

CANADA / JUDGMENT

R. v. B.T.R.

2025 BCSC 2363

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.T.R.,

2025 BCSC 2363

Date: 20251110

Docket: 113356-3

Registry: Kamloops

Rex

v.

B.T.R.

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Before: The Honourable Justice Hardwick

Oral Reasons for Judgment Re: Section 724 of the Criminal Code (Factual Findings for Sentencing)

Counsel for the Crown:

C. Cook

Counsel for the Accused:

M.J. Ford

Place and Date of Trial/Hearing:

Kamloops, B.C.

September 24, 2025

Place and Date of Judgment:

Kamloops, B.C.

November 10, 2025

[1] On July 23, 2025, B.T.R. was convicted by a jury on both counts of a two-count indictment (the "Indictment"). I presided over the trial.

[2] Count 1 of the Indictment read as follows:

[B.T.R.], from the 1st day of August, 2022 to the 31st day of December, 2022, inclusive, at or near [XXXX], in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with .a part of his body or with an object, the body of M.T., a person under the age of sixteen years, contrary to Section 151 of the Criminal Code.

[3] Count 2 of the Indictment reads as follows:

[B.T.R.], from the 1st day of August, 2022 to the 31st day of December, 2022, inclusive, at or near [XXXX], in the Province of British Columbia, did sexually assault M.T., contrary to Section 271 of the Criminal Code.

[4] In summary:

- a) B.T.R. was convicted of sexual interference, contrary to s. 151 of the Criminal Code, R.S.C., 1985, c. C-46 [Code];
 - b) B.T.R. was convicted of sexual assault, contrary to s. 271 of the Code;
 - c) The complainant named in both counts in the Indictment is M.T.
 - d) The date range of the offences according to the Indictment is from August 1, 2022 to December 31, 2022.
 - e) M.T. was respectively either 14 or 15 years of age during the material times covered by the Indictment;
 - f) B.T.R. was 29 years of age during the material times covered by the Indictment.
- [5] The primary issue for determination is judicial fact-finding following a jury verdict, which engages the application of s. 724(2) of the Code.

- [6] The issue arises because the jury heard evidence of four separate instances of sexual contact between M.T. and B.T.R. during the timeframe covered by the Indictment. Any one of those instances could have formed the basis for the conviction on both counts. However, the nature of the sexual contact is varied, from a single open-mouth kiss to open-mouth kissing for an extended period, aka making out, to penile/vaginal intercourse.
- [7] A secondary issue is the application of the Kienapple principle.

Section 724 of Code

- [8] Section 724(2) of the Code codifies the previous common law rule expressed in *R. v. Brown*, [1991] 2 S.C.R. 518 at 523, 1991 CanLII 73, that the sentencing judge is obliged to make the findings of fact necessary to impose sentence when the verdict has been reached by a jury.
- [9] Section 724(2) of the Code provides as follows:
- (2) Where the court is composed of a judge and jury, the court
- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
- [10] When I heard oral submissions from counsel on September 24, 2025, the leading case on the application of s. 724(2) of the Code was *R. v. Ferguson*, 2008 SCC 6. Just two days later, the Supreme Court of Canada released its decision in *R. v. Sheppard*, 2025 SCC 29, which provides further very helpful and timely guidance on the application of s. 724(2). Counsel was offered and did avail themselves of the opportunity to provide written submissions on the impact of *Sheppard*, if any, to this case.
- [11] In *Ferguson*, the Supreme Court of Canada considered the principles in *Brown* and s. 724(2) of the Code and observed at para. 16 that this can be a challenging exercise because the jury does not give reasons for its verdict. Nevertheless, the sentencing judge must determine the facts necessary for sentencing. The judge is only required, however, to make the factual determinations necessary for deciding the appropriate sentence.
- [12] At para. 17 through 18 of *Ferguson*, the Court held that there are two principles involved:
- a) First, the express and implied factual finding of the jury's verdict binds the sentencing judge and the judge shall not engage in finding facts inconsistent with what the jury must have found to reach its verdict; and

- b) Second, when the jury's factual findings are ambiguous, the sentencing judge should not try to infer or extrapolate from the verdict in an attempt to use logic to determine what the jury likely determined but should find facts independently: see *Brown; R. v. N.F.*, 1994 ABCA 402, 162 A.R. 117. This principle and s. 724(2)(b) permit the sentencing judge to make factual findings based on the evidence at trial.
- [13] If the Crown raises aggravating facts that are disputed, the burden is on the Crown to prove those facts beyond a reasonable doubt. To rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities; see s. 24(3)(d) and (e); *Ferguson*, at para. 18, citing *R. v. Gardiner*, [1982] 2 S.C.R. 368, 1982 CanLII 30; and *R. v. Lawrence*, [1987] 58 C.R. (3d) 71, 1987 CanLII 9452 (ON SC).
- [14] The foregoing principles were helpfully summarized in bullet point form by B.A. Allen J. of the Ontario Superior Court of Justice in *R. v. J.P.*, 2019 ONSC 6298, which is a somewhat analogous case wherein J.P. had been convicted by a jury of one count of sexual interference and one count of sexual assault involving a single complainant. In that case, however, the timeframe covered by the indictment was six years, and not five months, and there were far more alleged instances of sexual conduct.
- [15] Returning to the summary, at para. 10, wherein B.A. Allen J. stated:
- [10] The following considerations assist the sentencing judge in arriving at factual findings:
- (a) The sentencing judge must not attempt to reconstruct the jury's logical reasoning which recognizes that jurors arrive at a unanimous verdict for different reasons and on different theories of the case.
 - (b) It is speculative and artificial to attribute a single set of factual findings to the jury unless it is clear that the jury must have unanimously have found those facts.
 - (c) Where any ambiguity on this exists the trial judge should consider the evidence and arrive at his or her own findings of fact consistent with the evidence and the jury's findings.
 - (d) The jury must be given the benefit of the doubt regarding the basis on which an accused was convicted by the jury.
 - (e) For the purpose of sentencing, in cases involving significant credibility and reliability issues, it is open to the sentencing judge to find the minimum consistent facts consistent with the jury verdict.
 - (f) The offender is not entitled to the most lenient interpretation of the jury's verdict.
- [16] Turning now to *Sheppard*, which synthesizes the foregoing principles and then applies them. For necessary background, *Sheppard* involved convictions by a jury for sexual interference and invitation to sexual touching. They were historical offences. Only the complainant and the accused were witnesses at trial. In describing the case, Chief Justice Wagner said as follows, at paras. 53 and 54:

- [53] The trial in this case turned on credibility and reliability. The complainant testified to a pattern of conduct by the respondent that constituted sexual interference and invitation to sexual touching, and the respondent denied each allegation. No other witnesses were called. The jury returned a verdict of guilty on each count, necessarily implying that it found the complainant credible and reliable at least to some extent. This was the backdrop against which the sentencing judge made her factual findings.
- [54] Also relevant are counsel's submissions to the sentencing judge. The Crown submitted that the complainant's testimony established 10 to 12 instances of sexual violence, which occurred mostly in the duty master's room but also included one incident of oral sexual contact in the woods outside the school. Counsel for the respondent did not contest specific facts but argued that it would be an error for the sentencing judge to rely on any facts aside from those essential to the jury's verdict (A.R., vol. III, at pp. 290-91). Counsel for the respondent's position was that because the counts at trial had not been particularized, the only essential facts to convict on all three counts were that one instance of sexual touching and one instance of invitation to sexual touching occurred. In oral submissions, counsel explained his view that it was not open to the sentencing judge to accept any aggravating facts because the Crown led no evidence at the sentencing hearing (pp. 199-201).
- [17] In outlining the errors made by the Alberta Court of Appeal in allowing the sentence appeal, Chief Justice Wagner held as follows, starting at para. 55:
- [55] The sentencing judge did not take up the respondent's position, which was clearly wrong in law: sentencing judges are entitled to make factual findings based on the evidence led at trial, including findings as to aggravating facts, which must be found to be proven beyond a reasonable doubt (Criminal Code, s. 724(2)(b); Ferguson, at para. 18). Sentencing judges are not required to solicit the same evidence a second time on a dedicated evidentiary hearing in order to make findings regarding aggravating facts.
- [56] Setting that argument aside, the sentencing judge made factual findings that were available on the record. There was no evidence at trial that contradicted or undermined specific allegations made by the complainant other than the respondent's blanket denial of the allegations. The jury had already rejected the respondent's denial and accepted that the complainant was, at least to some extent, credible and reliable. With that premise as a starting point, and in light of the Crown's argument that the complainant's evidence on the 10 to 12 instances should be accepted, the evidentiary basis of the sentencing judge's reasons is sufficiently clear.
- [57] Wakeling J.A. objected that the sentencing judge should have addressed various reliability concerns, which he identified in his reasons. . . .

- [58] After canvassing these concerns, Wakeling J.A. concluded that "it would be very dangerous to rely on any other evidence than that the jury must have accepted to find the accused guilty on the three counts" (para. 165). In essence, Wakeling J.A. determined that the complainant's testimony was not reliable, full stop, and that the sentencing judge should have declined to make any factual findings over and above those that she was bound to accept because they were essential to the jury's verdict.
- [59] I reject this line of reasoning. The reliability concerns that Wakeling J.A. identified served only to challenge the complainant's reliability generally and could not logically form a basis for distinguishing between various aspects of their testimony. In my view, Wakeling J.A.'s conclusion amounts to an indirect rejection of the jury's guilty verdict, which was not up for debate on sentencing.
- [18] Finally, the sentencing judge does not have to find the facts most favourable to the accused but must not make findings inconsistent with the jury's verdict: see *R. v. Berry*, 2025 BCCA 14, at para. 25.

Evidence at Trial - Agreed or Uncontested

- [19] The Crown called three witnesses as part of its case, M.G., M.T.'s father, J.T., and a friend of M.T., A.M. A.M. was, however, called by the Crown simply for the purposes of cross-examination as A.M. did not have any personal knowledge of the alleged offending conduct. A.M. was called to challenge the credibility of M.T. as it was M.T.'s disclosures to A.M. which resulted in police involvement, and certain details of the disclosure that A.M. said M.T. made to her and as later recorded in A.M.'s statement to police differed from M.T.'s version of events at trial.
- [20] The defence elected to call evidence. In addition to B.T.R., B.T.R.'s former spouse, D.M., testified.
- [21] The evidence of M.T., G.T. and B.T.R. was generally consistent with respect to the overall factual matrix in which the subject offences occurred, namely, it was either agreed or uncontested that:
- a) The T. family and the [B.T.R.] family were long associated in the small community of XXXX named in the Indictment. J.T. went to high school with B.T.R.'s parents, and in later years their respective families had vacation properties in close proximity where they socialized and boated. As a result, B.T.R. admitted he was familiar with members of the T. family, including M.T. and her sister;
 - b) No defence as to mistake of age was asserted. In this regard, M.T. testified that B.T.R. was aware of her specific age because they had discussed a particular vacation that the T. family was taking for her 15th birthday in the fall of 2022. B.T.R. for his part simply did not testify that he was unaware of M.T.'s age at the material times relevant to the Indictment.

- c) At the material times relevant to the Indictment, B.T.R. was employed by a company owned by J.T. As part of that employment, B.T.R. received a work truck.
- d) On August 12, 2022, J.T., B.T.R., along with two other individuals also employed by J.T.'s company went for drinks at a pub in XXXX. At J.T.'s invitation, most of the group returned to the T. family residence. Present at the residence were M.T.'s mother, M.T. and her sister. There was further drinking. M.T.'s unchallenged evidence was that she had one alcoholic beverage. B.T.R. and J.T. testified to drinking more than a single beverage and admitted to using cocaine. Near the conclusion of the evening, M.T. and B.T.R. took a side-by-side ride to a location known as YYYY Falls with M.T. driving. They parked the side-by-side and walked on foot towards the falls. What happened during the walk to and from YYYY Falls is one occasion where the evidence of B.T.R. and M.T. is contradictory.
- e) At some point quite shortly following the August 12, 2022 side-by-side ride, M.T. and B.T.R. connected through social media platforms, namely, Snapchat and Instagram. There was some differing evidence about who initiated the social media connections, but ultimately it was agreed by both B.T.R. and M.T. that there had to be some mutuality to create these connections, namely, that the party that initially followed the other on Instagram was voluntarily followed back, and the request to add a party on Snapchat had to be accepted by the other party. Through these social media platforms, primarily Snapchat, there were private messages exchanged between B.T.R. and M.T. until some time in January of 2023.
- f) On December 23, 2023, the T. family hosted a holiday work party at the T. family residence. Amongst those in attendance were the entire T. family, B.T.R., D.M. and their two children.
- g) During the latter part of the holiday party, various attendees went outside of the T. family residence to sled down a portion of the driveway. Amongst those participating was B.T.R. and M.T. To reach the top of the sledding hill, participants were transported. One of the means of transport was with M.T.'s mother's truck. M.T. was driving that truck. At or near the conclusion of the sledding, M.T. and B.T.R. were alone in the truck and the truck ended up parked in a portion of the long driveway which was not visible to the other attendees at the holiday party. B.T.R. and M.T.'s evidence differs as to what occurred in the truck; and
- h) Near the conclusion of the holiday party, just as B.T.R. and his family were leaving to depart, B.T.R. and M.T. each proceeded to "shotgun" a beer on the front deck of the residence, which was recorded by M.T. on her phone. They were standing in close proximity while doing so in order to both be visible on the video.

Evidence at Trial - Contested

- [22] As indicated above, and as I will further detail, the Crown's case was that there were four separate instances of sexual contact between B.T.R. and M.T. during the material time. With one very minor exception, the defence denied that there was any contact whatsoever between B.T.R. and M.T. that could be considered sexual contact, and its theory of the case was that M.T. fabricated the allegations because of an infatuation M.T. had with B.T.R., which B.T.R. tried to gently rebuff.
- [23] With that context, the material contested evidence at trial was as follows:
- a) On the walk to YYYY Falls, after exiting the side-by-side on August 12, 2022, M.T. testified that there was an embrace shared between her and B.T.R. in which B.T.R. put his arm around her waist and pulled her into him. B.T.R. then initiated an open-mouth kiss lasting some approximately 10 seconds. B.T.R. denied that any kiss occurred at all. B.T.R. testified that the only physical contact was an attempted hug initiated by M.T. that was partially deflected by B.T.R. as he redirected her back to the side-by-side.
 - b) At the December 23, 2022 holiday party when M.T. and B.T.R. ended up alone in M.T.'s mother's truck in an isolated portion of the driveway, M.T. testified that there was a mutually initiated open-mouth kiss shared between her and B.T.R. B.T.R. testified that M.T. attempted to kiss him and that he was only partially successfully in deflecting M.T.'s efforts. According to B.T.R., the partial kiss initiated by M.T. is the only kiss that ever occurred between him and M.T. This is the very minor possible sexual contact I referred to above and B.T.R.'s evidence was that he was not a willing participant.
 - c) Beyond those two occasions, namely August 12, 2022, and December 23, 2022, B.T.R. denied ever being alone with M.T. during the material time covered by the Indictment. In contrast, M.T. testified to two other occasions, both of which involved B.T.R. picking M.T. up from the T. family residence in the late evening and going for a drive up a local forest service road(s) where there was some type of sexual contact between them.
 - d) The first interaction M.T. testified about occurred some time after August 12, 2022, but before September 30, 2022. On a date within this above range, M.T. testified that B.T.R. picked her up as arranged between them via Snapchat in B.T.R.'s work truck. They proceeded to drive up a particular forest service road in the vicinity of the T. family residence.
 - e) Whilst driving that evening, M.T. testified that they made a series of stops. On the first occasion, B.T.R. and M.T. both got out of the truck. They hugged. There was a short closed-mouth kiss that B.T.R. initiated. B.T.R. allowed M.T. to drive. When they stopped on the next occasion, they both got out of the vehicle again. There was another hug and another closed-mouth kiss. When they stopped the third time, M.T. and B.T.R. ended up in the back seat of the truck. B.T.R. asked M.T. to "give him head". M.T. did not respond. However, things shortly thereafter progressed to B.T.R. and M.T. laying in the back seat making out, which M.T.

described as open-mouth kissing. B.T.R. then proceeded to put his penis inside M.T.'s vagina. The penile/vaginal intercourse between M.T. and B.T.R. lasted approximately seven minutes. B.T.R. was not wearing a condom. M.T. believes B.T.R. ejaculated but M.T. does not believe it was inside of her body. M.T. testified to some bruising on her arms from her positioning in the truck but no other physical injury from the sexual interaction with B.T.R.

- f) B.T.R. testified that this incident did not happen. He never picked up M.T. at or near the T. family residence and went for a drive on the forest service road in the black Dodge work truck or any other truck. B.T.R. denied ever having sexual intercourse with M.T.
- g) The next occasion M.T. testified about occurred on or about October 5, 2022. According to M.T.'s evidence, B.T.R. and M.T. arranged for him to pick her up at the same place as the prior time. On this occasion, B.T.R. picked up M.T. in his personal truck. B.T.R. gave M.T. a quick kiss when she got in the truck. They proceeded to go for a drive up the same forest service road and they eventually parked in a different location that M.T. specifically identified. M.T. leaned over the console in the truck and kissed B.T.R., who was still sitting in the driver's seat. B.T.R. and M.T. engaged in alternating open-mouth kissing and talking for an extended period of time, some approximately 45 minutes to one hour, while they parked. They were both drinking.
- h) B.T.R. again testified that this incident did not happen. He never picked up M.T. at or near the T. family residence and went for a drive on the forest service road in his personal truck or any other truck. B.T.R. denied ever engaging in open-mouth kissing or making out with M.T.
- i) The final material point of conflict is that M.T. gave evidence about multiple occasions when B.T.R. stressed to her the need to keep the relationship secret, that it was "bad", that no one could find out and that she was not to tell anyone. B.T.R. denied any such statements.

The Crown's Position

- [24] The Crown's position is that it is implicit in the jury's verdict considering the evidence adduced at trial, the parties' submissions, their theories of the case and the jury instruction that they found M.T. to be a credible and reliable witness. Accordingly, the Crown submits that it is appropriate to accept all of her evidence as proven beyond a reasonable doubt.
- [25] In this regard, the Crown points to the fact that the court correctly instructed the jury on the principles articulated in *R. v. W.(D.)*. It is thus explicit from the jury's finding, the Crown submits, that they did not believe B.T.R.'s testimony and it did not raise a reasonable doubt.

[26] The Crown further says it is not necessary for this court to parse each individual incident of sexualized touching to which M.T. testified to determine whether or not each was proven beyond a reasonable doubt. Rather, the Crown submits that the court should, for the purposes of sentencing, find that between August 1, 2022 and December 31, 2022, B.T.R. engaged in four incidents of sexualized contact with M.T. when she was between 14 and 15 years of age.

The Defence Position

[27] The defence has taken the position since the pretrial conference stage of this proceeding that it was problematic that the Crown was proceeding on an indictment that included counts of both sexual interference and sexual assault premised upon multiple different allegations of sexual contact over a period that spanned some five months. The defence's concern being that if the Crown did not sever the counts or provide more narrow date ranges and/or factual particular, and the jury were to convict, it would not be possible to know whether it was a conviction for a kiss, kisses, intercourse or any combination thereof.

[28] As is apparent from the above, the Crown elected not to sever and proceeded to trial based on the Indictment as originally sworn. Given B.T.R. was convicted on both counts on the Indictment, the defence submits that the court must now, pursuant to s. 724(2), determine which facts support the conviction: the kiss, kisses, intercourse or any combination thereof.

[29] The defence further asserts that in the absence of jury clarity on which incidents they accepted as sustaining the convictions, I run the risk of over-sentencing B.T.R. if I accept that he committed all the acts as described by M.T. However, the defence accepts that I risk under-sentencing B.T.R. if I take a lenient view and determine that their verdict was based only on the minimum contact necessary to sustain a conviction: see *R. v. A.A.L.*, 2024 NBKB 130, at para. 34.

[30] In this regard, and importantly, the defence's argument at this stage of the proceeding is not that M.T. is a generally unreliable witness. Rather, its argument is primarily focussed on M.T.'s evidence regarding the single incident of penile/vaginal intercourse. Specifically, the defence submits that the credibility and reliability of M.T. suffered so significantly at trial that the jury could not have convicted on intercourse because there were far too many issues regarding this particular allegation.

[31] In the defence's written submission, the defence highlights the following:

- a) the various timeframes M.T. alleged that the sexual intercourse occurred, specifically citing differences between her police statement, her preliminary hearing testimony, and her trial testimony;
- b) the inconsistency between M.T.'s evidence at trial that the intercourse with B.T.R. only happened on one occasion, and the evidence of A.M. that M.T. told her intercourse happened on multiple occasions;

- c) inconsistencies in M.T.'s description of B.T.R.'s mood prior to the intercourse between her preliminary hearing testimony and her trial testimony;
 - d) inconsistencies between M.T.'s evidence on cross-examination at trial that she did not take any pictures of bruising she sustained on this occasion or take any pictures of such bruising and A.M.'s evidence that M.T. told her she was covered in bruises and that M.T. had pictures of the bruises;
 - e) inconsistencies between M.T.'s evidence that the intercourse took place in B.T.R.'s work truck and not his personal truck and that she never told anyone that it occurred in his personal truck with the evidence of A.M. that M.T. told her that she had intercourse with B.T.R. in his personal truck in November of 2022; and
 - f) inconsistencies between M.T.'s police statement, her preliminary hearing testimony and trial testimony as to how she got from the front seat of the work truck to the back seat of the work truck where she testified the intercourse occurred.
- [32] On the final point, namely the way M.T. got from the front seat to the back seat, the defence submits that there are three different versions of how this occurred which are "all different and untrue because this event never occurred."
- [33] In support of this argument, the defence relies quite significantly on a fairly recent decision of Justice Crerar in *R. v 32992*, 2024 BCSC 2073, which is something of a treatise on the application of s. 724(2) of the Code in respect of single count indictments for sexual assault involving multiple instances of alleged sexual contact, combined with a commentary about the potential pitfalls of doing so in certain circumstances.
- [34] While the review of the law by Justice Crerar in 32992 is instructive, the case is very factually distinguishable from the case at bar. The indictment in question charged the accused with a single count of sexual assault during a 14-month period which overlapped with the time in which the accused and the complainant were in a monogamist intimate relationship. There are alleged to have been some 21 individual assaults, substantially all of which involved the complainant sleeping, partially sleeping or feigning sleep. The accused was found guilty by the jury. In the discussion section of his reasons, Justice Crerar noted that there was considerable compelling evidence that, when viewed in totality and subjected to the *R. v. W. (D.)* analysis raised concerns well beyond a reasonable doubt. The reasonable doubt did not solely concern the allegations but cast an "overarching doubt" about the reliability of all of the complainant's evidence: see para. 53. Ultimately, for the reasons outlined, Justice Crerar found only the minimum facts necessary to align the sentencing facts with the verdict, namely, that the accused intentionally sexually touched the complainant without consent on one occasion during the material time alleged in the indictment: see para. 82.
- [35] In addition to the foregoing, the defence in this case also points to two questions posed by the jury as supporting their position that the jury could not have convicted B.T.R. based on the incident involving penile/vaginal intercourse which M.T. testified occurred.

[36] In this regard, late in the evening on July 22, 2025, the sheriff brought forward the following two questions from the jury:

- a) What is sexual integrity?
- b) How do we determine if it has been violated?

[37] After discussions with counsel regarding a draft response I had prepared while waiting for counsel and B.T.R. to reassemble at the courthouse, it was decided to have the jury retire to the hotel for the evening to allow counsel a fulsome opportunity to reflect on the precise wording of the response to the jury questions.

[38] When the Court reconvened on the morning of July 23, 2025, counsel and I collaborated on a response that was collectively approved. That response was:

Sexual integrity involves an individual's right to control their own body and personal interactions free from unwanted sexual contact.

Because children under the age of 16 lack the capacity to consent to sexual contact with an adult, all sexual contact with a child under the age of 16 is by statutory definition unwanted.

If you find beyond a reasonable doubt that B.T.R. intentionally touched Ms. [T.] for a sexual purpose or intentionally applied force, including any physical contact of a sexual nature, then he violated Ms. [T.]'s sexual integrity.

I also direct you back to paragraphs 129 to 140 and paragraphs 162 to 167 of my jury charge.

If you require further clarification after considering and discussing the response, please provide a further question(s) in writing to the presiding sheriff.

[39] Within less than an hour of being provided with the response to their questions, the jury advised the sheriff that they had reached a verdict.

[40] The defence's argument in this regard is that these two questions suggest that at least one juror had reasonable doubt regarding M.T.'s evidence about the incident of penile/vaginal intercourse because the above question would otherwise have been unnecessary. The rationale being it would be self-evident to any reasonable juror that penile/vaginal intercourse would be a violation of M.T.'s sexual integrity. Therefore, they must have been inquiring if M.T.'s sexual integrity had been violated by some other sexual contact M.T. testified to.

[41] As authority for this submission the defence relies upon the Supreme Court of Canada decision in *R. v. Punko*, 2012 SCC 39. Punko concerned the doctrine of issue estoppel where the prior proceeding was before a jury. In the course of considering this issue, the Court also touched on the issue of jury questions. Writing for the majority, Deschamps J. stated as follows at para. 8:

- [8] In applying the doctrine of issue estoppel where the prior proceeding was before a jury, "[t]he question is whether a finding in favour of the accused is logically necessary to the verdict of acquittal" (Mahalingan, at para. 53 (emphasis added)), not whether the general circumstances of the case tend to indicate that the jury resolved the issue in favour of the accused. Thus, factors such as questions asked by the jury, the timing of the jury's verdict or findings made by the sentencing judge are not directly relevant to whether the jury resolved an issue in favour of the accused. They can be used only to reinforce a conclusion reached through reasoning based on logical necessity. Where, in light of the record and the parties' allegations, there is more than one logical explanation for the jury's verdict, and if one of these explanations does not depend on the jury's resolving the relevant issue in favour of the accused, the verdict cannot successfully be relied on in support of issue estoppel. An approach that encourages judges to inquire into the jurors' mental deliberations and reasoning processes should be rejected.
- [42] The defence again relies on 32992, wherein Justice Crerar discussed whether a particular incident referred to in the reasons as the "kitchen sexual assault", had been proven to the high standard of beyond a reasonable doubt. Specifically, Justice Crerar noted that some or all of the jurors may have rejected the kitchen incident, instead preferring to rest their verdict on the "sleep incidents". In the footnote in this regard, Justice Crerar made the following reference to a jury question that arose during the trial which was potentially material:
- [12] The jury's request or question to the Court likely indicated that not all jurors were convinced of the kitchen assault, at least at the time the question was posed. Specifically, at 4:50 pm on the first half-day of deliberations, the jury asked to re-hear the recording of the complainant's testimony about the first sleep assault incident in September 2016: a request that would have been superfluous if all jurors were convinced of the more overt and conventional form of sexual assault represented by the kitchen incident. *R. v. MRH*, 2019 SCC 46 at para. 5 suggests that a jury question, in limited circumstances, may illuminate which of multiple sexual assaults alleged in a single count the jury believed. That said, the timing and content of the jury request in this case was not as clear as that in *MRH*. Following the edict of Ferguson and the authorities cited above -- that the sentencing court not speculate on the jury's deliberations and thought process -- this Court declines to do so.

Judicial Findings of Fact - Analysis

- [43] I agree with the defence that by virtue of the scope of the Indictment and the evidence received at trial, there is a potential for ambiguity in the verdict. Accordingly, as directed by Ferguson and Sheppard, it is necessary for me to consider the evidence and arrive at my own findings of fact based on my opportunity to observe the witnesses who testified at trial and consider the exhibits entered into evidence in accordance with s. 724(2) of the Code.

- [44] Despite being only 17 years of age, M.T. was a poised and collected witness. She tried to answer the questions that were asked of her and was not evasive or argumentative. She also did not appear to be exaggerating or embellishing her evidence. She also admitted that there were certain inconsistencies in her version of events between her police statement, her evidence at the preliminary hearing and her evidence at trial. For her police statement M.T. relied on the timing and circumstances on when it was given. Beyond that, M.T. did point to the fact that she had been attending counselling and that this process had allowed her to gain some greater clarity, which in turn improved her memory in certain respects.
- [45] In this regard, defence counsel did a very thorough job in cross-examining M.T. on her prior inconsistent statements, particularly in respect of the incident allegedly involving penile/vaginal intercourse. Notwithstanding these efforts of defence counsel, I believed M.T. that the incident involving sexual intercourse with B.T.R. did occur and that it occurred in the manner that M.T. testified to at trial.
- [46] The core details of M.T.'s evidence regarding the sexual intercourse incident have not varied. - the meet-up was arranged via Snapchat, M.T. was picked up at an agreed location within walking distance but out of sight of the T. family residence at a time of night when M.T.'s parents were in bed and/or asleep. M.T. and B.T.R. drove up the forest service road in the vicinity of the T. family residence and made stops along the way. B.T.R. let M.T. drive at one point. When they reached the "cut block" and parked, B.T.R. removed some distinctive work totes from the back seat of the truck wherein they proceeded to have penile/vaginal intercourse with B.T.R. being on top of M.T. M.T.'s inability to consistently recall how it was she got into the back seat of the truck did not, in my view, undermine her overall detailed evidence about this incident.
- [47] In terms of timing, I accept that M.T. could not be precise with the date of this incident beyond ultimately narrowing it down as after the YYYY Falls side-by-side drive and before the funeral of a mutual acquaintance. However, M.T. was 14 according to her evidence at the time this incident occurred; 15 when she gave her police statement; 16 when she testified at the preliminary hearing; and 17 when she testified at trial. Her status as a young person and its role in assessing her evidence was specifically explained in the jury charge as follows:

When you consider the evidence of [M.T.] and [A.M.], please take into account their ages at the time of the alleged offences, when they gave their police statements, when [M.T.] gave her evidence at the preliminary inquiry and her age now. Keep in mind that children and young persons may not perceive and recall events in the same way as an adult would. They may not be complete and accurate when describing details such as time and place or peripheral matters. Their evidence about events that occurred in childhood, the presence of inconsistencies, particular as to peripheral matters such as time, location and the exact sequence of events should thus be considered in the context of the age they were at the time of the events to which they were testifying.

Simply stated, the credibility and reliability of every witness who testified must be carefully assessed but assessed using common sense that takes into account the age of the witnesses when the alleged events occurred and the age of the witness when testifying. This does not change the onus that is always on the Crown to prove all essential elements of the offences beyond a reasonable doubt.

- [48] In keeping with this, M.T. was not entirely sure about the date of the second similar incident either. It occurred on or about October 5, 2022, to her recollection. In contrast, the two other occasions of sexual contact had fixed dates in M.T.'s evidence because there were other definitive events that occurred on those dates that acted as time markers in the chronology - the après work informal get-together at the T. family residence on August 12, 2022, and the holiday work party at the T. family residence on December 23, 2022. Again, despite the good counsel work by the defence, I am not satisfied that the lack of precision as to timing sufficiently undermines the credibility of M.T. to a degree that I am not satisfied beyond a reasonable doubt that the intercourse incident actually took place as testified to by M.T.
- [49] In contrast, had I not believed M.T. about the intercourse incident or even had serious doubts about her credibility, it would have undermined the credibility and reliability of her evidence about the incident on or about October 5, 2022, when B.T.R. allegedly picked her up in the same location and again went for a drive up the forest service road (this time to a different location). Although that incident did not involve intercourse, it did involve "making out" for an extended period of time and various other similarities. Further, there is no alternate version of events. Like the intercourse incident, either this incident happened, or it did not as B.T.R.'s evidence was, save for briefly at the December 23, 2022 holiday party, he was never alone in a truck with M.T. and never picked her up late at night in the evening to go driving down any forest service road.
- [50] In this regard, I did not believe B.T.R.'s evidence, nor did it raise a reasonable doubt for me even after applying *R. v. W.(D.)*. As a starting point, I am more than satisfied that something more than a deflected hug occurred on the walk to YYYY Falls during the side-by-side ride. I believe that what happened was an embrace and an open-mouth kiss as M.T. testified to. That there was some sexual contact between M.T. and B.T.R. on August 12, 2022, also explains, in my view, why B.T.R., a 29-year-old man with a long-term common-law spouse and two children of his own, would then decide to connect on both Instagram and Snapchat with a 14-year-old girl. A 14-year-old girl who happens to be the daughter of his employer. Further, B.T.R. not only connected with M.T. on these platforms but began exchanging private messages with M.T., including one in which he refers to her as his boss's "hot ass daughter" and another in which he references dating her when she turns 19, if she is "still interested". B.T.R.'s attempt to explain his conduct in this regard was entirely unconvincing.
- [51] Further, B.T.R.'s conduct at the Christmas party belies his claims that he was trying to rebuff M.T.'s crush or "puppy love" as he described it at one point in his testimony. Firstly, he was not only alone with M.T. in M.T.'s mother's truck, but they ended up parked in an isolated portion of the driveway away from all the other partygoers which allowed this allegedly

partially deflected kiss to occur. Further, after returning to the party, B.T.R. continued to closely interact with M.T., including making TikTok dance videos and later "shotgunning" a beer with her. On the latter point, I recognize it was M.T.'s mother who suggested B.T.R. be the one to "shotgun" the beer with M.T. instead of herself, but in the circumstances B.T.R. had an extremely plausible excuse that D.T. and his children were waiting in the truck for him and that he needed to leave.

- [52] Instead, what I surmise occurred, based in large measure on D.T.'s own evidence at trial, was that D.T. observed the "shotgunning" and the attempted hug and kiss by M.T. and, together with her observations of M.T.'s behaviour around B.T.R. at the party, concluded that something was possibly amiss. B.T.R. had no further in-person contact with M.T. after that evening and B.T.R.'s private messaging with M.T. ceased some time in January of 2023.
- [53] Before ultimately making my findings of fact, I must address the evidence of A.M. as this factors quite significantly into the defence argument that the intercourse incident was not proven beyond a reasonable doubt. I did not find A.M.'s evidence particularly helpful to the defence and it did not give rise to a reasonable doubt. The statements made by M.T. to A.M. were made when M.T. was 14 years old and possibly just turned 15. A.M. herself was 14 years old at the time. Their conversations were not made with any obligation or requirement to tell the truth. I accept that M.T. did tell A.M. that she had intercourse with B.T.R. more than once. But exaggerating or embellishing to a similar aged peer about the number of times the intercourse happened in the course of a private conversation is very different than lying under oath if intercourse happened at all. As for the other details, at the time M.T. made these disclosures to A.M. back in the fall of 2022 A.M. had no expectation of providing a police statement. That only came about when M.T. ran away and A.M. revealed her knowledge of the relationship between B.T.R. and M.T. out of a concern for M.T. In that statement, A.M. provided her best recollection of those prior disclosures, which may or may not have been completely accurate in the first place because of the circumstances in which the disclosures were made.
- [54] For the purposes of sentencing and pursuant to s. 724(2), I accordingly find that it was proven beyond a reasonable doubt that there were four incidents of sexual contact between B.T.R. and M.T. during the material time covered by the Indictment, namely:
- a) August 12, 2022 - embrace and open-mouth kiss;
 - b) Unspecified date between August 13, 2022 and September 30, 2022 - closed-mouth kisses, open-mouth kissing, and unprotected penile/vaginal intercourse;
 - c) On or about October 5, 2022 - extended open-mouth kissing (making out); and
 - d) December 23, 2022 - open-mouth kiss.

- [55] In terms of other aggravating factors, I find that the Crown has proved a reasonable doubt that B.T.R. actively encouraged M.T. to keep their sexual contact a secret as M.T. testified. Consistent with this, M.T. was not, as noted, the individual who brought M.T. and B.T.R.'s relationship to the attention of police. Further, M.T. initially took active steps to avoid providing a police statement and deleted substantially all saved private messages she had on her phone between her and B.T.R.
- [56] Having regard to the principles outlined in *Ferguson and Sheppard*, I further conclude that my findings of fact are consistent with the jury's findings. In this regard, although there was ambiguity, and despite the able defence submissions, I do not find this to be a case involving such significant credibility and reliability concerns that it is appropriate to find the minimum facts consistent with the jury verdict.
- [57] Finally, while I appreciate the rationale behind defence's argument regarding the jury question, to accept it, I conclude, would be an error.
- [58] I, like Justice Crerar in 32992, find that doing so would run contrary to the express instruction in *Ferguson* and followed in the other authorities which I have referenced above that the sentencing judge must not attempt to reconstruct the jury's logical reasoning.

Kienapple Principle

- [59] The rule against multiple convictions is known as the Kienapple principle and is stated in *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14.
- [60] In *R. v. Baptiste*, 2025 BCCA 208, the Court of Appeal recently reviewed the Kienapple principle, describing it as "precluding multiple convictions for offences involving the same 'delict' (criminal act or criminal wrong)", such that "when an accused is found guilty of multiple offences with the same or substantially the same elements, the accused should be convicted of only the most serious of the offences" and "the conviction for the less serious offence should be conditionally stayed": see para. 30.
- [61] Whether Kienapple applies is case specific and contextually informed: see *R. v. Mohsenipour*, 2023 BCCA 6, at para. 283.
- [62] In *R. v. Prince*, [1986] 2 S.C.R. 480, 1986 CanLII 40, the Supreme Court of Canada established a two-step analytical framework to be applied in deciding whether a conviction should be conditionally stayed: The framework involves determining first if there is a factual nexus between the offences at issue and, if so, whether there is also an adequate legal nexus between them.
- [63] The Kienapple principle is engaged here to preclude B.T.R. from being convicted on both Counts 1 and 2, as both arise from the same factual and legal matrix.

- [64] In *R. v. T.Q.*, [2019] Nu. J. No. 6, Sharkey J. undertook a thorough review of the application of the Kienapple principle when a person is convicted of both s. 151 and s. 271 offences. Justice Sharkey concludes at para. 66, that sexual interference (s. 151) is the more serious charge and that a conviction should be entered for that offence.
- [65] This is consistent with the recent decision of Justice Ahmad of our court in *R. v. J.A.F.*, 2025 BCSC 1392: see para. 5.
- [66] On this basis, the Crown's position is that B.T.R. should have a conviction entered for Count 1, sexual interference contrary to s. 151 of the Code, and a conditional stay entered on Count 2, sexual assault contrary to s. 271 of the Code, as a conviction for sexual interference is a more precise and complete record of the offence that was committed here given the age of M.T.
- [67] The defence does not take issue with the Crown's position regarding Kienapple.
- [68] I accept the Crown's position is accurate. Accordingly, a conviction shall be entered for Count 1 of the Indictment, and a conditional stay shall be entered for Count 2 of the Indictment.

Transcript

- [69] In anticipation of the substantive sentencing of B.T.R. in this proceeding, the Court will be ordering a transcript of these reasons for judgment on its own initiative later today. They are largely in the form of written reasons for judgment already but upon receiving the transcript I do still reserve the right to correct minor errors and to add or correct any case citations which I may have mistakenly omitted or misstated.
- [70] Those are my reasons for judgment.

"Hardwick J."

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