Case Name:

R. v. L.S.

Between
Her Majesty the Queen, Respondent, and
L.S., Appellant

[2017] O.J. No. 4586

2017 ONCA 685

2017 CarswellOnt 13640

141 W.C.B. (2d) 414

40 C.R. (7th) 351

354 C.C.C. (3d) 71

Docket: C60617

Ontario Court of Appeal

D.H. Doherty, G. Huscroft and B. Miller JJ.A.

Heard: March 22, 2017.
Judgment: September 6, 2017.

(118 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Assaults -- Assault -- Sexual assault -- Consent -- Honest but mistaken belief -- Appeal by LS from convictions for two assaults and one sexual assault on former partner dismissed -- EK gave statements and testimony about physical and sexual assaults LS denied took place -- Judge entitled to find no air of reality to defence of honest but mistaken belief in consent in such circumstances -- Insufficient detail of EK's statement given, to necessitate instruction to jury on limits on use of statements to confirm testimony -- Judge's error in failing to admit evidence of parties' relationship after May 2009 sexual assault had no impact on verdict, given continuation of relationship was obvious -- Criminal Code, ss. 273, 276.

Criminal law -- Procedure -- Trial judge's duties -- Charge or directions -- Defences -- Evidence of witnesses -- Appeal by LS from convictions for two assaults and one sexual assault on former partner dismissed -- EK gave statements and testimony about physical and sexual assaults LS denied took place -- Judge entitled to find no air of reality to defence of honest but mistaken belief in consent in such circumstances -- Insufficient detail of EK's statement given, to necessitate instruction to jury on limits on use of statements to confirm testimony -- Judge's error in failing to admit evidence of parties' relationship after May 2009 sexual assault had no impact on verdict, given continuation of relationship was obvious -- Criminal Code, ss. 273, 276.

Criminal law -- Evidence -- Admissibility -- Relevancy -- Witnesses -- Credibility -- Prior consistent statements -- Appeal by LS from convictions for two assaults and one sexual assault on former partner dismissed -- EK gave statements and testimony about physical and sexual assaults LS denied took place -- Judge entitled to find no air of reality to defence of honest but mistaken belief in consent in such circumstances -- Insufficient detail of EK's statement given, to necessitate instruction to jury on limits on use of statements to confirm testimony -- Judge's error in failing to admit evidence of parties' relationship after May 2009 sexual assault had no impact on verdict, given continuation of relationship was obvious -- Criminal Code, ss. 273, 276.

Criminal law -- Sentencing -- Criminal Code offences -- Offences against person and reputation -- Assaults -- Assault -- Sexual assault -- Particular sanctions -- Imprisonment -- Sentencing considerations -- Deterrence -- Denunciation -- Aboriginal offenders -- Previous record -- Lengthy -- Seriousness of offence -- Domestic abuse -- Appeal by LS from two-year sentence for two assaults and one sexual assault on former partner dismissed -- Deterrence and denunciation were primary considerations warranting penitentiary sentence for domestic physical and sexual abuse -- Gladue factors and lengthy record given due consideration -- LS's good behaviour on bail pending appeal was matter for Parole Board, not court, to consider.

Appeal by LS from convictions on two counts of assault and one of sexual assault, and application by LS to reopen an abandoned appeal from the two-year sentence imposed. The complainant was EK, the mother of LS's sons and his live-in partner from 2007 through 2012. After they separated in 2012 for the last time, EK's mother spoke with the police, to whom EK reported that she had been assaulted. EK gave a statement and testified about a June 2012 assault that took place as she and her son were in the kitchen while LS tried to find clean utensils to use to make breakfast. EK testified that LS became angry when she tried to help, pushed her, charged at her and squeezed her tightly enough to bruise her arms. He also threw a phone at her after throwing her to the floor. LS recalled that he and EK argued shortly before their relationship ended, but denied that he assaulted EK. EK also testified about a May 2012 assault that involved LS becoming enraged when the two ran into an ex-boyfriend of EK's. LS threw something at EK, she became angry, and he grabbed and shook her causing her to fall. He grabbed her arms and tried to pull her up from the floor. LS denied this assault ever took place, but admitted he did not like that she had other partners while they had separated in 2011. EK also testified about a night in May 2009, when the pair had attended an out of

town party without their infant child. LS asked her to have sex and she said no. He removed her clothing and had intercourse with her anyway, while she cried and refused to look at him. LS denied EK had ever refused sex, and claimed he would not have had sex with her, had she said no. He denied recollection of the party, and suggested that they would not have left their child with EK's parents when he was only four months old.

HELD: Appeal from conviction and sentence dismissed. Although the jury was aware that EK had made statement to the police, her mother and a cousin, about the assaults and sexual assault, little detail was provided about any of these statements, such that the jury would not have used these statements improperly to bolster EK's credibility. There was no need for the judge to provide a specific instruction on the limited use of the statements. There was no air of reality to a mistaken belief in consent claim on the evidence, so there was no need for the judge to leave this defence with the jury. General evidence about the relationship between the parties, including its sexual element, was properly excluded as irrelevant to the issue of whether EK consented to sex in May 2009. Evidence that, after May 2009, the parties' relationship continued as before was not determinative of whether the assault took place, but it could have probative value. The judge could have provided an adequate instruction to the jury that the evidence could be used only to determine if the sexual assault occurred. The judge's error in excluding such evidence caused no substantial wrong, given that it was obvious that the relationship between EK and LS continued after May 2009. The sentence was appropriate, given the need for denunciation and deterrence of LS's repeated assaults on his partner. His good behaviour on bail pending his appeal was something for the parole board to consider, but did not warrant a variation of the appropriate sentence. Due consideration was given to Gladue factors as well as LS's lengthy criminal record. Sentence: Two years' imprisonment.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 273.2(b), s. 276, s. 276(1), s. 276(2), s. 276(2)(a), s. 276(2)(b), s. 276(2)(c), s. 276(3), s. 276(3)(f), s. 276.1, s. 276.1(2)(a), s. 276.1(2)(b), s. 276.1(4), s. 276.1(4)(a), s. 276.2, s. 276.4

Appeal From:

On appeal from the convictions entered on September 19, 2014 and, if leave be granted, from the sentence imposed on January 19, 2015, by Justice Clayton Conlan of the Superior Court of Justice, sitting with a jury.

Counsel:

Andrew Menchynski and Jeff Marshman, for the appellant.

Eric Siebenmorgen, for the respondent.

The judgment of the Court was delivered by

1 **D.H. DOHERTY J.A.**:-- The appellant and E.K. met in 2007. They began living together in E.K.'s home almost immediately. They had a baby together in 2009 and remained together until early June 2012, although there were separations from time to time, especially in 2011.

2 The relationship ended on June 4, 2012. The next day, E.K. spoke to her mother, claiming the appellant had physically abused her. Her mother spoke with the police, and the police contacted E.K.

3 In her interview with the police on June 5th, E.K. described an assault on June 3, 2012, leading to the end of the relationship. She also described an assault in May 2012.

4 E.K. made a videotaped statement to the police, in which she described the two assaults. After the videotaping was finished, while E.K. and the officer were filling out a form, E.K. in response to questions, told the officer that she had been sexually assaulted by the appellant. E.K. refused to talk about that assault on video. She did, however, describe the assault to the officer who took notes of her description. According to E.K., the sexual assault occurred in May 2009.

5 The appellant was charged with two counts of assault and one count of sexual assault. E.K. testified and described the three assaults. The appellant testified and denied the three assaults. The investigating officer also gave brief evidence.

6 The jury convicted on all three counts. Counsel made a joint submission on sentence and the trial judge accepted that submission. He sentenced the appellant to two years on the sexual assault charge, and six months concurrent on the two assaults. The trial judge also imposed the usual ancillary orders.

7 Initially, the appellant appealed conviction and sentence. He later abandoned his sentence appeal. He now seeks an order allowing him to reopen his sentence appeal and if that order is granted, he asks this court to reduce the total sentence to time served (about five months).

THE JUNE 3, 2012 ASSAULT (COUNT 2)

8 E.K. testified that on June 3, 2012, she, their young son, and the appellant were living together in E.K.'s house. He was preparing breakfast and was looking for clean utensils. When E.K. offered to help, the appellant, who was already angry, became even angrier and left the kitchen. An argument ensued.

9 During the argument, the appellant pushed E.K. and charged at her, putting his hands on her head and squeezing tightly. The altercation moved into the bedroom. The appellant pushed E.K. and she landed on the bed. She kicked at him in an attempt to defend herself. The appellant grabbed E.K.'s legs, pulling her off the bed onto the floor. He threw a telephone at her saying, "Here's the phone, call the fucking cops". As E.K. lay on the floor crying, the appellant moved toward her, grabbing her by the arms and trying to pick her up. He told her to stop crying. The appellant grabbed E.K. so tightly that he bruised her arms. The bruising could be seen on the photographs taken by the police two days later.

10 In his evidence, the appellant acknowledged an argument in the kitchen that occurred shortly before the end of his relationship with E.K. He was somewhat confused about the dates. As the appellant recalled it, both he and E.K. were angry. She left and went into the bedroom. The appellant prepared breakfast. He denied assaulting E.K. on that occasion or any other occasion.

THE MAY 2012 ASSAULT (COUNT 1)

11 E.K. testified that on May 18, 2012, she and the appellant were in a nearby town shopping for fish to have for dinner. She and the appellant saw E.K.'s former boyfriend. The appellant became angry. E.K. told him to get over it and they drove home.

12 Later that evening at the house, the conversation turned to the former boyfriend. The appellant was obviously upset that E.K. had been with that person, even though it had occurred when the appellant and E.K. were separated. The appellant referred to E.K. as a "slut" and threw something at her. She became angry and spoke harshly to the appellant. He grabbed her and shook her, causing E.K. to fall to the floor. E.K. started to cry. The appellant grabbed E.K. by the arms and tried to pull her up from the floor. She remained on the floor for about five minutes. The assault ended with the appellant sitting at the table and E.K. crying in the kitchen.

13 The appellant and E.K. spoke about the altercation later that evening. The appellant admitted that he could not get over E.K.'s relationship with other men, even though he had had relationships with other women when they were separated. The appellant told E.K. that he knew he should not take his anger out on her, but he was reluctant to apologize.

14 In his evidence, the appellant denied that the events described by E.K. occurred. He had no recollection of seeing E.K.'s former boyfriend while he and E.K. were out shopping. He did recall that at some point, he told E.K. that he did not like the idea that she had been seeing other people while they were separated. The appellant adamantly denied physically assaulting E.K.

THE SEXUAL ASSAULT (COUNT 3)

15 E.K. testified that in early May 2009 (before her birthday on May 14th), she and the appellant had been out-of-town at a party. They returned home the next morning. Their son, who was about four months old, was staying with her parents. E.K. and the appellant were lying on the bed

laughing and talking about the party.

16 The appellant asked E.K. if she wanted to have sex. She said no. He asked why not, and she said she did not feel like it. The appellant persisted and started to remove E.K.'s clothing. She tried to cover herself with the blanket on the bed.

17 The appellant climbed on top of E.K. and inserted his penis into her vagina. She started to cry. He said, "How can you not like that?" E.K. continued to cry and refused to look at the appellant, although he told her to look him in the eyes and say she "wasn't' enjoying it."

18 E.K. said nothing and remained motionless. She did not assist the appellant in removing her clothing, nor did she physically resist. E.K. testified that she didn't think she could do or say anything to stop the appellant.

19 The appellant ejaculated into E.K.'s vagina. He got off of E.K. and started to clean himself up. There was a knock on the door. It was the appellant's mother.

20 E.K. was not physically injured during the incident. She said nothing about it to the appellant or anyone else until about four months later when she told her cousin. E.K. testified that after the incident, she and the appellant continued to live together as a couple "as if nothing has happened", sharing the same bed. They eventually separated permanently about three years later in June 2012.

21 E.K. testified that it occurred to her that the appellant did not take her refusal to have sex seriously. E.K. disagreed, however, with counsel's suggestion on cross-examination that it was possible that the appellant thought she was joking when she said she did not want to have sex. E.K. testified that she did not say anything to the appellant to suggest that she was not serious when she told him she did not want to have sex.

22 The appellant testified that he did not recall any specific morning in May 2009 when he and E.K. returned from a party out-of-town in the early morning. To the contrary, he testified that they would not have left their son with the in-laws to go to an overnight party when he was so young.

23 The appellant denied that he ever had sex with E.K. when she was crying, or that she had ever said she did not want to have sex. He insisted that had E.K. ever refused to have sex, he would not have had sex with her. The appellant also testified that had E.K. ever started to cry when they were having sex, he would have asked her what was wrong and tried to comfort her.

24 The tenor of the appellant's evidence is captured in the following questions and answers from his examination-in-chief and cross-examination:

> Question [In Chief]: Okay, do you recall ever being told that [E.K.] didn't want to have sex with you?

Answer: Absolutely not.

Question: Okay.

Answer: No.

Question: And, so I guess it would follow that you would recall that you do recall having sex after being told no?

Answer: Do I recall?

Question: Yes.

Answer: Did it ever happen?

Answer: No.

...

Question [Cross-Examination]: ...before you finish. Is it your position that you don't remember that ever happening, or that it never happened?

Answer: It never happened.

Question: You've got a firm memory and you can say and my firm memory says that series of events never happened?

Answer: I've never, I've never raped [E.K.] ever.

GROUNDS OF APPEAL FROM CONVICTION

A: Did the trial judge err in failing to instruct the jury on the limited use of E.K.'s prior statements?

25 The jury heard evidence that E.K. gave a statement to the police on June 5, 2012 relating to all three alleged assaults. The allegations relating to the physical assaults were videotaped. The allegation relating to the sexual assault was not. The jury also heard evidence that E.K. complained to her mother about one or more of the physical assaults, and that it was this complaint that led to the involvement of the police on June 5th. Finally, the jury heard evidence that E.K. told her cousin about the sexual assault about four months after the sexual assault allegedly occurred.

26 In her closing submissions, Crown counsel suggested to the jury that inconsistencies in a witness's evidence were relevant to credibility. She went on to submit that E.K. had not been cross-examined on any inconsistencies between her evidence and any previous statements E.K. may have made.

27 Defence counsel objected to this part of the Crown's closing argument. She submitted that the jury might be confused by the submission and take it as an assertion that E.K.'s prior statements were all consistent with her testimony and made her testimony more credible.

28 The trial judge declined to give a corrective instruction. In his assessment, the jury would not take from counsel's comment that they should assume that the contents of E.K.'s prior statements, of which they had heard no evidence, were consistent with her testimony.

29 The adequacy of a jury instruction on a particular point must be assessed by reference to the specifics of the individual case. I will consider the adequacy of the charge first without regard to Crown counsel's closing submission, and second, I will consider whether that submission demanded some comment by the trial judge in his instructions.

30 In this case, the evidence of E.K.'s prior statements was general, minimal and peripheral. The jury heard virtually nothing about the content of any of E.K.'s prior statements with the exception of what she said to her mother. The jury heard through the police officer's testimony what the mother told the police officer E.K. had told her. The trial judge immediately told the jury that evidence of what the mother said to the police officer was not evidence of the truth of the contents of the statement.

31 I see no risk that the jury would infer from the evidence it heard that E.K.'s prior complaints were consistent with the substance of her testimony and made that testimony more credible. There was no evidence of what E.K. said in the prior statements, and no basis upon which the jury could assess the consistency or inconsistency in those statements. This is not a case like *R. v. Stirling*, 2008 SCC 10 and other cases cited by the appellant, in which there was considerable evidence about the actual contents of the prior statements. In those cases, there is a genuine risk that a jury might infer credibility from consistency.

32 In my view, the jury would treat the references to the fact that E.K. made statements to her cousin, her mother and the police as nothing more than part of the unfolding of the story as told by E.K. on the witness stand. On the evidence heard by the jury, there was no need for a specific

instruction as to the limited use of prior consistent statements.

33 Crown counsel's comment in her closing submissions to the jury is of some concern. While it was open to the Crown to point out that E.K. had not been cross-examined on any inconsistencies in her testimony, Crown counsel's submission arguably went further and suggested that E.K. had been consistent in her various statements and was, because of that consistency, more credible. If the jury took that latter meaning from counsel's submissions, the jury may have misused the evidence of the prior statements.

34 Crown counsel's submission could be understood in different ways. Understood literally, it was no more than an observation that E.K. had not been cross-examined on any inconsistencies. While it is possible that the jury could understand the submission in the way the appellant urges, I cannot say that the jury would necessarily have taken Crown counsel's submission as an invitation to infer credibility from consistency. The trial judge clearly did not understand the submission in that way. He was better positioned than this court to consider how the jury would take counsel's submission.

35 Some judges might have reacted to the Crown's submission by specifically telling the jury that evidence that E.K. had made prior statements had no value apart from the unfolding of the narrative. Indeed, it may have been advisable to give that instruction. I cannot say, however, that an instruction in those terms was essential in this case. The evidence that E.K. had made prior statements was peripheral and unimportant. The trial judge determined that Crown counsel's submission did not alter the insignificance of that evidence so as to warrant a prior consistent statement instruction. I would not interfere with that assessment.

B: Did the trial judge err in refusing to instruct the jury on the "defence" of mistaken belief in consent?

36 The trial judge correctly instructed the jury that the Crown had to prove beyond a reasonable doubt that the appellant knew, or was reckless in the relevant sense, that E.K. was not consenting to the sexual activity. The instruction included the following:

> You should look at their words and conduct before, at the time and after [the appellant] intentionally applied force to E.K. Take into account the nature of what happened or didn't happen between [the appellant] and E.K., any words/ gestures that may have accompanied it (including any alleged threats) and anything else that indicates [the appellant's] state of mind at the time he intentionally applied force to E.K.
>
> On this question, the relevant evidence is Miss E.K.'s testimony that she made it known and clear to [the appellant] that she did not consent to having sex with him and [the appellant's] evidence that he would not have had sex with E.K. if he

> had known she did not consent.
>
> If you have a reasonable doubt that [the appellant] knew that E.K. did not consent to the force that [the appellant] intentionally applied, you must find [the appellant] not guilty. Your deliberations would be over.
>
> If you are satisfied beyond a reasonable doubt that [the appellant] knew that E.K. did not consent to the force that [the appellant] intentionally applied, you must go on to the next question.

37 The appellant does not, and indeed could not, take issue with the trial judge's instruction on the knowledge requirement. The appellant submits, however, that the trial judge should have gone further and instructed the jury on the "defence" of mistaken belief in consent. That "defence" is not in fact a defence, but is rather a variation on the requirement that the Crown prove beyond a reasonable doubt that the accused knew that the victim was not consenting: see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 44.

38 Section 273.2(b) addresses the mistaken belief in consent "defence". It provides, in part:

> It is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject matter of the charge where...
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

39 If an accused argues that he had a belief, albeit mistaken, that the complainant consented to the sexual activity, the accused is in effect arguing that the Crown has failed to prove the knowledge requirement beyond a reasonable doubt. If that doubt is said to be based on the accused's honest belief in consent, the accused must show that he took "reasonable steps" to "ascertain that the complainant was consenting". Evidence in support of a mistaken belief in consent argument may come from the complainant, the appellant, other sources or some combination of the three: see *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 15.

40 I agree with the trial judge that there was no air of reality to a mistaken belief in consent claim on the evidence adduced in this case. On E.K.'s evidence, she made it clear both verbally and by her actions that she was not consenting to any sexual activity with the appellant. On her evidence, the appellant's remarks during the sexual activity demonstrate that he knew she was not consenting. Nor is there anything in her evidence offering any air of reality to the suggestion that the appellant may have misapprehended E.K.'s words and actions as somehow a consent to sexual activity. E.K.'s

evidence that it occurred to her that the appellant was not taking her refusal to have sex seriously is not evidence of the appellant's state of mind, but rather evidence of what E.K. was thinking when the appellant persisted in having sexual intercourse despite her express refusal. Finally, nothing in her evidence offers any support for any "reasonable steps" the appellant may have taken to determine whether E.K. was consenting.

41 On the appellant's evidence, the sexual assault described by E.K. did not happen and could not have happened. The appellant was adamant that he would not have proceeded with any sexual advances had E.K. said she did not want to engage in sexual activity, or had E.K. seemed upset with the sexual activity.

42 There is no evidence from any source other than the appellant or E.K. that provides any insight into what happened at the time of the alleged sexual assault. The trial judge accurately and succinctly captured the essence of the case when he told the jury:

> The real issue in this case is whether the events alleged to form the basis of the crime charged ever took place.

43 There was no air of reality to a mistaken belief in consent claim. A reasonable jury could not, on this evidence, be satisfied that E.K. did not consent, but have a doubt about whether the appellant believed she was consenting: *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 81. An instruction on mistaken belief was not only unnecessary, but it could have served to muddy the clear instructions given to the jury on a knowledge requirement.

C: Did the trial judge err in refusing to admit evidence of other sexual activity between the appellant and E.K.?

(a) The relevant *Criminal Code* provisions

44 Evidence that a complainant engaged in sexual activity with the accused or anyone else, other than the sexual activity alleged in the charge (other sexual activity), is subject to the special evidentiary regime set out in the *Criminal Code*. Section 276(1) declares inadmissible evidence of other sexual activity offered to support either the inference that the complainant is more likely to have consented by reason of the sexual nature of the other activity, or the inference that the complainant is less worthy of belief by virtue of the sexual nature of the other activity.

45 Section 276(1) does not create a new rule of evidence. Rather, it is an expression of the fundamental rule that to be admissible, evidence must be relevant to a fact in issue. Section 276 identifies two illegitimate inferences from a complainant's sexual activity that have historically infected the criminal trial process. The section declares that neither inference provides a road to admissibility of evidence of other sexual activity: see *R. v. Darrach*, [2000] 2 S.C.R. 443, at paras. 32-34.

46 Section 276(2) provides that evidence of other sexual activity is inadmissible at the instance of the accused, regardless of the purpose for which it is tendered, unless the accused meets the three criteria set down in s. 276(2). The evidence of other sexual activity must be:

* evidence of specific instances of sexual activity (s. 276(2)(a));

* relevant to an issue at trial (s. 276(2)(b)); and

* have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (s. 276(2)(c)).

47 Section 276(3) sets out several factors which the judge must consider in balancing the probative value against the prejudicial effect of the evidence of other sexual activity as required by s. 276(2)(c).

48 Section 276.1 and s. 276.2 describes the procedure to be followed when an accused seeks to tender evidence of other sexual activity. Section 276.1 requires that the accused apply for a hearing to determine the admissibility of the evidence. In making the application, the accused must provide "detailed particulars of the evidence that the accused seeks to adduce" (s. 276.1(2)(a)) and must also set out the relevance of the evidence to an issue at trial (s. 276.1(2)(b)).

49 A judge may order an evidentiary hearing only if satisfied that the three prerequisites in s. 276.1(4) are met. The first two are procedural. The third requires that the judge be satisfied:

> That the evidence sought to be adduced is capable of being admissible under s. 276(2).

(b) **The appellant's s. 276(2) application**

50 Prior to trial, the appellant brought an application for an evidentiary hearing pursuant to s. 276.2. He sought an order:

> Allowing the applicant to adduce, at his trial on a single charge of sexual assault, evidence of consent by the complainant to sex with this applicant in similar circumstances to those complained of.

51 In the grounds for the application, the appellant indicated that the "context of the relationship", including its intimate nature, was "relevant to the features of the offences that were allegedly committed". The appellant further contended that evidence of "previous and post-dating sexual relationships" were relevant "to whether or not he could have reasonably believed that the

complainant was consenting to the sexual contact in issue".

52 The notice of application did not identify any specific event or events upon which the appellant proposed to adduce evidence. Instead, the appellant sought an order allowing him to adduce evidence "of the sexual history of the relationship both before and after the alleged incident".

53 The appellant filed a brief five-paragraph affidavit in support of the application. He described himself and E.K. as involved in a "relationship" between July 2007 and July 2012. He noted that there were several breakups during the relationship. In paragraph 3 of his affidavit, the appellant asserted:

> We were together as a couple for the entire year of 2009, we had an active sex life for that year. We had sex on a regular basis.

The appellant also stated that he could not remember the "exact times" that he had sex with E.K.

54 The appellant's affidavit makes no reference to any specific instances of sexual activity between himself and E.K. Nothing in the affidavit identifies specific features of the other sexual activity upon which the appellant sought to either cross-examine E.K. or adduce evidence. Nothing in the affidavit affords any insight as to how evidence of other sexual activity could lend credence to a claim that the appellant reasonably believed E.K. was consenting to the sexual activity alleged in the charge.

55 In addition to his affidavit, the appellant filed E.K.'s preliminary inquiry testimony on the application. Her preliminary inquiry evidence was consistent with her trial testimony. The appellant filed no other material in support of his application.

56 In oral argument on the application, counsel submitted that cross-examination of E.K. on the other sexual activity was relevant to her credibility on the issue of consent, the availability of the defence of mistaken belief in consent, and to place the allegation in the proper context of a relationship between the appellant and E.K. which included regular consensual sexual intercourse both before and after the alleged sexual assault.

57 By way of alternative, defence counsel submitted that s. 276(2) had no application because the proposed evidence described only the nature of the relationship between E.K. and the appellant and not specific instances of sexual activity. Counsel relied on *R. v. C. (A.R.)*, [2002] O.J. No. 5364 (Sup. Ct.), at paras. 9-10.

58 The trial judge held that the proposed evidence failed to meet two of the three prerequisites to admissibility under s. 276(2). First, the evidence was not evidence "of specific instances of sexual activity" as required by s. 276(2)(a). Second, the evidence was not sufficiently probative to substantially outweigh the prejudicial effect of the evidence as required by s. 276(2)(c). The trial

judge held that admitting the evidence could lead the jury to reason "once a willing participant, always a willing participant, at least in the eyes of your common law spouse". He observed that this very line of reasoning was one of the "myths" s. 276 was designed to eradicate: *R. v. L.S.*, [2014] O.J. No. 3015, at paras. 19-23.

59 The trial judge also held that even if the evidence, because it referred only to the nature of the relationship, was not captured by s. 276(2) should be excluded under the common law rule that excludes evidence proffered by the defence if its probative value is substantially outweighed by its prejudicial effect: *R. v. L.S.*, at para. 24. The trial judge excluded the evidence.

60 The trial proceeded. The defence did not ask the trial judge to reconsider his s. 276(2) ruling at any time during the trial.

(c) **Arguments on appeal**

61 On appeal, counsel argued that evidence that the appellant and E.K. regularly engaged in consensual sexual activity before and after the alleged assault would make the appellant's professed inability to recall the specific events described by E.K. more credible. Counsel further argued that had the jury regarded the appellant as more credible because of the evidence of other sexual activity, this would inevitably have furthered his mistaken belief in consent defence. This submission, of course, assumed that there was some air of reality to that claim.

62 The arguments made on appeal are somewhat different from those made at trial. The trial judge's ruling on admissibility was made on a pretrial motion when no one knew whether the appellant would testify. The submissions made to the trial judge were not directed at the potential impact of the evidence of other sexual activity on the appellant's credibility. On appeal, the arguments focused mainly on how that evidence would have made the appellant more credible.

63 Usually, the correctness of a trial judge's ruling is tested against the record that was before the judge when she made the ruling. I appreciate that in *R. v. Harris*, [1997] O.J. No. 3560, at para. 81, this court observed that circumstances may require a trial judge to reconsider an evidentiary ruling made under s. 276(2) on her own initiative in light of evidence adduced during the trial. I think *Harris* describes a situation in which the nature of the evidence given by the complainant at trial cried out for a reconsideration of the s. 276(2) ruling.

64 Generally speaking, absent a request at trial for a reconsideration of the ruling, the merits of the trial judge's pretrial evidentiary ruling should be reviewed in the context of the record upon which the ruling was made. Routine appellate review of evidentiary rulings in the light of evidence that was not before the trial court when the ruling was made would severely compromise finality principles. I see no basis in this case to reconsider the trial judge's ruling based on the evidence adduced at trial. In any event, I see nothing in the trial evidence that advances the appellant's position on the admissibility of the evidence of other sexual activity.

(d) **Analysis**

65 A consideration of the admissibility of evidence of other sexual activity tendered under s. 276(2) must begin with a clear understanding of the nature of the evidence the defence seeks to adduce. A finding of relevance and a balancing of probative value against prejudicial effect, both of which are prerequisites to admissibility under s. 276(2), can only be properly done if the nature of the proposed evidence is clearly articulated. For example, in balancing probative value against prejudicial effect, the trial judge is required to consider, among other factors, "the potential prejudice to the complainant's personal dignity and right of privacy" (s. 276(3)(f)). Evidence indicating that the complainant and the accused, who were in a spousal relationship, regularly engaged in consensual sexual intercourse, would raise very different concerns about prejudice to the complainant's personal dignity and privacy than would evidence of the details of the sexual activity between the complainant and the accused.

66 The integrity of the trial process is also protected by insisting that the proposed evidence of other sexual activity be clearly described. Evidence of other sexual activity runs the real risk of derailing a trial by turning it into an inquiry about the complainant's sexual character rather than the accused's guilt. Evidence of other sexual activity involving the complainant, particularly cross-examination of the complainant about other sexual activity, can, unless carefully controlled, interfere with the trial process by unfairly compromising the complainant's ability to give an accurate and complete account of the relevant events. Far-ranging cross-examination of complainants about other sexual activity runs the very real risk of intimidating, humiliating and distracting the complainant in the course of his or her testimony. None of those conditions are conducive to a witness providing an accurate and credible account of the relevant events.

67 The importance of clearly identifying the evidence sought to be introduced under s. 276(2) is apparent from an examination of the statutory regime governing admissibility. Section 276.1(2)(a) requires that the application for an evidentiary hearing provide "detailed particulars of the evidence that the accused seeks to adduce". Absent compliance with that provision, the judge cannot order an evidentiary hearing under s. 276.2. If an evidentiary hearing is ordered, the judge can admit the evidence only if it is evidence "of specific instances of sexual activity": s. 276(2)(a).

(i) **What kind of evidence did the appellant seek to adduce?**

68 The material filed on the pretrial motion, particularly the appellant's affidavit, indicated that the defence wanted to introduce evidence that the appellant and E.K. were in a spousal relationship before and after the alleged sexual assault and that as part of that relationship they regularly engaged in consensual sexual activity. Nothing in the material suggests that the defence sought to elicit, either by cross-examination of the complainant or otherwise, evidence of specific sexual encounters or the details of the sexual activity between E.K. and the appellant.

69 The general nature of the evidence the defence sought to adduce at trial is further demonstrated by the defence argument that s. 276(2) did not apply to the evidence. The defence

contended that s. 276(2) had no application because the defence sought to adduce evidence of the nature of the relationship and s. 276(2) applied only to evidence of specific instances of sexual activity.

70 On appeal, counsel expanded the argument. While maintaining the position that the defence should have been allowed to lead evidence of the nature of the relationship before and after the alleged sexual assault, counsel on appeal argued that the defence should have been allowed to cross-examine the complainant and lead evidence "on the usual practices and frequency of sex in their relationship". This submission invites a much more open-ended and far-reaching inquiry into the sexual activity of the complainant and the appellant.

71 Nothing in the trial record would allow the trial judge to admit evidence of either specific instances of prior sexual activity between E.K. and the appellant, or details of sexual activity between the two. It was incumbent on the appellant if he wished to adduce evidence of that kind to provide a basis for doing so in his affidavit. It works no unfairness on an accused, who is after all one of the participants in the relationship underlying the evidence, to require that the accused identify any specifics in which he seeks to adduce evidence as part of his application for an evidentiary hearing: see *R. v. Darrach*, at paras. 53-56. The affidavit provided no details or specifics.

72 Section 276.1(4)(a) confirms that evidence of other sexual activity can only be admitted if the accused has offered "detailed particulars of the evidence" (s. 276.1(2)(a)). The appellant provided no particulars of any specific incidents or acts involving sexual activity between himself and E.K. Evidence of other specific instances of sexual activity, or the details of other sexual activity, was inadmissible by virtue of the appellant's failure to comply with s. 276.1(2)(a): see *R. v. S. (P.)* (2007), 221 C.C.C. (3d) 45, at para. 15-17 (Ont. C.A.).

73 I also see no relevance, based on the material filed in support of the application, to any fact in issue of evidence of specific instances of other sexual activity involving E.K. and the appellant, or the details of their sex life. The appellant's submission that evidence including details of other consensual sexual activity could somehow make the appellant's assertion that the incident alleged by E.K. never happened more credible, makes no sense to me. This was not a case in which the appellant testified that whatever sexual incident E.K. was talking about, must have been consensual, but that because of the many consensual sexual encounters they had, he could not recall the details. The appellant insisted that the encounter described by E.K. did not and could not have happened as it was entirely inconsistent with the nature of their sexual relationship.

74 Nor, would evidence of the details of other sexual encounters between E.K. and the appellant assist the appellant in advancing a mistaken belief in consent claim. Without some indication of the specific nature of the evidence to be adduced, and some explanation of how the specifics impacted on the appellant's state of mind at the relevant time, evidence merely describing the details of other consensual sexual activity between E.K. and the appellant cannot inform an assessment of the

appellant's state of mind at the time of the alleged incident. In any event, for the reasons outlined above, the evidence gave no air of reality to a claim of mistaken belief in consent.

(ii) **Is "relationship" evidence admissible?**

75 I come back to the argument advanced at trial. It was clear from the evidence adduced at the preliminary inquiry that the jury would hear evidence that E.K. and the appellant were in a spousal relationship of some length before and after the alleged sexual assault. It was equally clear that the jury would hear evidence from which it could readily conclude that the relationship included consensual sexual activity, both before and after the alleged assault. The defence wanted to make that inference explicit by adducing evidence that before and after the alleged assault, E.K. and the appellant, as part of their spousal relationship, regularly engaged in consensual sexual intercourse.

76 This submission raises two questions -- does s. 276(2) apply to "relationship" evidence and, if so, should the evidence have been admitted in this case?

(iii) **Does s. 276(2) apply?**

77 In *R. v. C. (A.R.)*, the judge was asked to admit evidence that between and before the two alleged sexual assaults, the accused and the complainant had been involved in an intimate relationship involving consensual sexual activity. The trial judge held that the exclusionary rule in s. 276(2) did not apply to evidence describing the nature of the relationship. He reasoned that since s. 276(2)(a) required, as a precondition to admissibility, that the evidence refer to "specific instances of sexual activity", the exclusionary rule did not reach evidence that was not evidence of "specific instances of sexual activity". The trial judge went on to consider the admissibility of the evidence under the generally applicable rules of evidence.

78 The analysis in *R. v. C. (A.R.)* produces an interpretation of s. 276(2) that is inconsistent with the purpose of the statute and its plain language. On the approach adopted in *R. v. C. (A.R.)*, the language in s. 276(2)(a) -- "specific instances of sexual activity" -- intended to create a precondition to admissibility, becomes a basis upon which one kind of evidence about sexual activity is entirely exempted from the exclusionary rule in s. 276(2). A provision clearly designed to limit the admissibility of evidence of other sexual activity would instead limit the scope of the exclusionary rule.

79 The purpose behind the enactment of ss. 276(1) and (2) is well-understood. Evidence of other sexual activity can be important to an accused's ability to make full answer and defence. At the same time, however, that evidence has historically been misused to blacken the character of the complainant, distort the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations. Sections 276(1) and (2) are designed to create an evidentiary filter, which separates evidence of other sexual activity that is germane to an accused's ability to make full answer and defence, from evidence of other sexual activity that will prejudice the proper conduct of the trial.

80 Evidence referring to other sexual activity of a complainant in general terms as part of the description of a relationship between the complainant and an accused carries the potential to distort the trial process and unfairly disparage the complainant, as does more detailed evidence of specific sexual activity. While the latter perhaps carries greater risk than the former, the risk exists when either kind of evidence is tendered. The purpose driving ss. 276(1) and (2) is best served by subjecting all evidence of other sexual activity, whether specific or general, to the exclusionary rule in s. 276(1), and the test for admissibility in s. 276(2).

81 The plain meaning of the words of ss. 276(1) and (2) is consistent with the purpose of those sections. The phrase "sexual activity" is not qualified in either section. Evidence that two people were in a relationship involving regular consensual sexual intercourse is clearly evidence that those two people were "engaged in sexual activity". As the plain meaning of the words promotes the purpose underlying the sections, I see no reason to depart from the plain reading. *R. v. C. (A.R.)* was wrongly decided on this point. Section 276(2) applies to "relationship" evidence of sexual activity.

(iv) **Was the "relationship" evidence admissible?**

82 As outlined above, there are three preconditions to the admissibility of evidence under s. 276(2). The first, found in 276(2)(a), requires that the evidence refer to "specific instances of sexual activity". This provision is designed to ensure that the nature of the proposed evidence is properly identified so that the criteria for admissibility in s. 276(2) can be accurately applied. The provision also serves to ensure that the Crown has full notice of the evidence to be adduced and that the complainant's legitimate interests can be properly safeguarded: *R. v. B. (B.)*, [2009] O.J. No. 862 (Ont. Sup. Ct.), at para. 16.

83 The phrase "specific instances" modifies the phrase "sexual activity". The degree of specificity required to meet s. 276(2) (a) depends to a large extent on the nature of the sexual activity that the accused seeks to adduce: see *R. v. Aziga*, [2008] O.J. No. 4669, at paras. 21-22 (S.C.). If an accused wants to lead evidence of a specific incident of sexual activity, the details must identify that specific incident. If, however, the accused seeks to adduce evidence of a general nature, describing the relationship between himself and the complainant, the specificity requirement speaks to factors relevant to identifying the relationship and its nature and not to details of specific sexual encounters. Insofar as relationship evidence is concerned, the required specifics would include reference to the parties to the relationship, the relevant time period, and the nature of the relationship.

84 The appellant gave notice that he sought to introduce evidence that during the currency of his spousal relationship with E.K., both before and after the alleged assault, he and E.K. regularly engaged in consensual sexual intercourse. The appellant identified the sexual activity by reference to the parties, the time period, and the general nature of the activity.

85 Having regard to the nature of the evidence the appellant sought to adduce, the description of the evidence provided permitted the trial judge to properly determine its admissibility under s. 276(2) and, if admitted, to fully protect E.K. against questioning that was unfair, irrelevant or

unnecessarily intrusive. I am satisfied that the appellant adequately identified the sexual activity in respect of which he sought to adduce evidence.

86 The second admissibility requirement, common to all evidence, requires that the evidence of other sexual activity be "relevant to an issue at trial" (s. 276(2)(b)). Relevance is fact-specific. It depends on the material facts in issue, the evidence adduced, and the positions of the parties. The appellant was charged with sexual assault, arising out of a specific incident described by the complainant as occurring in early May 2009. On E.K.'s evidence, the appellant raped her over her clear objections. On the appellant's evidence, the incident never happened. As the trial judge told the jury, their verdict turned on whether the Crown had proved that the incident described by E.K. occurred.

87 On the evidence heard by the jury, the appellant and E.K. had a spousal relationship that began sometime before the alleged sexual assault and carried on long after the alleged sexual assault. In her evidence, E.K. acknowledged that after the sexual assault, she and the appellant carried on as if nothing had happened. It was the defence position that in fact nothing had happened.

88 I think that evidence that the relationship between E.K. and the appellant, including the sexual component of the relationship, carried on as it had before the alleged assault was relevant to whether the assault occurred. The defence could argue that evidence that the sexual component of the relationship carried on as before, supported the defence position that the parties carried on as if nothing had happened because nothing had in fact happened.[1]

89 I do not suggest that evidence that E.K. and the appellant continued a relationship that included consensual sexual intercourse after the alleged assault demonstrated that the assault did not occur. Different people will react differently to the same event. However, to acknowledge that evidence that the relationship continued as before was far from determinative of whether the assault occurred, is not the same as holding that the evidence is irrelevant. Evidence does not have to establish or refute a fact in issue to be relevant; it need only, as a matter of common sense and human experience, have some tendency to make the existence or non-existence of that material fact more or less likely. There is a big difference between evidence that is relevant and evidence that is determinative: see *R. v. A.* (No. 2), [2001] 2 W.L.R. 1546, at para. 31 (H.C.). This evidence was relevant.

90 The third and final condition to admissibility is found in s. 276(2)(c). The accused must demonstrate that the evidence has "significant probative value", and that the probative value "is not substantially outweighed by the danger of prejudice to the proper administration of justice". Evidence of "significant probative value" is evidence that has more than "trifling relevance" and is capable in the context of all of the evidence of leaving the jury with a reasonable doubt: *R. v. Darrach*, at paras. 39-41.

91 Evidence that a consensual sexual relationship existed between E.K. and the appellant before the alleged assault and that it continued after the alleged assault had probative value that was more

than trifling. A jury could reasonably, by considering and comparing the nature of the relationship between the two before and after the alleged assault, be assisted in deciding whether the assault described by E.K. had happened.

92 The potential probative value can be demonstrated by considering the effect of evidence that the relationship had ended immediately after the alleged assault. Had the evidence been that the relationship ended, the Crown could have argued that the termination of the relationship was consistent with E.K.'s testimony that she had been raped by the appellant. The same logic applies to defence use of the evidence based on the absence of any change in the relationship, although evidence of absence of any change in the relationship may have less potential probative value than evidence that E.K. immediately terminated the relationship after the alleged assault.

93 Turning to the prejudice side of the balance sheet, I see virtually no risk of any prejudice flowing from the admission of this evidence. The evidence the jury heard strongly indicated that the relationship between E.K. and the appellant, both before and after the alleged assault included consensual sexual intercourse. E.K. candidly acknowledged that the relationship carried on after the assault just as it had been before the assault. She specifically agreed that she and the appellant continued to share the same bed. I think it highly probable that the jury inferred from this evidence that the appellant and E.K. continued to engage in consensual sexual intercourse after the alleged assault. Express evidence to that effect would only have made explicit that which was strongly implied by the evidence the jury heard.

94 No one suggests that the jury should not have heard the evidence that it did hear about the nature of the relationship between E.K. and the appellant, both before and after the alleged assault. Considered in the context of that evidence, there is no risk that additional evidence simply confirming the strong inference available from that evidence the jury heard, could have prejudiced "the proper administration of justice": s. 276(2)(c).

95 I also do not agree with the trial judge that the risk that the jury would misuse the evidence by reasoning that "once a willing participant, always a willing participant" justified the exclusion of the evidence. There is always a risk that jurors will misuse evidence. The risk can be high when the accused is charged with sexual assault and the evidence in issue relates to other sexual activity.

96 The risk of juror misuse of evidence of other sexual activity is taken into account by the scheme established under s. 276. Section 276.4 requires that when a trial judge admits evidence of other sexual activity, she must "instruct the jury as to the uses that the jury may and may not make of the evidence". Any consideration of the potential prejudice under s. 276(2) (c) premised on the potential misuse of the evidence by the jurors must take into account that the jurors will be properly instructed in compliance with s. 276.4.

97 I am confident that the trial judge could have effectively explained to the jury that evidence that there was no change in the relationship between E.K. and the appellant, including the sexual component of that relationship, after the alleged assault, was evidence to be considered, along with

the other relevant evidence, in deciding whether the Crown had proved beyond a reasonable doubt that the incident described by E.K. had in fact occurred. I am equally confident that the trial judge could have made it clear to the jury that if, after considering all of the relevant evidence, the jury was satisfied beyond a reasonable doubt that the incident described by E.K. had occurred, evidence that E.K. and the appellant had engaged in consensual sexual intercourse on other occasions had no relevance to, and was of no assistance in, determining whether E.K. had consented to sexual intercourse on the occasion in issue.

98 I have full confidence that a jury having received the proper instructions would have followed those instructions. The jury's verdict on the sexual assault charge justifies that confidence. The jury convicted the appellant in the face of evidence that left little doubt that he and E.K. engaged in consensual sexual intercourse, before and after the alleged assault. The jury's verdict demonstrates that it did not reason "once a willing participant, always a willing participant", even without the benefit of an instruction telling them they could not use that line of reasoning.

99 In summary, having regard to the evidence the jury actually heard and taking into account the instruction the jury would have received had the evidence been admitted, I see no risk of prejudice to "the proper administration of justice" flowing from admitting evidence that the relationship between E.K. and the appellant, before and after the alleged assault, included consensual sexual intercourse. The evidence was admissible under s. 276(2).

100 I am, however, satisfied that the error caused no substantial wrong or miscarriage of justice. As explained above, the jury would inevitably have understood from the evidence it did hear that E.K. and the appellant were in a relationship that included consensual sexual intercourse, both before and after the alleged assault. While the jury was not expressly instructed as to the use it could make of that evidence in deciding whether the Crown had proved that the alleged incident occurred, I think it would have been obvious to the jury that the evidence was capable of supporting the appellant's claim that the relationship carried on as if nothing had happened between E.K. and the appellant, because nothing had happened. The real risk inherent in the failure to give a more explicit instruction on the use of the relationship evidence lay in the danger that the jury would misuse the evidence in favour of the appellant on the issue of consent. The verdict shows that the jury did not make that error.

101 The improper exclusion of the "relationship" evidence effectively kept nothing of substance from the jury, but did assist the appellant in the sense that the jury did not hear the limiting instruction it would have heard had the evidence been admitted under s. 276(2) as it should have been.

102 I would dismiss the conviction appeal.

THE SENTENCE APPEAL

103 The appellant received a sentence of two years on the sexual assault conviction, and six

months concurrent on each of the assault convictions. The sentence reflected a joint submission made by counsel at trial. In imposing the sentence requested, the trial judge described the sentence as within the range, although somewhat less, than he would have imposed absent the joint submission.

104 The appellant initially appealed conviction and sentence. He was released on bail pending appeal. The appellant abandoned the sentence appeal. He now seeks to re-open that appeal.

105 The sentence appeal was not dismissed on its merits. This court has jurisdiction to re-open the appeal and hear the appeal on its merits: *R. v. Sippos*, 2008 ONCA 325, at para. 4.

106 Crown counsel opposes the motion to re-open the sentence appeal arguing that this court will vary an otherwise fit sentence based on post-sentence conduct only in exceptional circumstances. Counsel contends there are no exceptional circumstances here. He submits that the proposed fresh evidence alters only minimally the picture painted in the material that was before the trial judge.

107 There is merit to the Crown's position. In my view, however, the sentence appeal if allowed to proceed must fail on its merits. Rather than addressing the merits of the application to re-open the sentence appeal, I propose to go directly to the merits of the appeal itself.

108 The appellant raped his common law spouse. He also physically abused her twice, although the assaults were relatively minor. Denunciation, above all other sentencing principles, dictated the sentence to be imposed on the appellant. A penitentiary sentence was fully warranted in light of the gravity of the sexual assault even having regard to the appellant's rehabilitative potential. I do not understand the appellant to suggest that the sentence was not fit when imposed.

109 Clearly the appellant has had a difficult life. He also has a lengthy criminal record. The appellant's antecedents and his potential for rehabilitation were reflected in the sentence agreed upon by counsel and imposed by the trial judge.

110 The appellant has done well on bail pending appeal. To the extent that the sentence imposed aimed at deterring the appellant from future criminal activity and encouraging him to lead a positive lifestyle, it is to be hoped that the time spent in custody has achieved that purpose. Denunciation, however, remains as important now as it was when the sentence was imposed. Varying the sentence to four to five months, would trivialize the serious nature of the offences and lend credence to the claim that the criminal justice system does not treat domestic sexual violence as the serious criminal conduct that it is.

111 When an offence calls for a denunciatory sentence, the length of the sentence imposed is most often the means used by the court to send the denunciatory message. An appellant's positive lifestyle while on bail pending appeal does not justify departure from that norm.

112 The appellant places considerable reliance on *R. v. Ghadban*, 2015 ONCA 760, to support

his submission that the sentence should be reduced to time served. *Ghadban* assists the appellant in that it recognizes that this court will, on occasion, reduce a sentence that was fit when imposed to reflect changes in the circumstances relevant to sentence that occurred between the imposition of sentence and the hearing of the appeal. Variation of sentences on this basis is the exception and not the rule: *Ghadban*, at paras. 13-15, 20.

113 In *Ghadban*, the accused played a secondary role in a serious home invasion. The trial judge sentenced the accused to two years to be followed by three years' probation. In doing so, the trial judge emphasized specific deterrence and rehabilitation as the key drivers of the sentence: *Ghadba*n, at paras. 7, 18.

114 In *Ghadban*, the accused appealed his conviction and sentence. For reasons beyond his control, the appeal took over three years to be heard. The accused was on bail pending appeal. On appeal, he abandoned his conviction appeal, accepted responsibility for his criminal conduct, and pursued his sentence appeal based on fresh evidence detailing his conduct during his lengthy time on bail pending appeal. This court referred to the changes in the appellant's lifestyle while on bail as "very significant", noting that he now accepted full responsibility for his crime: *Ghadban*, at para. 16.

115 In allowing the appeal and reducing the sentence to time served, this court said, at para. 22:

> This was a serious offence that ordinarily, would clearly call for more than seven weeks' imprisonment, on the other hand, we are dealing with a case in which however inadvertently, the criminal process and the sanction that was imposed have actually worked. The two sentencing objectives emphasized by the trial judge, specific deterrence and rehabilitation, have now been satisfied.

116 The appellant has not taken responsibility for his criminal acts. There is no suggestion that he has come to terms in any way with the cause or the consequences of his repeated abuse of his domestic partner. Equally importantly, denunciation, the principal goal underlying the appellant's sentence, remains as vital now as it was when the sentence was imposed.

117 In most cases, and this is one, positive steps taken by the appellant between sentencing and the hearing of an appeal are best dealt with by the correctional authorities. This court cannot act as a *de facto* parole board, but must trust the parole authorities to exercise their powers to facilitate the appellant's reintegration into the community at the earliest appropriate time. No doubt they will pay careful attention not only to the positive steps taken by the appellant since he was sentenced, but also to the very positive features of his background and character noted in the "Gladue" report and the pre-sentence report.

118 I would set aside the order dismissing the sentence appeal, grant leave to appeal sentence and dismiss the sentence appeal.

D.H. DOHERTY J.A.
G. HUSCROFT J.A.:-- I agree.
B. MILLER J.A.:-- I agree.

1 I recognize that in *Darrach*, at para. 58, Gonthier J. states that evidence of other sexual activity will "rarely" be relevant to support a denial that the alleged act took place. Justice Gonthier's observation does not alter the meaning of "relevance" and does not assist in determining relevance in any given case.