touched his penis[67]); and the Court should consider his immediate post event conduct which was inconsistent with just having committed an assault.[68]

35. In her decision[69] the Trial Judge noted the DNA match, and rejected secondary transference as speculation. Further, she was satisfied the DNA most likely came from an internal source as the expert had testified, and this was consistent with the Complainant's evidence of penetration. As such, she was satisfied the Appellant penetrated the Complainant as described.

36. Regarding the Complainant's reliability, the Court was unmoved by the discrepancy in evidence concerning their interactions throughout the evening. Instead, the Complainant's description of the assault was accepted, corroborated in part by J.S's testimony. Similarly, although the Complainant was unsure where she had been penetrated and, in fact, told authorities and medical personnel she was 90% sure she had been penetrated, the Trial Judge accepted the evidence about the injuries and, in particular, Dr. Carter Snell's testimony about how it can be difficult for people to differentiate how they were penetrated if there was pain in the area.

37. In the result, the Trial Judge accepted the assault unfolded in accordance with the Complainant's testimony. Finally, after setting out evidence supporting the *actus reus*, the Court examined *mens rea* and rejected honest and mistaken belief in consent as lacking any air of reality.

Applications:

38. At trial, the Appellant made two important applications. First, he argued his s. 10 *Charter* rights were violated for various issues arising from language issues, confusion and a rejected request to call a friend. Additionally, he argued the penile swab violated s. 8 of the *Charter*. The

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[67] Evidence of Det. Reule – just before the swab was taken, the Appellant removed his pants and officers searched them. As this was going on, he noticed the Appellant attempting to rub the head of his penis and he was directed to stop. AAR Vol. IV., page 439 line 39 to page 440 line 20

[68] AAR Vol. V., page 565 line 11 to page 566 line 13, page 567 line 31 to page 574 line 34, page 575 line 15-20, page 576 line 34 to page 577 line 27, page 578 line 1-3, page 578 line 11 to page 579 line 33

[69] ***R. v. Cortes Rivera*****,** 2017 ABQB 593

Trial Judge dismissed the s. 10 arguments, noting, *inter alia*, the presence of the translator meant any language differences fell short of establishing special circumstances which would compel police to inquire as to why the Appellant wanted to call a friend. She also found a waiver was not required when the Appellant, having reportedly already spoken to a lawyer, was subsequently offered, but declined, the chance to contact counsel again.[70]

39. As to the penile swab, the Court found three breaches of the ***Saeed***[71] guidelines pertaining to full nudity, the lack of a complete record, and the presence of an extra officer. Nevertheless, the breaches were not serious and the process was not overly disproportionate to a perfectly conducted penile swab. As such, the evidence was admitted after the 24(2) assessment.[72]

40. The second, and the one which brings the matter before this Court, was an application to cross examine the Complainant about a reported prior act of consensual vaginal intercourse as a means of addressing the lacerations to the anus. (At the time, s. 276.1- currently, s. 278.93. For the sake of convenience, reference will simply be made to "276".)

41. The genesis of the application came from the sexual assault examination report which has a section for personal history. Therein the Complainant was asked about "*consensual vaginal penetration < 8 days,*" (with boxes for "yes," "no" or "N/A"). She indicated "yes" with a note indicating this took place "*about a week ago.*"

42. The next question inquired about "*consensual rectal penetration* ***< 3*** *days*." Here the Complainant's recorded response was "no."[73]

43. The written application itself read "*[W]hen speaking to medical people after the alleged incident, the Complainant admitted to having consensual vaginal sex sometime the week prior the alleged incident. If there were tears on her anus, it is submitted they could have come from*

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[70] ***R. v. Cortes Rivera,*** 2017 ABQB 275 AAR Vol. 1, page 24-57
[71] 2016 SCC 24
[72] ***R. v. Cortes Rivera,*** 2017 ABQB 405
[73] AAR Vol II page 13, see also page 16

the prior sex she had with another person. Investigation into the prior sex could explain the tears."(emphasis added)[74]

44. The Crown responded in writing and made brief submissions, the thrust of which was that, while the application had facial validity for most things (i.e. narrow time frame, specific act), it fell short on (facial) *relevance* – i.e. cross should not be allowed primarily because prior vaginal sex has no connection to anal sex and injuries that may occur (there was also some discussion about lack of detail in the application). The Crown did not oppose cross about fellatio that may have occurred that day.[75]

45. Aside from noting the defence was limited in the type of details to which they had access, and therefore could appear in the application, the Appellant did not elaborate on the basis for the application and/or ask the Court to (re)consider the matter untethered from the act of vaginal intercourse.[76]

46. The Court agreed with the Crown; evidence of prior consensual vaginal intercourse occurring roughly seven days prior to the assault could not assist the Appellant in explaining the injuries, and therefore, the application was dismissed without a *voir dire*.[77]

Court of Appeal:

47. An appeal was brought concerning both of the above applications as well as the scope of Dr. Carter Snell's evidence. The *Charter* arguments were unanimously dismissed, as was the concern over the expert testimony.

48. As to the s. 276 application, the Appellant suggested the Trial Judge had erred in not holding a *voir dire*. More specifically, Dr. Carter-Snell testified the injuries could have been between a few hours and, up to, five days old,[78] and, as such, an indication of no anal penetration within the last three days, did not eliminate the possibility the injuries occurred (up to five days)

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[74] AAR, Vol. II Tab 9
[75] AAR Vol. II, page 16 line 34-40, page 17 line 1-26, line 28 to page 18 line 25, page 23 line 9-12
[76] AAR Vol. II, page 23 line 3-6, line 30 to page 23 line 2
[77] AAR Vol. II, page 25 line 25 to page 26 line 6, page 30 line 11-30
[78] AAR Vol. III, page 213 line 11-18, page 221 line 32 line 40, page 230 line 23-30

prior. Further, ***R. v. Seaboyer*,**[79] and most recently, ***R. v. R.V.*,**[80] hold that where the Crown intends to rely on an injury or condition, the defence should be entitled to cross examine about potential other sources, for example if there was merely attempted, rather than completed penetration during another encounter. Moreover, ***R.V.*** made clear that facial validity and relevance may be established by focusing on a narrow timeframe.[81]

49. The Appellant did not argue the curative proviso in their factum, however during the oral hearing, the Appellant noted the Crown and Court relied on the injuries to draw certain inferences, and therefore the verdict would not inevitably have been the same had defence counsel been permitted to cross the Complainant.[82]

50. Crown counsel agreed with the basic principle about cross examination being potentially relevant to explore alternate sources of injury/condition. However, given how the original application was framed, with clear reference to wanting to cross about the prior episode of vaginal intercourse, (an act disconnected physically and temporally) as well as the failure to amplify the application in light of the Crown's initial response, the Trial Judge had not erred. As such, the appeal was predicated on suggesting the Trial Judge had a responsibility, but failed, to appreciate what counsel was trying to do and take it upon herself to perfect the application.

51. As regards the curative proviso, in light of the other available evidence, including the pain which was absent prior to being in the bathroom, Crown counsel argued it was difficult to conceive that further information would alter the outcome. Similarly, since the Appellant had also been able to cross examine Dr. Carter Snell about other possibilities such as pre-existing physical conditions, unusual bowl movements, or prior, rough, but consensual, sex (the latter of which she discounted as unlikely given the number of injuries), no miscarriage of justice occurred.

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[79] [1991] 2 S.C.R. 577
[80] *Supra* at note 2
[81] *Ibid*, at para 55
[82] Transcript of proceedings January 08, 2020, Respondent's Appeal Record, TAB 1.

52. As the Appellant correctly points out, at no point in either the written materials or during the hearing, was the topic of invoking s. 683(1)(b) to make further inquiries of the Complainant broached. Nor were counsel asked to provide supplementary materials after the initial hearing.

53. The Court unanimously found that the Trial Judge misunderstood the precise nature of the 276 application, resulting in her erroneously denying cross examination. However, the Court split on the nature of remedy. The Majority dismissed this ground of appeal by invoking the curative proviso. They stated:

> *We arrive at this conclusion because even had cross-examination been allowed in this targeted area of prior anal sexual contact, Mr. Cortes Rivera suffered no prejudice, given the other evidence of his guilt including his police statement in which he stated he was unsure as to whether he had sexually assaulted JT, the evidence of her DNA found on his penis, in amounts consistent with it likely having come from an internal source, and JT's testimony that he had sexually assaulted her, evidence that was accepted by the trial judge. That collection of evidence, without any consideration of JT's anal tearing, was sufficient to base a conviction of sexual assault.*
>
> *While not essential to this conclusion, we observe that it is highly unlikely that cross-examination would have revealed that JT had anal intercourse within the five day period Dr. Carter-Snell testified it would take for the anal tears to heal in any event given JT's testimony that the pain she felt during the event was intense, a 9 on a pain scale of 10, and her completion of the form on which she checked "no" to the question on whether she had had anal intercourse during the prior three days.*
>
> *As the Supreme Court of Canada concluded in **RV**, although on other evidence, no miscarriage of justice occurred here because the trial judge would not have found a reasonable doubt existed as to whether Mr. Cortes Rivera had sexually assaulted JT even had the s. 276.1 application been granted and subsequent cross-examination revealed another possible source for her anal tears.*[83]

54. The dissenting Justice held the case brought to the forefront the remedial powers of the appellate court, and that new trials need not be ordered when more proportionate remedies are available. Thus, he suggested that the Court exercise its authority under s. 683(1)(b) to have the Complainant attend before the court and/or be examined in the acceptable manner. He states,

> *The more appropriate remedy in this appeal is to invoke these powers and direct the inquiry that should have taken place at trial.*

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[83] ***R. v. Cortes Rivera***, *supra* at note 1, at para 28-30

> *The missing evidence is very focused. The SART questionnaire asked the complainant if she had had "consensual rental penetration . . . within two days prior to assault?" She need only be asked if she would have given the same negative response if the question had been "within six days prior to assault." That question could now be put to the complainant in a formal examination under s. 683(1). Alternatively, the appellant and the Crown might consent to a more informal cross-examination of the complainant, or might be content to have an affidavit from the complainant answering this missing question.*
>
> *The Appellant has identified an error leading up to his conviction. Where possible, he should be given a substantive response to that error. While it is possible, and often desirable and necessary, to have resort to the curative power in s. 686(1)(b)(iii), that should not be done when there is another more suitable remedy available. In my view, this appeal should not be decided on the existing record. The complainant's evidence should be supplemented, and the appeal resolved only once that is done.*[84]

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: ARGUMENT

55. The Appellant's argument is in several parts, but upon further review, can be classified into three broader categories: first, arguments about the fundamental importance of cross examination, a breach of which usually requires a new trial; second, those addressing discrete errors in the use of the curative proviso in this case; and finally, concerns with the alternate remedy proposed by the dissent.

56. As will be seen, the Respondent agrees the alternate remedy proposed in the dissent presents problems (and perhaps should be left for another day,) as well as established legal principles set out by this Court regarding cross examination and trial fairness. However, the Majority below committed no errors, and was correct to utilize the curative proviso given the evidence and elements of the offence. As such, the appeal ought to be dismissed.

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[84] *Ibid*, at para 65, 67-68

Arguments re: the importance of cross examination and call for a new trial – Appellant's A, B, C, D(i)

57. The Respondent does not disagree with the Appellant's first argument (A), at paragraphs 56-60, which sets out the fundamental importance of cross examination to a fair trial. This principle is both firmly established and constantly reiterated by this Court.

58. Under subsection (B) at paragraphs 61-64, the Appellant suggests his right to make full answer and defence was breached in this case because (i) the Crown relied upon the injuries as a key corroborating feature, (ii) the Complainant was unsure at the time if she had been penetrated, anally, vaginally, or at all, and (iii) the Trial Judge found she was assaulted by penetration. Cross examination might have raised reasonable doubt about that finding. Furthermore, per the dissent in ***R.V.,*** the defence was not merely denied a small line of inquiry, but rather the organic process of cross.[85]

59. Once again, the *prima facie* nature of the breach is not in issue. Indeed, even if it had been argued in the court below, the ruling on this particular point was unanimous and is not under appeal. (Comments about the organic nature of cross are discussed further below.)

60. That said, a difficulty in the present case is that no *voir dire* was held. At first blush, given the long standing principle which gained prominence in ***R. v. Seaboyer*****,** culminated in ***R. v. R.V.*****,**[86] and is presently accepted, it may seem that a *voir dire* is redundant when the issue involves cross examination about injuries or other conditions. On the contrary, the *voir dire* remains a vital, and indeed necessary step in the proceedings; a point worth stressing regardless of the outcome of this case. As seen in the majority decision in ***R.V.***, s. 276 does not merely address the admissibility of evidence, but also the scope of permissible cross examination, and the outcome of balancing the various considerations set out in the legislation.[87] Likewise, as this

[85] *Supra* at note 2 at para 101-136
[86] *Ibid,* at para 57, 62-66
[87] ***R. v. R.V.*****,** *supra* at note 2, at para 33-45, 46, 60, 67, 69-70, ***R. v. A.L*****,** 2020 BCCA 18 at para 219-226, 261-264

Court's decision in ***R. v. Barton*** makes clear, it would be an error for a trial judge to not follow the 276 regime,[88] and by extension, refuse a *voir dire*.

61. Logistically, the process of holding the *voir dire* better serves all concerned. The Crown and Defencse are put in the best position to understand the evidence on which to rely or meet as the case may be, and can make decisions accordingly, up to and including not perusing the matter, as they see fit. A complainant's evidence is brought out in circumstances far more conducive to respecting privacy as compared to speaking for the first time in front of a jury, and they may even be spared from subsequently having to testify about prior sexual activity in the trial proper, either because defence is satisfied it need not be perused further or directly challenged, or the parties agree to have the *voir dire* evidence admitted into the trial proper. Finally, the court can assess what mid or final instructions may be warranted, and more importantly, understand and limit the nature of cross examination to ensure trial fairness is met by allowing relevant information to be brought out in proper and respectful way.

62. The nature of limited cross examination and how the lack of a *voir dire* in the present matter impacts the alternate remedy are discussed more fully below. For present purposes, the important point is the *voir dire* must not be cast aside, even if cross, *prima facie*, would essentially always be permitted at trial (i.e. if counsel wishes to explore the credibility/reliability of denials of alternate sources.)

63. Under subsection (C) and (D (i)) at paragraphs 65-73, the Appellant makes his case for a new trial, which is the fundamental thrust of the appeal. He notes that because it is difficult to predict what information may arise during cross, a new trial is the usual remedy when it has been unduly restricted. Additionally, relying on ***R. v. Barton*****,** it is suggested neither this, nor any other court, ought to speculate on what the outcome of a 276 application would be.[89] Moreover, ***R.V.***, may be distinguished because the only reason the Majority invoked the curative proviso was because it was determined that cross which should have been permitted, was achieved in a roundabout way through other questions.[90] (Again) permissible cross-examination may well

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[88] 2019 SCC 33 at para 64, 68, 80-84
[89] *Ibid.*, at para 84
[90] *Supra* at note 2, at para 85-96

have revealed an alternate source for the injury, and as recognized by the dissent in ***R.V.***, prohibiting cross amounts to denying an entire process of questioning. Finally, in the aggregate, a miscarriage of justice has occurred, and therefore, the curative proviso cannot be utilized.

64. Once more, there can be no dispute this Court has repeatedly affirmed a new trial is the usual remedy whenever relevant cross examination has been inappropriately denied. However, it is equally clear that a new trial is not a mandated remedy. While the Appellant may attempt to distinguish it on the facts, ***R.V.*** nevertheless demonstrates the possibility of using the curative proviso for ostensibly the same breach, and therefore, it should not be dismissed out of hand.

65. Furthermore, the Appellant's reliance on paragraph 84 of ***Barton*** is misplaced. In ***Barton***, the accused was permitted to testify in a murder trial about all manner of evidence concerning his prior sexual contact with the deceased, a sex trade worker. . The issue on appeal centered on what of the evidence could be properly admitted. In turn, this would require examining the evidence to identify its intended use, assess whether the intended use conflicted with the law, whether evidence that conflicted could still be admissible for other purposes, as well as a balancing of the other statutory conditions. In short, what may be admitted, and why, was very much in dispute. It is little wonder the Majority in Barton warned against speculating about what would be deemed admissible at the end of the day.

66. That said, the Court only warned against, rather than outright prohibited, speculation. Indeed, at paragraph 118, it was observed that many aspects of Mr. Barton's suggestions conflicted with established legal principles. Surely the Court would conclude evidence tendered solely for these purposes would have been inadmissible. However, having already tainted the jury with unfettered information, the problem was exacerbated by the lack of proper limiting instructions. It was clear a new trial was necessary.

67. Conversely, in the present case, because of ***R.V.*** and the authorities cited therein, it is known (a) that cross about a condition or injury is *prima facie* relevant and admissible regardless of outcome, and (b) the intended use by the defence would be to raise reasonable doubt about the source of the injury or condition (and/or an attack on credibility) as a means of refuting the inference of causation (corroboration).

68. Consequently, in keeping with the majority decision in ***R.V.,*** in order to assess trial fairness and potential prejudice, this Court may consider what questions would be permitted, as well as the outcome. (More on this below.) Indeed, section 276 is unique in that it requires defence counsel to inform the court, in advance, as to the lines of inquiry (in broad terms) and the court has an obligation to balance the privacy of the witness and various other concerns along with the right of the accused to make full answer and defence. The result of this assessment, by design, restricts cross-examination.[91] In other words, the "organic process" that the dissent in ***R.V.*** spoke of is not entirely applicable.[92]

69. As applied, it is accepted[93] the Appellant should have been permitted to inquire of alternate sources, and more specifically should have been permitted to ask if the Complainant engaged in any other sexual activity within five days that could explain the injuries (i.e. actual or attempted anal penetration through some means), the result of which would have been either "no" or "not no." While the uncertainty does not foreclose finding a breach of the right to full answer and defence, it does not follow that prejudice should be assumed.

70. When it comes to assessing the effect of the Trial Judge's 276 ruling on trial fairness, the matter may be thought of as akin to cases of lost disclosure, as in both scenarios exploration of a discrete issue has been curtailed. Logically then, trial fairness and prejudice may be examined in a similar fashion, i.e. by assessing the impact/prejudice in advancing the defence's theory, including consideration of the evidence that does exist, and whether it contains the same information as that which was lost.[94] This is essentially what the majority did in ***R.V.*** when relying on, (a) the questions that had been allowed, and (b) the fact the section 276 ruling did not prevent defence from advancing his theory that the complainant had lied to protect her relationship with her boyfriend, as the basis for utilizing the curative proviso.[95]

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[91] *Supra* at note 87

[92] It would appear such an approach was rejected by the majority in ***R.V.***

[93] Since there was no *voir dire*, it will be assumed the Court would have found a basis for allowing cross.

[94] ***R. v. Girou,*** 2017 ABCA 426 at para 17, ***R. v. J.G.B. (aka Bradford),*** (2001) 139 OAC 341 at para 8

[95] *Supra* at note 2, at para 96-97

71. Thus, bearing in mind the Appellant conducted the trial in light of the Trial Judge's ruling, it is worth briefly reviewing the theory of the Appellant at trial as it would appear raising a doubt about penetration was not central to his defence.

72. While the Appellant wished to explore the source of the injuries, it is clear from the tenor of cross examination of *all* witnesses and final arguments, that the essence of his defence was that the Complainant was too intoxicated to be reliable on *all points*. Aside from pointing out gaps in her memory,[96] the Complainant was cross examined about not actually turning around to see who was in the bathroom,[97] whether it was physically possible to have been assaulted as claimed given the confines of the bathroom,[98] and that she was not actually sure (and therefore reliable) about what she alleged happened in the bathroom as evidenced by the fact she did not initially (and thereafter, fully) tell her sisters, and informed investigators she was only 90% sure she had been penetrated at all. Likewise, her reliability was challenged through cross examination of J.S. and X.H. and others on the issue of whether the Complainant was flirting with the Appellant and/or if they overheard the Complainant say stop.

73. Utilizing the above, the Appellant's final arguments posited the Crown had not proven (a) that an assault had occurred (either at all, or because it was a consensual encounter that stopped upon request – assuming she said stop at all), and/or (b) identity of the perpetrator (owing to the nature of the Complainant's evidence as contrasted with his post event conduct, as well as the possibility of mistaken identification since there were other male partygoers and the Appellant was clearly consoling her at the sofa.) Likewise the Appellant made use of Mr. Westecott's and Det. Reule's evidence to suggest DNA may have gotten on his penis innocently.

74. As it concerns penetration, the Appellant again relied on the Complainant's own uncertainty, as well as the fact that the Crown had not shown his DNA was found on the swabs taken from the Complainant.

75. Overall, the presence or absence of penetration may have fed into the Appellant's theory regarding credibility and reliability, but it was clearly not central to it, nor can it be said the

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[96] *Supra* at notes 12, 13
[97] Transcript of proceedings page 94 line 32-37
[98] Transcript of proceedings page 94 line 25-27

inability to cross about prior sexual acts inhibited him from advancing his far more imperative, and stronger arguments about consent and identification. Thus it may be said the prejudice to his case was low.

76. Furthermore, as it pertains to the other available information at hand, it will not be overlooked he was still able to explore other sources, and potentially sow the seeds of doubt, about penetration through the evidence of the Complainant, Raelene Miller and Dr. Carter Snell. (Though it should be noted the Complainant was not asked about them, topics such as hard stool, diarrhea or any other preexisting medical condition were not barred by the Trial Judge's ruling.) He even specifically asked Dr. Carter Snell about insertion of fingers or sex toys and rough consensual anal intercourse. As it happens, their evidence pointed away from such theories (in particular Dr. Carter Snell suggested the number of injuries was inconsistent with even prior, rough, consensual anal sex) but the point is, the argument was still available even if ultimately the Trial Judge disbelieved it.

77. In sum, the Appellant's suggestion the trial was unfair, and thus a new trial is a fait accompli, is not accurate. There is no denying the Complainant herself was not asked about other sources of injury and, as such, this Court may very well decide that raising the issue with other witness is not analogous to what occurred in ***R.V.*** or that his defence was still stymied. Nevertheless, ***R.V.*** clearly demonstrates that declaring a miscarriage of justice is not obligatory whenever cross examination has been denied, but rather is dependent on the facts. More to the point, as will be developed further in the next section, the outcome of what would be the permitted inquiry sets the stage for the curative proviso.

Arguments re: the curative proviso, proper test and application – Appellant's (D)(ii-iv).

78. Aside from suggesting a new trial ought to be ordered when trial fairness has been compromised, the Appellant has also proposed two discrete errors on the part of the Majority in the Court below. First, applying the wrong test by looking at whether the (other) evidence was sufficient to ground a conviction, rather than whether the conviction was inevitable such that there was no realistic possibly that a new trial would produce a different result, and second, that the case here is not so overwhelming as to meet that standard.

79. Once again, the Respondent does not dispute the standard of review set out in ***R. v. Trochym***,[99] ***R. v. Van,***[100] and ***R. v. Sarrazin***.[101] However, for the reasons that follow, it is clear the Majority below did not err in law or application.

80. Respectfully, there is no basis to find the Majority applied the wrong test. To start, the learned Justices are presumed knowledgeable and competent in the law with which they routinely work. Second, the Appellant's argument rests on a singular reference to the remaining evidence being "sufficient" to base a conviction, however two paragraphs later, the Majority concludes that "*no miscarriage of justice occurred here because the trial judge* ***would not have found a reasonable doubt*** *existed…even had the s. 276.1 application been granted and subsequent cross-examination revealed another possible source for her anal tears.*"[102] Clearly the Majority considered and concluded reasonable doubt was not a possibility.

81. The Appellant may say the reference(s) to "*the* trial judge," "would," or the earlier mention to "sufficient" means the Majority was still not considering whether *any other* trier of fact *could* reasonably acquit, however, a plain reading shows the reasons adequately addressed whether they felt an acquittal was ever reasonably possible in general. Any (remaining) doubt as to whether the Majority applied the incorrect standard is resolved by the established principle that, "*[w]here a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law.*"[103]

82. Additionally, it should not be overlooked that the Appellant's position is predicated on the notion the court must resort to a specific branch of the curative proviso. As this Court has established, the curative proviso may be used in 2 situations, (1) where the error is "harmless" *in that it could not possibly have affected the verdict*, or (2) where the error is serious, and ordinarily would result in a new trial, but the evidence is overwhelming such that the conviction

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[99] 2007 SCC 6
[100] 2009 SCC 22
[101] 2011 SCC 54
[102] ***R. v. Cortex Rivera,*** *supra* at note 1 at para 30
[103] ***R. v. C.L.Y.,*** 2008 SCC 2 at para 11 adopting *R. v. Morrissey*, (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at pp. 205.

would have been inevitable.[104] Admittedly, at first blush, it may seem illogical to suggest anything but the "overwhelming" stream applies in this (or a like) case given the case law. However, once again in ***R.V.,*** the Majority recognized the lack of cross would ordinarily require a new trial, and yet, rather than relying on the "overwhelming" stream, assessed and found the error to be "harmless."[105] Thus, it may be that ***R.V.*** has evolved the curative proviso such that the identification of an error that might otherwise require a new trial does not necessarily dictate resorting to the "overwhelming" branch of the curative proviso. Instead a "harmless" assessment should be undertaken.

83. As applied, it has already been set out how the Appellant was not hindered in advancing his defence, including exploring other sources of the lacerations through the other witnesses as a means of calling the existence of penetration into question. Although the Complainant wasn't asked about prior sexual activity, the Appellant was still able to go as far as asking Dr. Carter Snell about it, who suggested the evidence pointed away from the lacerations resulting from prior rough, consensual sex. Thus the Court was not completely deprived of relevant evidence.

84. Moreover, all of the Appellant's arguments on this point are intertwined, and give rise to two responses.

85. First, as above, one must understand what would have come from cross in light of the specific restrictions that may flow from the 276 assessment, where full answer and defence is but one consideration to be balanced against other interests designed to protect a complainant's dignity and privacy, as well as societal interests such as encouraging reporting by victims. (para 39-45) While in 2020, there should no longer be a stigma on the sexual preferences of consenting adults, the topic remains intensely private. Thus, on appeal, a court may speculate as to the limits of cross that would nevertheless result in fair proceedings.

86. As it happens, the scope of cross in a case such as this can be clearly defined, and a particular question will have to be asked, and indeed should be asked *first* to ensure privacy and dignity are at the forefront, i.e. was there any other sexual activity within the last five days

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[104] *Supra* at note 99-101
[105] *Supra* at note 2, at para 85-99

(before the exam) that could account for the injuries (i.e. actual or attempted anal penetration through some means)? Even more precisely, since the Complainant already denied any other penetration within three days, the proper question would be to ask if she engaged in any other sexual activities three to five days before the exam.

87. Furthermore, one can confidently assume there are only 2 answers; "no" or "not no,"[106] The Appellant would hold that the uncertainty is enough to declare a miscarriage of justice, however, that is not the case.

88. Rather, a fulsome, proper consideration of the issue calls for an assessment of what might reasonably result from cross. In any case where the topic is an injury or condition, the obvious "best case" scenario for an accused is that the witness will either say they are unsure or will actually admit to a recent encounter.

89. But, the question remains, what does evidence of a potential alternate cause actually mean in terms of the process of a trial? The Appellant contends cross might raise a doubt about the source of the injuries, and that's certainly not inaccurate, but that describes an available outcome. Respectfully, in terms of the process itself, and by extension trial fairness, at worst, all it means is the trier of fact would have two available, competing inferences, and, in executing their duty, would have to decide which, if any, they were prepared to draw. Put another way, it situates the Crown's inference on this particular point (i.e. causation) into more circumstantial territory. However, as in any circumstantial case, although guilt should be the only reasonable inference, (1) circumstantial evidence *does not* have to totally negate other possibilities and (2) it nevertheless remains up to the trier of fact to determine whether proposed alternative ways of looking at the case is reasonable enough to raise a reasonable doubt[107] --bearing in mind of course that these principles apply to verdicts as a whole, whereas individual facts (such as penetration) do not have be proven beyond a reasonable doubt.[108] Point being, the mere

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[106] The latter would include yes, or ambiguous answers like maybe, or any situation where the Complainant cannot affirmatively rule it out.

[107] ***R. v. Villaroman*****,** 2016 SCC 33 at para 42, 50, 56

[108] ***R. v. Morin*** [1988] 2 S.C.R. 345 at para 21

possibility of an alternate source of injury is not necessarily the death knell in the trial (or trial fairness) the Appellant implies it to be.[109]

90. Consequently, always appreciating it is the Crown's onus to establish the curative proviso, the question of harmlessness to the verdict/inevitability can be taken in two steps. First, by asking whether it was inevitable the trier of fact would conclude, based on all the evidence, that the assault was the source of the injury. If the answer is "yes", then the injuries can still be used to then assess the inevitability of the conviction overall, and by extension, the lack of cross can be deemed harmless.

91. Though the application of the curative proviso raises a question of law,[110] invoking it is no different than the application of any other legal standard in that one must accept and utilize the facts as found in the court below.[111] Resort to the proviso is not a license to retry the case. As such, consideration must be given to Dr. Carter Snell's evidence, which came in her report and testimony. In the former, she described lacerations as being consistent with (recent) penetration, and more importantly, she claimed that due to high blood flow to the area, most anal injuries are non-existent within three days.[112] Similarly, she testified that these types of injuries healed in three to five days. From this, it may be inferred that had the Complainant suffered the injuries in another encounter, three to five days before her exam, the process of healing would have been well under way, if not outright completed. Contrast that with the testimony of Raelene Miller who indicated she could see four of the lacerations without the use of a dye (which Dr. Carter Snell described as significant) and that the Complainant displayed tenderness when touched (i.e.

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[109] For example, in this very case, the Appellant put forth an alternate explanation for the DNA, yet it was for the Trial Judge to ultimately decide how it was on the Appellant's penis.

[110] ***R. v. Jolivet***, 2009 SCC 29 at para 5

[111] ***R. v James***, 2011 ONCA 839 at para 54, ***R. v. Sarrazin***, 2010 ONCA 577 at para 66, aff'd, *supra* at note 101, at para 46

[112] The report (Respondent's Appeal Record, TAB 2) was entered as an exhibit in a *voir dire* into her expertise (VD1-2) and she was examined and cross examined about it. ARR Vol. III page 82 line 35-36, page 87 line 15-23, page 91 line 32-34, page 94 line 13-14. Evidence that was deemed admissible was subsequently entered in the trial proper en masse, without further comment/limitations. AAR Vol. V, page 1 line 31-36.

she felt pain, recoiled and/or winced), as well as the Complainant's own claim that she experienced a terrible pain which *lasted for days*, and was not present before the Appellant came in the bathroom.

92. Taken together, the notion that the Complainant would have been healing or virtually healed by the time of the exam is simply incompatible with the evidence of long lasting pain which didn't exist before the Complainant was in the bathroom. The clear and undeniable outcome of this assessment is that it was inevitable to find the assault caused in the injuries. (Alternatively, if one assumes the *injuries* are unrelated to pain and thus could have come from somewhere else, the *pain itself* supports an inference of penetration.)

93. In the result, the inference of causation was inevitable, and therefore, the lack of cross in this case was harmless.

94. Next, if necessary, consideration then turns to the inevitability of the verdict itself. The Appellant contends the case was not overwhelming, and in so doing, seeks to chip away at individual pieces of evidence, such as his statement (voluntariness and accuracy of the translation) as well as the DNA.

95. There are two problems with this argument. First, as mentioned, when assessing the curative proviso one must utilize the facts as found, particularly when these facts are untouched by the error.[113] The findings of voluntariness and accuracy of the translation have nothing to do with the lack of cross and are not subject to reinterpretation now.[114] The same can be said for the DNA where the Trial Judge considered, but rejected, secondary transference. Likewise, the hysterical crying, immediate identification of the Appellant as the perpetrator on scene, evidence of pain as corroborated by Raelene Miller, are all independent of cross examination about prior sexual acts. Second, as always, it is the totality of the evidence that is at issue, rather than a

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[113] *Supra* at note 111

[114] Voluntariness was specifically ruled upon at trial and affirmed on appeal and is not subject to further appeal, and there has been no finding that the translation is inaccurate on material points. The Appellant was chastised in the Court below for suggesting such a problem without having had the statement independently translated.

piecemeal approach, and that evidence includes the injuries, the timing and nature of the pain, the immediate identification, DNA (which it should be noted was used to confirm penetration, rather than penetration being used to identify the source of the DNA[115]), and the Appellant's statement which confirmed his place in the bathroom, there is no *realistic* possibility a not guilty verdict would have resulted. Comparatively speaking, this case is much stronger than ***R.V.***, and it will not be overlooked that the Majority below concluded the evidence was strong enough, even without the injuries. [116] Once again, the error was either harmless or the verdict inevitable.

96. This last point leads into the second overall response to the Appellant's arguments. Simply put, even if one removes the injuries from consideration, and further still, removed penetration entirely,[117] the verdict itself would still remain for the simple fact penetration is not an essential element of the offence. The charge was sexual assault, not sexual assault causing bodily harm. To repeat, since the DNA, quick identification and other circumstantial evidence remains, the (other) facts of taking down her pants and underwear and holding her hips as he rubbed up and down against her without consent, constitutes a sexual assault. Moreover, the DNA on his penis suggests he rubbed against her with it; even if there was no (completed) penetration per se, he could have easily rubbed/pushed it against the anus or the outer labia. Even further, if one gave full credence to the secondary transference theory espoused at trial,[118]

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[115] ***R. v. Cortes Rivera***, *supra* at note 69, at para 79-81. The Trial Judge relied on Mr. Westecott's opinion the DNA was internal to support a finding of penetration, rather than finding she had been penetrated as a means of corroborating Mr. Westecott's theory.

[116] Consider a hypothetical where the Crown's case turns on 2 Vetrovec witnesses, A and B. If the court follows the law but ultimately concludes they are prepared to accept A's credibility and, more importantly, would convict on A's evidence alone, then errors surrounding B's evidence are immaterial. Similarly, there are many cases were a court has determined there were no breaches of any *Charter* rights, but nonetheless provided a s. 24(2) analysis in the alternative.

[117] Up to an including finding the Complainant was not credible on this point.

[118] Or frankly even the Appellant's current arguments about his statement.

pressing his fully clothed body against hers and moving up and down while she was nude from the waist down is a sexual assault.[119]

97. Additionally, since the Appellant went to considerable lengths to emphasize the Complainant was unsure if she had been penetrated at all, and sought to explain away the DNA found, he can take no refuge behind an argument that he would have conducted his defence differently. In short, it was always a foreseeable risk the Appellant would have been successful in raising reasonable doubt about penetration, yet still be convicted based on the facts overall.[120]

98. Thus, at worst, the verdict would be maintained and consideration would have to be given to whether penetration had been proven beyond a reasonable doubt at sentencing (just as the dissenting Justice said in the Court below). As such, it would have to go back not for trial, but rather just for a contested sentencing hearing, if at all. There the onus would be on the Crown to prove the aggravating feature beyond a reasonable doubt (as opposed to the higher standard for the curative proviso). Respectfully, for all the reasons above, it would appear the finding would be inevitable.

Section 683(1)(b) *is Not Applicable.*

99. The Appellant's next arguments have to do with the alternate remedy proposed by the dissenting Justice,[121] and has several parts: (1) the Complainant is not compellable in a 276 *voir dire* and s. 683(1)(b) only applies to those compellable at trial (thus the remedy is neither warranted nor more appropriate than ordering a new trial), (2) The trial court has jurisdiction over 276 hearings and per ***Barton***, the appellate court should not speculate as to the outcome, (3) s. 683(1)(b) applies to appeals which cannot be decided without further evidence and such is not

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[119] As an aside, responding to the manner in which defence ran his case in light of the 276 ruling, there is no way he could claim, under the circumstances of just meeting the complainant and her being drunk and bent over the toilet vomiting, that he honestly believed there was consent. Surely such would be barred by his intoxication, recklessness and willful blindness.

[120] As always, triers of fact can believe none, some or all of what a witness has to say. ***R. v. Francois***, [1994] 2 S.C.R. 827 at para 15

[121] ***R. v. Cortes Rivera***, *supra* at note 1 at para 64-38

the case here, (4) a truncated appeal process would further delay trials (i.e. having inquires at the appeal level would delay matters should a new trial be ordered), (5) as the default is a new trial, the proposed remedy is an extraordinary one, which must be justified by more than merely finding it suitable, and (6) neither side asked for it (the onus being on the Crown) and the Court gave no notice it was contemplating such a solution.

100. At the outset, it is relevant to note that while the dissenting Justice labelled utilizing s. 683(1)(b) as a "more suitable remedy" than simply resorting to the curative proviso, it is undeniable that it is not an alternate remedy at all, but simply part and parcel of the curative proviso. At the end of the day, all calling supplementary evidence does is inform the process of whether the error was harmless or the verdict inevitable. Admittedly, from an accused's point of view, it may be advantageous to have the additional evidence, as it may inform the decision to pursue a further appeal. That said, there is no propriety in witnesses, and the basic inquiry could be made by defence counsel informally, just at it could have been before the trial.

101. Similarly, at first blush, there is clearly an advantage in that it may help avoid utilizing judicial resources on (ultimately unnecessary) retrials by eliminating any concerns of the appellate court. Nevertheless this approach may ultimately be unsupportable.

102. Before discussing some of the legitimate concerns further, most of the Appellant's arguments can be quickly addressed. First, as correctly pointed out by the Appellant, the Complainant is not compellable in the 276 *voir dire*. As such, it is suggested calling the Complainant before the appellate court is incompatible with the spirit of this prohibition, and therefore utilizing s. 683(1)(b) is no more appropriate than a new trial where the inquiry can properly take place in a *voir dire*.

103. The difficulty with this argument is that it fundamentally contradicts the position the Appellant has taken in the appeal overall. Clearly, in coming to this solution, the dissenting Justice was operating on the record of events, and the belief the cross examination was permissible within the trial, just as the Appellant has been arguing all along. As the entire Court found, a *voir dire* should have been held since the issue was *prima facie* relevant, and in the absence of such, or more specifically, in the absence of evidence in the *voir dire* there are no other possible sources of the injuries, it must be assumed cross should have been permitted at

trial. In this light, the dissenting Justice did not err on the issue of compellability. Acceding to this particular argument would also allow the Appellant to have it both ways, arguing on the one hand, the cross should have been permitted in the trial proper as a basis for demanding a new trial, while simultaneously suggesting cross might not happen in the trial as a means of resisting a s. 683(1)(b) inquiry.

104. The next argument is something of a reprise. The appellate courts cannot speculate about the outcome of a 276 hearing, a new trial is typically warranted where a hearing has been denied, and any permissible cross should occur at trial [and be considered] with other evidence, rather than in isolation on appeal.

105. Taking these in order, as has been established above, the appellate court can speculate on the outcome of a 276 hearing in a case such as this. Moreover, calling the Complainant to fill in a gap specifically alleviates any speculation. Finally, the latter two points rest on the inference that a change in the trial evidence overall may have impacted a trial judge's specific findings and, therefore, the verdict. However, this argument is superseded by the overall issue of trial fairness, and the appeals process, and in particular the curative proviso, has always called for some speculation as to how the outcome may or may not have been changed. Consequently, suggesting the trial was unfair such that the curative proviso cannot be applied, does not aid the Appellant in addressing the applicability of s. 683(1)(b) as part of the assessment process per se. Appellate courts deal with supplementary material in other contexts and clearly have the jurisdiction and the expertise to assess, along with the trial evidence, the impact of any error.

106. Skipping over the third argument for a moment, the Appellant next raises concerns with increased delay to re-trials should 683(1)(b) be invoked. However, any delay resulting from a hearing ordered under s. 683(1)(b) would constitute appellate delay, which does not factor into a s. 11(b) assessment.[122]

107. Next, the Appellant argues since a new trial is the default, a s. 683(1)(b) examination is something of an extraordinary remedy that requires it be far better than just being suitable in

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[122] Although s. 7 may be impacted which would requiring establishing prejudice, ***R. v. Potvin***, [1993] 2 S.C.R. 880 at para 26-37

order to justify it. The difficulty here is that the authority on which the Appellant relies, ***R. v. Hobbs***,[123] specifically states that in order to meet this threshold, one has to reasonably satisfy the court of the possibility, if not probability, the inquiry will produce relevant evidence to assist the court in its task on appeal.[124] The impetus for the dissent was that the record should be supplemented with narrow and relevant information before a decision was made on the curative proviso. In other words, the dissenting Justice felt the evidence would be of assistance.

108. Finally, the Appellant correctly notes that neither side requested such a remedy or was given advance notice by the Court so that submissions could be made. While this is clearly accurate, there is a purely logistical impediment with using these facts as a means to argue against a s. 683(1)(b) inquiry. In brief, since the Crown did not seek to admit fresh evidence or request/suggest a s. 683(1)(b) inquiry, and more importantly, the Majority did not take it upon itself to decide the issue on this basis, the lack of notice is essentially moot as it pertains to the case at bar. Plainly the dissent was geared towards use of such an inquiry in the future, which would afford the parties the benefit of notice (the absence of which would be a legitimate ground of appeal) and the ability to make submissions, rendering these concerns a nullity.

109. That said, since there was no argument below, this Court may wish to refrain from commenting on the issue until the matter actually arises on another case where full argument has been heard.

110. Respectfully then, several of the Appellant's arguments are unconvincing. However, that does not mean the Respondent or this Court should not have concerns with the suggestion made by the dissenting justice.

111. First and foremost, when errors occur, the curative proviso is the exception to the default remedy of a new trial and, is based on the record at hand.[125] As above, the test is whether the error was so harmless it could not have possibly affected the verdict, or the evidence is overwhelming such that the verdict would inevitably had been the same. If it is acknowledged the record needs to be supplemented (i.e. changed) before the curative proviso can be justified,

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[123] 2010 NSCA 32
[124] *Ibid,* at para 40
[125] *Supra* at note 111

then it would seem there is a tacit admission/finding the verdict has been affected by the error[126] and/or one cannot be sure the conviction was inevitable. In short, it presupposes the very condition that this Court has said warrants a new trial.

112. Additionally, s. 683(1)(b) is part of the rubric for an application to admit fresh evidence, which means that one of the parties has started the process. However, since no such request was made in the matter at bar, and the dissenting opinion did not address it, it is unclear whether such an application is necessary when the issue is supplementing the record for the purpose of deciding the curative proviso, or if the appellant court can order an inquiry of its own motion, possibly over objection. The dissent reads as though it could be the latter, but in examining the issue, the Respondent was unable to unearth any reported decision in which the court ordered an examination on its own motion.[127]

113. Thus, assuming one party has to first make an application for fresh evidence, this means they (a) will have to have some information in hand, typically an affidavit,[128] to meet their persuasive onus and (b) will have to satisfy the ***Palmer*** criteria,[129] which brings up problems of its own. Specifically, the due diligence criterion essentially requires demonstrating the evidence

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[126] Or more accurately, the possibility cannot be ruled out such that the error is "harmless."

[127] A search of "683(1)(b)" was conducted on the Westlaw database.

[128] Cases in which applications for examinations were granted involved situations in which the witness had not provided an affidavit or declined to provide more detail without a court order. See ***R. v. Ross*****,** (1993) 18 C.R (4th)122 (NSSC) where a psychiatrist brought concerns about the complainant's credibility to light after the trial, but declined to give further details without a court order. ***R. v. M.R.B*****.,** 1999 BCCA 656 where the complainant reportedly recanted trial testimony to a probation officer post-trial, but then denied her evidence was untrue when subsequently interviewed by police. ***R. v. Ballantyne*****,** 2011 BCCA 532 an appeal from a murder conviction, defence counsel had an unsworn statement from a fellow inmate, who failed to appear at trial, but claimed he would provide information the accused was not the shooter if called before the appellant court.

[129] [1980] 1 S.C.R. 759 at para 22. The Respondent takes it as a given the Court is aware of the criteria.

could not reasonably have been brought out during the trial. Logically speaking, from the prosecution side of things, an application would only be made if the Crown had information there were no other potential sources for the injuries. However, given the access the prosecutors tend to have to information in the possession of the complainants, it would seem an inescapable conclusion the Crown had ready access to the information at trial (or more specifically, at the *voir dire*.[130]) Relaxed though it may be for the defence in a criminal context where trial fairness is the issue, where the Crown seeks to tender fresh evidence special attention is to be paid to due diligence.[131]

114. Similarly, from the point of view of the defence, they would only peruse supplementing the record to refute using the curative proviso if they had information that there were other potential sources to explain the injury. As mentioned above, since there is no propriety in witnesses, counsel would likely have to demonstrate they made all reasonable attempts to informally gather the information from the complainant, directly, or through the Crown before the trial.

115. Additionally, from a purely logistical stance, in the ***Hobbs*** decision cited above, the Court noted that a paramount consideration for determining whether to have an inquiry under s. 683(1)(b) is the court's view as to the extent to which the applicant will be able to produce the intended fresh evidence with respect to the alleged miscarriage of justice, with or without the proposed examination. Presumably if the Crown had the relevant information in an affidavit, which would then be subject to cross examination, an actual examination before the court of appeal would be redundant.[132] This redundancy was hinted at in the dissent at bar, when it was

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[130] Recall too, the Majority decision in ***R.V.*** *supra* at note 2, at para 79-82 noted a 276 analysis may be required for Crown led evidence as well.

[131] ***R. v. Jarvis*****,** (2006) 211 C.C.C. (3d) 20 (ONCA) at para 16

[132] *Supra* at note 123, at para 40. Once again, examinations have been ordered where the witness *did not give an affidavit* or declined to provide other detail without court order – *supra* at note 128.

suggested the parties might consent to a more informal process or even simply receiving an affidavit.[133]

116. Finally, although the idea of supplementing the record in this case seems like a tidy, precise solution, the general notion of supplementing the record to inform the curative proviso can open itself up to further complications. For example, what is to be done if a complainant is examined per s. 683(1)(b) and says there was no other sexual activity within the relevant timeframe, but during the ensuing delay, defence learned of an independent witness who contradicts this evidence? Fairness would dictate that the defence would (a) first cross the complainant per ***Browne v. Dunn***,[134] and then (b) provide their own fresh evidence for consideration.[135] However, fairness to the Crown would suggest they would get to examine the defence witness(es). Further, would the parties be restricted to hearing from witness(es) who directly address the error, or would they be permitted to put forth evidence from a witness which was not directly related, but nevertheless had relevant evidence to show that the verdict would/would not be the same had this new evidence been received (assuming due diligence was met)? For example, in this case, rather than hearing from the Complainant, could Dr. Carter Snell be examined to amplify the evidence she gave at trial to discuss the statistics about what percentage actually display an injury after three days, and thereby potentially re-inform the Court on the harmlessness of the error? (For the record the Respondent is not suggesting any such information exists.)

117. Very quickly it can be seen how the process could unravel into completing applications and affidavits in the name of supplementing the record to address the curative proviso. This risks turning the appeal process into an augmented trial. To avoid such problems, it would seem the parties would have to agree or argue over the nature, scope and means of supplementing the record, which may give rise to its own issues and further appeals.

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[133] *Supra* at note 1, at para 67. Frankly it's not clear if the dissent was suggesting counsel bring a fresh evidence application in the future before or rather than employing 683(1)(b).

[134] 1893 CanLII 65

[135] There may be a s. 7 breach if they were not allowed to put in the defence evidence.

118. Of course, then there is the question of whether supplementing the record is an available approach when the error at trial is not so easily defined and addressed as in this case.

119. Overall, with great respect to the dissenting opinion, the notion of supplementing the record, while neat at first blush, is fraught with unanswered questions and complications. Respectfully, it would seem best to leave the curative proviso as it is now; dependent on the trial record.

Conclusion:

120. At this point, there is no dispute the Appellant had the right to cross examine the Complainant about potential other sources of her injuries within a limited time frame. Properly, this inquiry should have been made in the course of a *voir dire*, a process which may have ultimately rendered the point moot as it concerned the trial. Nevertheless, in the absence of such evidence, it must be presumed cross would have been permitted in the trial proper, and the remaining issue is simply whether the curative proviso was properly utilized.

121. Given the Complainant's evidence (corroborated by others), quick identification, expert interpretation of the lacerations and DNA, the Majority did not err in finding there was no room for reasonable doubt. More importantly, given the pain experienced by the Complainant, and expert evidence, it would seem inevitable to conclude the assault caused the injuries, as opposed to some other encounter more than three, but less than five days prior. As such, cross examination, even if it exposed a potential alternate source, was harmless. It follows the injuries can be used to assess the verdict overall, which in turn remained inevitable. Finally, even if there was reasonable doubt on this point, since penetration is not an essential element of the offence, a court would inevitably convict of a sexual assault based on the Appellant's having taken down the Complainant's pants and rubbing his body against her. Therefore, the Majority was correct to invoke the proviso, and a new trial is not warranted.

122. The alternate path to the curative proviso presented in the dissent is interesting, but raises problems of its own. It may be best to address that particular issue in the future when full argument has been made.

PART IV: COSTS

123. The Respondent does not seek and makes no submissions about costs.

PART V: NATURE OF ORDER SOUGHT

124. The Respondent respectfully requests the appeal be dismissed.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

125. None, save for the ban on publishing the identity of the Complainant, and the witnesses herein listed as J.S., X.H., R.M. and N.B.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 10rd day of July 2020, at Edmonton, Alberta

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Keith A. JOYCE

Counsel for the Respondent.

PART VII: TABLE OF AUTHORITIES AND STATUTORY PROVISIONS

Case	Paragraph reference
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Criminal Code, RSC 1985 c. C.-46. Ss. 278.93 (francais) 683(1)(b) (francais)	**Paragraph reference** 40, 48, 53, 60, 63, 68, 70, 80, 85, 99, 102, 104, 105
The Constitution Act, 1982 Schedule B to the **Canada Act 1982**, 1982, c. 11 (U.K.),, 1982, c. 11 Part 1, Canadian Charter of rights and Freedoms. **Ss.** 7 **(**francais**),** 8 **(**francais**),** 11(b),(d) **(**francais**),** 24(2) **(**francais**)**	38, 47