# SUPREME COURT OF CANADA

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## Case in Brief: *R. v. T.W.W.*

**Judgment of May 24, 2024 | On appeal from the Court of Appeal for British Columbia**
**Neutral citation: 2024 SCC 19**

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***The Supreme Court says a trial court was right to refuse evidence of prior sexual activity in a sexual assault case.***

The accused was convicted of a sexual assault that took place on April 2, 2018. The complainant was his spouse, who testified that her marriage to the accused had completely broken down in February of that year. However, in an earlier statement to the police, the complainant also stated that she and the accused had engaged in consensual sexual activity on the evening of April 1, the night before the sexual assault.

Prior to his trial, the accused asked the court to allow evidence that he and the complainant had engaged in consensual sexual activity in the evening of April 1 and in the morning of April 2. He argued that admitting such evidence would serve to challenge the complainant's credibility – specifically with respect to her claim that the marriage had completely broken down at the time of the alleged assault – to provide context, and to support his defence that the complainant had consented to the sexual activity, as it was all part of one interaction.

Under section 276(1) of the *Criminal Code*, evidence of a complainant's sexual activity with the accused or with any other person is not admissible to support an inference that the complainant is either (a) more likely to have consented to the sexual activity at the center of the charge; or (b) is less worthy of belief. In law, this is called "twin-myth reasoning" and relying on such inferences is not allowed.

The trial judge dismissed the accused's application to admit this evidence. He found no inconsistency between the complainant's statement to the police and her testimony. In his view, the evidence the accused wanted to submit was irrelevant to her credibility – it would only serve to support one of the two inferences prohibited under section 276(1) of the *Criminal Code*. As required under section 278.95 of the *Criminal* Code, the content of the accused's application, the hearing that was held to decide the issue and the trial judge's decision were subject to a publication ban. The case went to trial and the accused was ultimately convicted.

The accused's appeal proceeded *in camera* (closed to the public) and the appeal record was sealed (not made public). A majority of the Court of Appeal for British Columbia dismissed the accused's appeal. It agreed with the trial judge that the accused had not identified a legitimate use of the proposed evidence.

The accused then appealed the decision to the Supreme Court of Canada. By way of a motion, the Crown relied on section 278.95 of the *Criminal Code* to ask the Court for an *in camera* hearing, for filed materials to be sealed, and for any other order necessary to protect information and evidence related to the accused's application to admit evidence on prior sexual activity. The Court heard oral arguments on the motion before continuing with the hearing on the appeal.

The Supreme Court has dismissed the accused's appeal and allowed the Crown's motion in part.

**The evidence of prior sexual activity was inadmissible at the trial.**

Writing for the majority, Justice O'Bonsawin held that the accused failed to sufficiently identify a specific use for the prior sexual activity evidence that did not invoke twin-myth reasoning and that was essential to his ability to make full answer and defence. The trial judge did not make a mistake in denying the application. As such, the accused's conviction was upheld.

With respect to the Crown's motion, Justice O'Bonsawin determined that the mandatory publication ban under section 278.95 of the *Criminal Code* did not extend to appellate proceedings. Rather, she said the Supreme Court's power to make an order limiting court openness in the instant case was derived from implied jurisdiction of courts to control their own processes and records. The Court's discretion should be exercised in a way that maintains court openness as far as practicable while protecting the complainant's personal dignity and privacy and the accused's fair trial rights.

Justice O'Bonsawin then applied the test set out in *Sherman Estate v. Donovan*, a prior unrelated decision of this Court, to conclude that the circumstances of the instant case did not justify all of the measures requested by

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the Crown. Banning publication of any information about or reference to the nature of the sexual activity other than that which formed the subject-matter of the charge was sufficient.

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**Breakdown of the decision:** ***Majority*****:** Justice O'Bonsawin dismissed the accused's appeal and allowed the Crown's motion in part (Chief Justice Wagner and Justices Karakatsanis, Rowe, Martin, Kasirer and Jamal agreed) | ***Dissent*****:** Justices Côté and Moreau agreed with the majority on the Crown's motion but would have allowed the accused's appeal, set aside his conviction and ordered a new trial.

**More information:** Decision | Case information

**Lower court rulings:** Decision (Supreme Court of British Columbia) (unreported) | Appeal (Court of Appeal for British Columbia)

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