

CANADA / JUDGMENT

R. v. Brooks

2023 BCCA 121

COURT

British Columbia Court of Appeal

DECIDED

17 March 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCCA 121 R. v. Brooks

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Brooks,

2023 BCCA 121

Date: 20230317

Docket: CA47531

Between:

Rex

Respondent

And

Allen James Brooks

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials F.B., J.B., P.O., A.A., and J.S.

This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Bennett

The Honourable Justice Griffin

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated
October 26, 2020 (conviction) (R. v. Brooks, Port Coquitlam Docket 99091-1).

Counsel for the Appellant:

B. Zargarian

Counsel for the Respondent:

L.A. Vizsolyi

Place and Date of Hearing:

Vancouver, British Columbia

September 15, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 17, 2023

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Justice Griffin

The Honourable Mr. Justice Grauer

Summary:

The appellant appeals his conviction on two counts of sexual assault. The appellant was an X-ray technician and was charged with sexually assaulting three patients while performing X-rays in 1990, 1997, and 2001. At trial, the judge admitted evidence of a fourth patient who alleged she was sexually assaulted by the appellant in 1990. The judge found the appellant guilty on two counts and acquitted him on the third. On appeal, the appellant argues, among other things, that the trial judge erred in admitting the similar fact evidence of the fourth patient and in his assessment of credibility. Held: Appeal allowed and new trial ordered. The trial judge erred in admitting the evidence of the fourth patient as uncharged propensity evidence that was not probative of a fact in issue at trial. Given that the admission of the evidence played a significant role in the judge's assessment of the credibility of the complainants, a new trial is required.

Table of Contents

Paragraph Range

Background

[3] - [36]

A.A.

[5] - [7]

F.B.

[8] - [14]

J.B.

[15] - [25]

P.O.

[26] - [36]

Issues on appeal

[37] - [37]

Issue #1: Similar fact evidence

[38] - [91]

Legal framework

[38] - [58]

A. Relevance

[39] - [46]

B. Exclusionary rule

[47] - [50]

C. Probative value versus prejudicial effect

[51] - [58]

Probative value

[52] - [56]

Prejudicial effect

[57] - [58]

The judge's analysis

[59] - [75]

Analysis of the admissibility of A.A.'s evidence

[76] - [87]

A. Proof of the actus reus

[77] - [78]

B. Defence of accident

[79] - [79]

C. Collusion

[80] - [82]

D. Supporting the credibility of the complainants

[83] - [85]

E. Conclusion on the admissibility of A.A.'s evidence

[86] - [87]

Cross-count similar fact evidence

[88] - [91]

Issue #2: Prior consistent statements and credibility findings

[92] - [96]

Issue #3: Applying uneven scrutiny

[97] - [97]

Issue #4: Inconsistent verdicts

[98] - [98]

Fresh evidence application

[99] - [99]

Conclusion

[100] - [101]

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Allen James Brooks worked as an X-ray technician at a hospital in Maple Ridge, B.C. between 1990 and 2016. He was charged with sexually assaulting three patients while performing X-rays at the hospital: F.B. on November 15, 1990, J.B. on November 1, 1997, and P.O. on July 8, 2001. A fourth woman, A.A., was permitted to give similar fact evidence that Mr. Brooks sexually assaulted her on November 14, 1990. Charges were laid in November 2017. Mr. Brooks was convicted by a provincial court judge of the charges in relation to F.B. and J.B. and acquitted of the charge relating to P.O.
- [2] In my view, the judge erred in admitting the evidence of A.A. as similar fact evidence. I would allow the appeal and order a new trial.

Background

- [3] The main issue is whether the evidence of A.A. should have been admitted as similar fact evidence. I have read the transcript and set out the evidence in detail in order to properly address that question.
- [4] Mr. Brooks was trained at the British Columbia Institute of Technology ("BCIT") to work as an X-ray technician. He was certified in 1989 and started working at the hospital in Maple Ridge in 1990.

A.A.

- [5] A.A. had a scheduled appointment on November 14, 1990. Mr. Brooks was the X-ray technician who conducted A.A.'s chest X-ray. She was sober. A.A. had undergone several chest X-rays in the past. She testified that she was alone in the room with Mr. Brooks. She was wearing a hospital gown that was only tied at the top and her back was exposed. She was standing, facing the X-ray machine, and Mr. Brooks stood behind her, put his hands under her gown, and lifted her breasts, touching her skin. He touched the sides of her breasts, not her nipples. She testified that while it was normal for the technician to stand behind her to adjust her shoulders, the touching of her breasts alarmed her and made her feel uncomfortable. She stood back. She said he placed his hands on her breasts and lifted them a second time. He said to her, "Excuse my hands". She mentioned this to a friend who was also a family doctor a few days later. The doctor told her to report the incident. A.A. reported the incident and was interviewed by the police on December 4, 1990. She recalled receiving a written apology from Mr. Brooks.
- [6] Mr. Brooks testified that he had been trained at BCIT to place his hands below a person's armpits on the side of the body and then push the person up against the machine when doing a chest X-ray. This was to ensure the person was lined up properly in front of the machine. In 1990, this was done manually -- now there are lasers that assist in the body placement of the patient. He said that A.A. had on a very small gown tied at the back. He recalled her being large-breasted, and he acknowledged that his hands touched the sides of her breasts when he was positioning her in front of the machine. He tried not to touch her breasts. He recalled saying to her, "Please excuse my touch". After the incident came to light,

he met with hospital management and BCIT. While acknowledging the touching, he said that he touched her for the purpose of centering her on the X-ray film cassette and had no sexual intent or purpose. He said BCIT acknowledged that they had trained him incorrectly and changed the method of teaching men to conduct chest X-rays. Mr. Brooks said that at the time, there were very few men in the X-ray technician program. He also spoke with a police officer about the incident. No charges were forwarded to Crown counsel.

- [7] He wrote an apology letter to A.A. and thought the incident had been resolved. He stopped putting his hands on the sides of patients while performing similar X-rays.

F.B.

- [8] F.B. testified to an incident that occurred in the early morning hours of November 15, 1990. She had been drinking and "was not with it". She could not recall what part of her body was to be X-rayed, but she remembered laying down on a hospital bed or gurney in the X-ray room and putting her arms up. She said the X-ray technician, who was Mr. Brooks, touched her vagina and placed his hand inside her. She remembers feeling "bad" as a result. She did not say anything to him because she was scared and she froze. She said he stopped when they heard someone coming. She said she told the first person she saw.
- [9] F.B. acknowledged drinking prior to attending the hospital, but denied telling the police officer she was "bombed". She also denied telling the police officer she smoked marihuana. During cross-examination, she told defence counsel he was a "bad man" and was admonished by the judge. She could not recall what she was wearing and stated she could have been wearing pants, long johns and/or a hospital gown. She said she wanted to proceed with the charges in 1990, contrary to the police officer's evidence.
- [10] Admissions of fact indicate that F.B. was attended by Emergency Health Services ("EHS") at 1:14 a.m. on November 15, 1990, and admitted to the hospital in Maple Ridge at 1:30 a.m. Her Blood Alcohol Content ("BAC") was tested and was 190 milligrams of alcohol per 100 millilitres of blood at 4:18 a.m. and 170 mg/100 mL at 4:35 a.m. Expert evidence affirmed that at 2:00 a.m., her BAC would have been between 213-236 mg/100 mL and at 2:30 a.m., between 208-226 mg/100 mL. The Criminal Code criminalizes driving with a BAC over 80 mg/100 mL (see Criminal Code, s. 320.14(1)(b)).
- [11] Mr. Brooks testified that he was on-call when F.B. was brought into the hospital and was called in to take an X-ray. He obtained the paperwork from the doctor, who said to him "Good luck, AOB plus plus plus"-- "AOB" meaning "alcohol on breath" and "plus plus plus" meaning the patient is "very intoxicated" or "heavily intoxicated". Mr. Brooks was instructed to take a chest X-ray.
- [12] F.B. had very slurred speech, was drooling, had mucous around her mouth, and had tears on her cheeks. The chest X-ray was a standing X-ray, like the one conducted on A.A. Mr. Brooks had to stand F.B. up against the X-ray machine. Her left arm was not in the hospital gown. He placed her left arm in the gown and tied up the back so it would not fall off. She was

wearing dark pants and they were never removed. She was nauseous, so he put her back on the bed and got a tray in case she vomited. He eventually got her to stand up in front of what is referred to as a "bucky", which held the X-ray film cassette. F.B. was not coherent and did not understand simple commands. She kept moving and Mr. Brooks had to centre her twice. He took one X-ray and put her back on the bed. The first one was not good, so he had to take a second one, which was "barely acceptable". He was not wearing gloves, as at that time, it was frowned upon. He was concerned about his health as F.B. had poor hygiene. He put her back in the bed and was washing his hands when the doctor came in to look at the X-rays. He denied touching her vagina or her breasts. He did not have to centre her on the machine as he did for A.A. because she was very tiny.

- [13] He received a call a few hours later from the doctor asking if any impropriety occurred during the X-ray. He said it did not and explained the difficulty he had had in taking the X-ray. He provided a written report, and spoke with his manager and the police regarding the complaint by F.B.
- [14] Retired RCMP officer William Kerr testified he was assigned to investigate the complaint by F.B. and later A.A. He had a great deal of difficulty tracking down F.B. for a follow-up. When he finally located her in February 1991, she was very reluctant and told him that she did not want to proceed with further action. As noted above, F.B. denied that statement and said she had wanted to proceed. The statement given by Mr. Brooks in 1990 was tendered as evidence by the Crown. At the time, Mr. Brooks told the officer that F.B. was intoxicated, referencing AOB +++ on the chart, and that she did not appear to be coherent. He said her hospital gown had fallen and he tied it for her. He told the officer about putting F.B. back on the stretcher because she was nauseous. He mentioned the health concerns he had due to her lack of hygiene. He denied touching her breasts, even accidentally, and denied removing her pants and touching her vagina. Mr. Kerr agreed that F.B. told him that she was "bombed" at the time and had been "smoking pot" (as noted, both denied by F.B.). He spoke to A.A. on December 4, 1990, but no further details were provided regarding her statement. He thought Mr. Brooks was forthright and honest and did not forward charges to the Crown.

J.B.

- [15] J.B. attended the Maple Ridge hospital on November 1, 1997, with her partner J.S. She had injured her knee by stabbing herself in the knee with a pair of tweezers while plucking her eyebrows. She was in considerable pain. She had been smoking crack cocaine prior to attending the hospital. She testified that she was at the hospital at 11:00 a.m., when she was in fact there at 11:00 p.m. She said she was vomiting from the pain. She was eventually given something for her pain by the hospital staff.
- [16] She was sent for an X-ray of her knee. Mr. Brooks was the X-ray technician. She testified that she was lying down and that she thought Mr. Brooks was positioning her for the X-ray. She was wearing a sports bra and underwear. She said he moved her sports bra, pushing it to the side, exposing her breasts to a degree. He did not touch her breasts. He also adjusted her

underwear in the crotch area but did not touch her genitalia. She said she screamed for J.S. who was waiting outside the X-ray room. She knew something was wrong but did not say anything to Mr. Brooks.

- [17] She had been smoking crack cocaine over the span of approximately 30 hours before going to the hospital. She and J.S. shared two grams. She had not used drugs for several months prior to this and agreed she had relapsed. She acknowledged that she was delirious, which to her meant hysterical, anxious, and sick. She acknowledged that she fell asleep at points when she was in the emergency department and had a lot of dreams.
- [18] J.B. did not recall if she was placed on her back in the X-ray room but did recall the X-ray technician touching her hip to move her, and she understood that process. She did not agree that was the only contact he had with her. She presumed she was wearing a hospital gown and could have had a blanket or sheet as well. She thinks she told J.S. what happened with Mr. Brooks the next day.
- [19] J.S. testified that he drove J.B. to the hospital at 11:00 p.m. They had been using cocaine and drinking wine before they went to the hospital. J.B. was given pain medication before the X-ray. She was in the X-ray room for about 20 minutes. At one point the technician came out and spoke to J.S., but he could not recall the conversation, other than he told the technician about J.B. using cocaine. She told him about the incident the next morning.
- [20] J.S. agreed that J.B. was a little delirious and angry in the emergency department, and it was difficult for the hospital staff to deal with her. He agreed that he was "Facebook friends" with P.O., the third charged complainant, but did not recognize or recall her.
- [21] J.B. gave a statement to the police on November 19, 1997. The evidence is not clear when she reported the allegation to the police.
- [22] Dr. Lim was the physician who treated J.B. in 1997. She came in around 10:45 p.m. She had punctured her knee with tweezers, and he was worried about an infection in her knee joint. He ordered a knee X-ray. His notes indicated that when she arrived at the emergency department, she was confused, hallucinating, and showing inappropriate behaviour. She had been using cocaine for the past three days. The nurses' notes indicated that she was not always coherent.
- [23] Mr. Brooks testified that he was working on November 1, 1997 when J.B. arrived and needed an X-ray of her knee. She was curled up in a ball, screaming, with a blanket wrapped around her like a cocoon. She appeared intoxicated. She was wearing a hospital gown. He needed to take a "horizontal beam" X-ray, which involved J.B. lying on her back with her knee straight and her toes pointed towards the ceiling. She refused to follow directions. She would not roll onto her back, so he lifted the blanket to expose the knee. It looked all right, so he asked her again to roll onto her back. When she would not, he held the sheet and her hip and rolled her over. He did that several times and each time, she rolled back onto her side. The area on the hip he touched was opposite her naval, not near her vagina. She wanted her partner to

come into the room, but Mr. Brooks did not allow that, as it was against hospital policy because of the exposure to radiation. He later agreed that he could have allowed J.S. to come into the room but did not think it necessary. He did go outside of the room and spoke with J.S. to get a history from him, as he was unable to get any information from J.B. J.S. told Mr. Brooks that J.B. had walked into the hospital, which meant she should have been able to straighten her leg for the X-ray, and that she had been using drugs.

- [24] Mr. Brooks denied adjusting J.B.'s bra or underwear. He testified that he had no physical contact with J.B. for a sexual purpose. He learned of her allegation a week or two later and spoke with the police in 1998.
- [25] Mr. Brooks' statement to the police on March 3, 1998, was tendered by the Crown. In that statement he told the police officer that he touched J.B.'s hip to turn her but did not touch her genitals. He denied touching her breasts. He said he did not know about the drug use before he took X-rays. He said if he had known, he would have brought someone into the room with him.

P.O.

- [26] P.O. testified that she was in a car accident on July 8, 2001, and she was taken to the hospital by an ambulance. She said she was lying on the X-ray table and the technician inserted his fingers into her vagina and "play[ed] around with [her] breasts". She said he rubbed his penis against her when he was behind her and leaning across her. She recalled being in the room for about 10 to 15 minutes.
- [27] P.O. testified that she had had four alcoholic drinks at a baby shower that afternoon but was not drunk. She denied being asked to blow into a breathalyzer by the police. She said she had hit her head on the windshield during the car accident. She said she had all her clothes off in the X-ray room except a hospital gown because there could be no metal during the X-ray. In cross-examination, she agreed that she could not recall if she was wearing a hospital gown or a sundress.
- [28] Mr. Brooks was shown a series of X-rays of P.O., which he identified were taken by him. When he was first interviewed by the police in 2016, he had no recollection of P.O., but when he was shown the X-rays, his memory was refreshed by the presence of her toe rings that were apparent in the X-rays. He took eight X-rays of P.O. starting with her cervical spine and ending with her feet. One of the cervical spine X-rays shows a metal zipper pull. Hospital gowns do not have zippers. Mr. Brooks believed that P.O. was wearing a dress not a hospital gown. She was wearing a c-spine collar for the cervical spine X-rays. She was very cooperative regarding rolling over and moving into position. He denied touching her vagina or "anywhere" for a sexual purpose.
- [29] P.O. testified that the man who assaulted her showed up at her house a few days later and got out of a green car. She said she shouted at him to leave. Mr. Brooks denied going to P.O.'s house and denied owning or having access to a green car.

- [30] P.O. acknowledged that she knew J.S. She agreed that she was considering suing the hospital.
- [31] Emails between the RCMP and ICBC show that P.O. was in an accident on July 8, 2001, where she crashed head-on into another vehicle and was found 100% at fault. Charges for refusing to take a breath test were forwarded to the Crown but were not approved.
- [32] An agreed statement of facts stipulated that P.O. first reported the sexual assault in 2016.
- [33] Mr. Brooks was interviewed by Cpl. Westra on September 1, 2016. In cross-examination, he agreed he was not completely honest with the police officer because he was scared, he had not received any warning that he was going to be interviewed, and he did not want to give up information to the police.
- [34] Mr. Wayne Jeffery, a toxicologist, gave evidence regarding the effects of alcohol and cocaine on the system in relation to F.B. and J.B.
- [35] Ms. Bernice Oxley gave expert evidence regarding the proper procedures to be followed by X-ray technicians.
- [36] The trial judge, in lengthy reasons for judgment, did not accept the evidence of Mr. Brooks. He reviewed his similar fact ruling again (as detailed below) and concluded that A.A.'s evidence was admissible with respect to all three counts and that he could use the evidence of each count as similar fact evidence with respect to the other counts. He accepted the evidence of F.B. and J.B., relying on similar fact evidence and what he referred to as external confirmation or consistencies (also discussed further below). The evidence of P.O. left him with a reasonable doubt. As a result, he convicted Mr. Brooks of the counts in relation to F.B. and J.B. and acquitted of the count relating to P.O.

Issues on appeal

- [37] Mr. Brooks alleges the judge erred in law by:
- (1) admitting the similar fact evidence;
 - (2) his assessment of credibility (by bolstering credibility through prior consistent statements);
 - (3) applying uneven scrutiny to the evidence; and
 - (4) rendering inconsistent verdicts.

Issue #1: Similar fact evidence

Legal framework

- [38] In *R. v. Schneider*, 2022 SCC 34 at para. 36, the Court refined the three-part test judges are to apply regarding the admission of evidence: (a) whether the evidence is relevant; (b) whether it is subject to an exclusionary rule; and (c) whether to exercise their discretion to exclude the evidence.

A. Relevance

- [39] The first step is ascertaining relevance. Relevance is determined "by asking whether, in light of all the other evidence, the at-issue evidence logically tends to make a fact in issue more or less likely. This standard applies to all evidence in criminal trials" (Schneider at para. 45). The determination of relevance is a question of law and reviewable on a correctness standard (Schneider at para. 39).
- [40] Relevance is determined by applying logic and human experience. The threshold for relevance is low and judges can admit evidence that has modest probative value (Schneider at para. 39).
- [41] At the first stage of the analysis, the question is simply whether the evidence is relevant to a fact in issue. The issue here was whether the allegations made by the complainants were true, and that turned on the credibility and reliability of F.B., J.B., and P.O.
- [42] The law relating to similar fact evidence tends to commence with the second and third tests in the Schneider framework, in that relevance is often discussed within the probative value analysis of the evidence. In Schneider, the weighing of the probative value and the prejudicial effect is the third step of the test. For example, in *R. v. Handy*, 2002 SCC 56 at paras. 52 and 54, the Court affirmed that the test is as stated by McLachlin J. (as she then was) in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717 at p. 732, and summarized it as follows:
- [55] Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.
- [43] Evidence of prior conduct is generally inadmissible if it goes solely to disposition (*Handy* at para. 50, citing *B. (C.R.)* (at pp. 734-735)).
- [44] As noted in *Handy*, citing Lord Herschell L.C. in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 at p. 65:
- [44] On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question [of] whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.
- [45] The rationale for the admission of the evidence is that the similarities of the acts in question defies coincidence or other innocent explanations (*Handy* at para. 47). However, this tends to mix relevance with the weighing process.

- [46] To assess relevance at the first stage, it is simply a question of examining if the evidence (in the absence of an exclusionary rule) would be relevant to a fact in issue. The "degree of relevance" is weighed at the third stage to take into account the exclusionary rule.

B. Exclusionary rule

- [47] Needless to say, the evidence is subject to an exclusionary rule. Evidence of discreditable conduct outside the confines of a charge is presumptively inadmissible. The evidence is inadmissible because an accused "has only to answer to the specific charge contained in the indictment" (Handy at para. 43, quoting *Leblanc v. R.*, [1977] 1 S.C.R. 339 at p. 345). The evidence of disposition or propensity is "exceptionally admissible" (Handy at para. 51).
- [48] In Handy, the Court summarized the general exclusionary rule as follows:
- [72] Proof of general disposition is a prohibited purpose. Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but "moral prejudice" and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person. The defence of "innocent association" in B. (F.F.) was simply another way of expressing the denial by an accused of an element of the offence. The evidence of his prior discreditable conduct of a distinctive and particular nature, was considered to be strongly probative of specific issues in the case. Thus read, B. (F.F.) is quite consistent with B. (C.R.), and should not be interpreted as a rival "two-step" variant of the test.

[Emphasis in original.]

- [49] The issue of whether evidence falls within an exception from the general exclusionary rule is a question of law that is reviewed on a correctness standard (*Schneider* at para. 58).
- [50] The existence of an exclusionary rule invokes the weighing process to determine admissibility.

C. Probative value versus prejudicial effect

- [51] Evidence that is presumptively inadmissible may be exceptionally admissible when the probative value of the evidence outweighs its prejudicial effect. The probative value of the evidence in relation to the issue in question must be so high that it displaces the heavy prejudice that will inevitably inure to the accused where the evidence of prior immoral or illegal acts is presented to the jury (Handy at para. 52, quoting B. (C.R.) at p. 732).

Probative value

- [52] In assessing the probative value, the judge must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn (Handy at para. 26, quoting *R. v. Robertson*, [1987] 1 S.C.R. 918 at p. 943).

- [53] The value of the evidence must be assessed in relation to the issue to which the evidence is said to be relevant (Handy at para. 69, quoting B. (C.R.) at p. 732). The issue must be something beyond the general disposition of the accused. As noted in Handy at para. 72, bad character is not an offence known to law. The identification of the issue is essential to the weighing process. "Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact" (Handy at para. 73).
- [54] In Handy, the Court noted:
- [74] The issues in question derive from the facts alleged in the charge and the defences advanced or reasonably anticipated. It is therefore incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded [citations omitted]. The relative importance of the issue in the particular trial may also have a bearing on the weighing up of factors for and against admissibility. Similar fact evidence that is virtually conclusive of a minor issue may still be excluded for reasons of overall prejudice.
- [55] The assessment involved in determining the cogency of the probative value of the evidence is to assess whether the evidence is strong enough to be capable of properly raising in the eyes of the jury the inferences contended by the Crown (Handy at para. 102).
- [56] Here, the judge was asked to infer from the evidence of A.A. that the actus reus had been committed in relation to the other three complainants, that the touching of the three complainants was not by accident, that there was no collusion among the three complainants and to strengthen the evidence of the three complainants.

Prejudicial effect

- [57] In assessing the prejudicial effect, the judge must assess whether the admission of the evidence will result in a jury becoming confused by the multiplicity of incidents, such that they put more weight than is justified on the similar act evidence ("reasoning prejudice") or by convicting the accused based on nothing more than bad personhood ("moral prejudice") (R. v. Shearing, 2002 SCC 58 at para. 64, citing Handy at para. 31).
- [58] The judge should also consider the effect of admitting the evidence on all aspects of trial fairness, including "the practicalities of its presentation, the fairness to the parties and to witnesses, and the potentially distorting effect the evidence can have on the outcome of the case" (R. v. J.J., 2022 SCC 28 at para. 130, citing D.M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at p. 47).

The judge's analysis

[59] The admission of the evidence of A.A. unfolded as follows: after the judge had heard the evidence of F.B. and J.B., he was asked to admit the evidence of A.A. as similar fact evidence. The Crown gave a summary of what he anticipated her evidence would be and outlined what he saw as the relevance. The Crown submitted that the evidence would assist to prove the actus reus, rebut a defence of accident, address the issue of mens rea (which appeared to be connected to the defence of accident), and address the credibility of the complainants. On the other hand, defence counsel made it clear that he was not relying on or raising the defence of accidental touching with respect to the counts that were charged.

[60] The judge, in advance of hearing the evidence of A.A. on a voir dire, ruled her evidence admissible. He indicated that counsel were content with brief reasons, with more detailed reasons to follow. He said:

The parties are agreeable that I provide a brief decision on the ultimate question as to its admissibility so as to facilitate continuation of this trial in an orderly manner and that reasons for this decision will be provided at a later time, either prior to the conclusion of the trial or contemporaneously with provision of my reasons for judgment in the trial proper once the trial concludes.

I'm satisfied the evidence can be admitted from Ms. [A.A.] with respect to her interactions with Mr. Brooks. I'm satisfied that the Crown has established, on a balance of probabilities, that the evidence proposed is relevant to specific issues in the case and that the evidence possesses sufficiently unique connecting factors that it would be inconsistent with common sense to suggest that the similarities, if ultimately accepted by the trier of fact, were due simply to coincidence.

Further, I accept that in all the circumstances the probative value of the evidence outweighs any prejudicial effect of the evidence, particularly bearing in mind that this is a judge alone trial.

As noted, I'll provide my explanation for this decision in reasons for judgment at a later time.

I am also satisfied that the evidence is admissible with respect to all counts and not simply that related to Ms. [F.B.].

[Emphasis added.]

[61] The judge provided additional oral reasons on the admissibility of A.A.'s evidence after hearing all of the evidence, save that of Mr. Brooks. In those reasons, he set out the issues to which the evidence is relevant: proof of the actus reus, rebuttal of an allegation of collusion (which had not been raised when the evidence was admitted), rebuttal of a defence of accident (also noted as innocent association and lack of intent), and to support the credibility of the complainants (Admissibility Ruling at para. 12).

- [62] The judge acknowledged that the defence was not raising the defence of accident but concluded that accident was raised because J.B. was asked if Mr. Brooks touched her hips in order to roll her over for the X-ray (Admissibility Ruling at para. 13).
- [63] The judge further concluded that the issue of collusion was raised because the defence questioned J.S. and P.O. regarding being "Facebook friends". He stated that "there was no suggestion of contact or connection among the four alleged complainants" (Admissibility Ruling at para. 20). He referred to a "hint" of connection between J.S. and P.O. as Facebook friends, but noted that J.S. had no recollection of P.O. Neither P.O. nor J.B. testified that they knew each other, yet the judge concluded that the evidence with respect to collusion was "unclear".
- [64] The judge said the following about the similarity of events:
- [17] Regarding similarity in detail or distinctive features unifying the incidents, there is a unifying thread connecting the four alleged incidents in that they are said to have occurred while in hospital, while alone in an x-ray room with Mr. Brooks, where as the assigned x-ray technician he was to perform an x-ray on each of the four women. The act said to have occurred is essentially the same with respect to [F.B.] and [P.O.], while [J.B.'s] incident involved exposure of her vagina and to some extent her breasts. The uncharged incident with [A.A.] involves an allegation that Mr. Brooks grabbed her breasts on a couple of occasions.
- [18] While not the same acts in [A.A.]'s situation as any of the other events, there is, as I say, a unifying thread of sexual misconduct in relation to [A.A.] and the three charged matters. The acts need not be identical to still have a unity in features. The context and opportunity for Mr. Brooks is a unifying feature, as well. In this regard, the opportunity for close physical proximity in the course of performing x-ray functions is also of note.
- [65] I note that the evidence of A.A. is that Mr. Brooks put his hands inside her gown and "lifted" her breasts from the side without touching the nipples, as opposed to "grabbing" her breasts, as stated by the judge at para. 17 of the Admissibility Ruling.
- [66] In concluding that the evidence was admissible, the judge said that the question of whether the evidence of A.A. was admissible to all counts or just to F.B. would be determined at the end of the trial (Admissibility Ruling at para. 26), overlooking that he had already concluded that the evidence was admissible in relation to all counts.
- [67] The judge made no reference to "dissimilarities" in the first two sets of reasons.
- [68] In his reasons for judgment, the judge again reviewed the similar fact evidence ruling. He again stated, in error, that he left the issue of the extent of the admission of A.A.'s evidence to the end of the trial, as well as the issue of the count-to-count or cross-count similar fact evidence. He stated:

- [4] I will first review the evidence of the complainants in the three counts before the Court without considering cross-examination to consider afresh the similar fact evidence application. I will then proceed to consider the evidence of the accused and the other evidence as a whole.
- [69] The judge then appeared to revisit the issue of the similar fact evidence and supplemented his reasons previously given. He identified the key issue, which was the actus reus, or whether the acts as described by the three complainants occurred (at para. 5).
- [70] He noted the issues identified by the Crown to which the evidence of A.A. and cross-count similar fact was relevant: to rebut collaboration or collusion (which the judge acknowledges has been disavowed by the defence), to undermine the defence of accident (which was disavowed by the defence from the outset and confirmed after Mr. Brooks testified), and to support the credibility of the complainants (at para. 36).
- [71] At paras. 38-39, the judge set out what he saw as the similarities and dissimilarities in relation to the evidence:
- [38] With respect to similarities and dissimilarities of Ms. AA's complaint, compared with those of Ms. FB, Ms. JB and Ms. PO, each involve Mr. Brooks as the x-ray technician being alone in the x-ray room with a woman who requires an x-ray. Each of the four women testified to being clothed in hospital gowns [although he later found P.O. was likely not wearing a hospital gown]. Each of the four women testified to sexual assaults against them by Mr. Brooks. The nature of the sexual assaults differed in that Ms. FB and Ms. PO testified to Mr. Brooks inserting his fingers or hand in their vagina. Ms. PO testified to him also fondling her breasts while she was lying on a hospital bed or x-ray table. Ms. AA testified the sexual assault in her case involved Mr. Brooks standing behind her and placing his hands on her skin under the hospital gown and cupping and lifting her breasts on two occasions during the course of the X-ray process. Ms. JB testified to Mr. Brooks touching the sports bra in the front and moving it exposing at least part of her breasts, as well as moving her underwear exposing her [genitalia]. None of the alleged sexual assaults matched each other with precision, but there is a unifying thread of sexual misconduct that links all four instances. While not relevant to the allegations of Ms. AA, the three charged allegations each involved the complainants being in some manner under the influence of intoxicating substances. Ms. FB was under the influence of alcohol, Ms. JB under the influence of cocaine, alcohol and either Ativan or Valium and Ms. PO under the influence of pain medication administered to her by medical personnel, together with alcohol from the baby shower.
- [39] A significant dissimilarity relates to the proximity in time of the various similar acts. While this is not an issue with respect to the incidents involving Ms. FB and Ms. AA, as their events occurred within hours of each other in 1990, there is then a seven-year gap between those events and that of Ms. JB (1997). And then there is a further four year gap between the event involving Ms. JB and Ms. PO (2001). These latter gaps are significant periods of time, particularly if one considers the likely number of x-rays Mr. Brooks would have performed

over those years. The evidence of Ms. Oxley suggested a figure of between 5 and 30 a shift.

[72] I note, parenthetically, that the description of "cupping" A.A.'s breasts is not found in her evidence, but in a description of her evidence provided by the Crown in submissions.

[73] In concluding that the evidence of A.A. and the cross-count evidence was admissible, the judge found:

[42] I conclude that there are significant similarities of the circumstances of Ms. AA and the three charged matters that is probative to the issues identified by Crown - proof of the actus reus of the offence, to undercut any suggestion of collusion, to undercut any suggestion of accident, and to support the credibility of the complainants in the three charged matters. While there are differences in each of the circumstances, none of them undermine the broader theme of sexual touching by Mr. Brooks occurring in the context of women being alone with him during an x-ray. The similar fact evidence meets the low bar necessary of being reasonably capable of belief. But it is important to note that at this stage I have not made findings about the ultimate credibility and reliability of the evidence. That awaits until my consideration of the evidence as a whole. That is when I will deal with frailties of the evidence as presented, for instance, through cross examination.

[43] There is clearly prejudice to Mr. Brooks in admitting to the similar fact evidence of Ms. AA, and allowing cross-count application of similar fact evidence. The prejudice is particularly acute when the act charged is considered a morally repugnant offence such as sexual assault by a health care professional on patients. But it is well accepted that the twin dangers of moral and reasoning prejudice are significantly lessened when the trial is conducted by a judge alone. I conclude that the evidence of Ms. AA and the cross-count evidence has significant probative value and it is not outweighed by the prejudicial effect on Mr. Brooks. The evidence is directly tied to proving the actus reus of sexual assaults, undercuts suggestions of accident and is useful in assessing credibility. I must of course be mindful of the obligations of R. v. WD when assessing credibility in light of the exculpatory evidence of Mr. Brooks when he testified. I find that the evidence of Ms. AA, and the evidence on each count, is admissible as similar fact evidence.

[44] While the cross-examination of Ms. JB, Mr. JS and Ms. PO canvassed the possibility of collusion as Mr. JS and Ms. PO are "Facebook friends", there was no credible suggestion of collusion and, indeed, counsel did not raise it in his written closing submissions.

[Emphasis added]

[74] Thus, the judge appears to have excluded collusion as a relevant factor in terms of the similar fact evidence.

[75] Absent an exclusionary rule, the evidence of A.A. would be relevant to support the evidence of the complainants in a general way. On the evidence before the judge at the time of his first ruling, there was a vague reference to collusion. Part of the difficulty is that the judge admitted the evidence without hearing it on a voir dire and without fully understanding the

issues that would in fact be engaged in the trial. The judge could not conduct a proper analysis of whether the evidence had probative value at the point he was asked to make his ruling.

Analysis of the admissibility of A.A.'s evidence

[76] In my view, the judge erred in admitting the evidence of A.A. as similar fact evidence. A person is not required to defend a case with which he is not charged except in exceptional circumstances.

A. Proof of the actus reus

[77] Here, the judge concluded that the evidence of A.A. was admissible to establish the actus reus of the charged offences, however, the actus reus of the event involving A.A. was never in issue. Mr. Brooks did not deny touching A.A. as alleged. He acknowledged that he touched her breasts on the sides with his hands, incidental to taking the X-ray. He said he was trained in a certain way to align someone in front of the bucky when performing a chest X-ray. He said at the time "Excuse my hands" or "Please excuse my touch". When the incident was drawn to his attention, he wrote a letter of apology. He also said that the training was changed because of this incident. A.A. was completely sober when the incident occurred. I note that the judge misstated the nature of A.A.'s evidence when he referred to Mr. Brooks "grabbing" her breasts and "cupping" her breasts. A.A. said he "lifted" her breasts. In my view, that is a distinction with a difference given the context of the incident.

[78] The circumstances of the incident with A.A. bear almost no relation to the incidents described by the other three complainants. The other complainants were all affected by alcohol or drugs to varying degrees, making them vulnerable. Each of the complainants alleged touching of or near the vaginal area with various degrees of intrusion. P.O. and J.B. alleged touching near or of the breasts. All were lying down when the touching occurred. The touching alleged by the three complainants clearly had no relation to the taking of an X-ray. Mr. Brooks' defence of those allegations was a complete denial. The incident in relation to A.A. does not support the inference that the actus reus in relation to F.B., J.B., and P.O. occurred. I say this bearing in mind the closeness in time with respect to F.B. and A.A.

B. Defence of accident

[79] In addition, the judge concluded that the similar fact evidence was relevant to the defence of accident and that it was a live defence, even though defence counsel disavowed the defence from the outset. All the evidence demonstrates that Mr. Brooks denied touching the three complainants in the way they described. He testified to the "log-roll" in relation to J.B. and P.O., however, there was no suggestion that either had mistaken the "log-roll" for the touching of their breasts and vaginal area. A.A.'s evidence had no relevance to a defence of accident. Accidental touching was raised in relation to her account; however, it was not raised with respect to the charged offences.

C. Collusion

- [80] The judge appears to have acknowledged that collusion was not a relevant matter by the end of the trial. He was correct in that finding. There was no evidence to support a finding of collusion among the complainants.
- [81] I note that the defence counsel at trial did not refer to collusion in his written submissions (see the judge's reasons at para. 44) and did not suggest there was any collusion among the complainants. He submitted it suspicious that J.S. denied knowing P.O., when she said she had met him several times, and suggested the judge could consider that when considering J.S.'s evidence. He did not press the suggestion of collusion.
- [82] On appeal, defence counsel raises the judge's failure to address collusion as an error, as he submits that the judge relied on collusion as a portal for the similar fact evidence. He submits that collusion needed to be addressed in advance of the ruling on admission. As seen above, in his first ruling, the judge did not rely on collusion as an issue on which to admit the evidence. In his second ruling, he did raise it. However, in his final ruling, the judge did address collusion and found that there was no evidence of collusion to rebut. In my view, in a rather roundabout way, the judge did not in fact rely on the similar fact evidence to rebut collusion.

D. Supporting the credibility of the complainants

- [83] That leaves the issue of supporting the credibility of the complainants. In Handy, the Court said the following on the issue of the credibility of a witness:
- [115] The Crown says the issue generally is "the credibility of the complainant" and more specifically "that the accused has a strong disposition to do the very act alleged in the charges against him", but this requires some refinement. Care must be taken not to allow too broad a gateway for the admission of propensity evidence or, as it is sometimes put, to allow it to bear too much of the burden of the Crown's case (Sopinka, Lederman and Bryant, supra, at § 11.26). Credibility is an issue that pervades most trials, and at its broadest may amount to a decision on guilt or innocence.
- [116] Anything that blackens the character of an accused may, as a by-product, enhance the credibility of a complainant. Identification of credibility as the "issue in question" may, unless circumscribed, risk the admission of evidence of nothing more than general disposition ("bad personhood").
- [84] General issues such as "credibility", "narrative", or "nature of the relationship" are not "portals" to propensity evidence about uncharged similar facts (R. v. M.R.S., 2020 ONCA 667 at para. 72, citing R. v. Gareau, 2016 NSCA 75 at para. 51).

[85] In my view, the evidence of A.A. was uncharged propensity evidence that was not probative of a fact in issue in this case. Admission solely to support the evidence of the complainants was not a proper basis to admit the evidence, as the only relevance would be that Mr. Brooks was the "kind of person" who committed the acts in question.

E. Conclusion on the admissibility of A.A.'s evidence

[86] In my opinion, the judge erred in law in admitting the evidence of A.A. as similar fact evidence. As the judge relied heavily on the evidence of A.A. to find both F.B. and J.B. credible, a new trial is necessitated.

[87] In Handy, the Court concluded at para. 136 that if the evidence is not "properly capable of supporting the inferences sought by the Crown, the analysis generally need go no further", as the evidence has no probative value that would bring it within the exception. It is therefore not necessary to consider the prejudicial effect of the evidence.

Cross-count similar fact evidence

[88] The judge also found that he could consider the cross-counts as similar fact evidence. His reasons for doing so are very brief. However, in my view, the judge did not err when he considered the cross-count evidence.

[89] The evidence of the complainants stands on a different footing than the evidence of A.A. The count-to-count evidence was highly relevant to the proof of the actus reus, which was the main issue in the case. The evidence was sufficiently similar as all three complainants alleged sexual touching unrelated to the taking of X-rays. All were intoxicated to certain degrees by drugs or alcohol or both. The fact that the evidence also boosted the credibility of the complainants was a necessary and proper by-product of the admission of the evidence to prove a fact in issue (see R. v. Mostowy, 2019 BCCA 216 at para. 40).

[90] In Mostowy, this Court also noted that both moral prejudice and reasoning prejudice is lessened when the evidence is independently admissible as part of the charges (citing R. v. J.H., 2018 ONCA 245 at paras. 23-24):

[35] Prejudice in the similar fact context involves the two distinct concepts of reasoning prejudice and moral prejudice . This was a non-jury case where the similar fact evidence related to the counts in the information and the evidence was already before the court. As noted by this court in [R. v. T.B. 2009 ONCA 177], at para 27, there is little risk of reasoning prejudice in a judge-alone case, as the trial judge is presumed to know the law and the proper and improper use of evidence.

Further, the risk that the appellant would be convicted solely on the basis of general bad behaviour (moral prejudice) is also not a significant concern in a judge-alone trial . And, both moral and reasoning prejudice are significantly reduced in a "count-to-count" similar fact application, as the evidence is admissible independent of its status as similar fact.

[Emphasis added by Newbury J.A. in Mostowy.]

[91] Thus, based on the evidence at this trial, in my view, the judge did not err in considering cross-count similar fact evidence.

Issue #2: Prior consistent statements and credibility findings

[92] Mr. Brooks submits that the judge erred in finding that prior consistent statements bolstered the credibility of two of the complainants, F.B. and J.B.

[93] The judge said the following in his reasons:

[118] There is some external confirmation of pieces of her evidence such as her evidence that she was not comfortable with what [was] being done by Mr. Brooks and that she screamed for Mr. JS. Mr. Brooks confirmed in his evidence that she screamed for Mr. JS while in the x-ray room alone with Mr. Brooks. And while Mr. JS cannot be considered an independent witness, he does confirm Ms. JB's evidence that she informed Mr. JS about what happened the day after their return from hospital.

[128] In addition, Mr. Brooks said on direct examination that he learned of the allegations of impropriety by Ms. FB a couple of hours after leaving the hospital, when he came back for another call-out that night. He also stated in his police interview on November 29, 1990, which became Ex. 9 in these proceedings, that when he came back that night for the next call-out, one of the nurses asked him if there had been any problems with the last patient, that being Ms. FB. Mr. Brooks also said in that statement that he was again called in at about 4:00 am for another x-ray and this time Dr. Hatelid asked him to write down what had happened with respect to Ms. FB. It was not until later on when Mr. Brooks got home that Dr. Hatelid called and told Mr. Brooks about the complaint from Ms. FB. Clearly, Ms. FB said something to someone shortly after the event about her interaction with Mr. Brooks. Otherwise, there would have been no reason for the nurse to ask Mr. Brooks nor for Dr. Hatelid to have him write down what occurred. This is another external anchor supporting her evidence.

[94] The judge apparently considered the fact that F.B. and J.B. informed someone of the assault as external confirmation regarding their evidence.

[95] In my view, the judge's reliance on this evidence was entirely consistent with this Court's judgment in *R. v. Gill*, 2018 BCCA 275 at para. 76, and affirmed by the Supreme Court of Canada in *R. v. Langan*, 2020 SCC 33, relying on the dissent of Bauman C.J.B.C. at para. 91 of the Court of Appeal decision (2019 BCCA 467):

[91] My colleague has already reproduced para. 76 of Justice Fitch's reasons (at para. 44 of Justice Stromberg-Stein's reasons) and I would highlight this admonition from the Court in *Gill*:

The prior consistent statement is not admitted for the truth of its contents or as a form of self-corroboration of the trial testimony of the witness. The trier of fact also must not rely on the statement to support the prohibited inference that repetition enhances truthfulness. Rather, "the probative value of the statement lies in the inferences that can be drawn from the timing and circumstances of the statement, rather than the simple fact that the [witness] has said the same thing before"

[Emphasis added.]

[96] The evidence that each complainant told someone about the fact (as opposed to the details) of the assault is admissible as narrative. The relevance is the timing of the statement as opposed to its content. Other witnesses confirmed the statements either directly, as in the case of J.B.'s statement to J.S., or circumstantially, as in the case of F.B. and the inquiry of Mr. Brooks by the attending physician. In my view, the judge did not err in his consideration of that evidence.

Issue #3: Applying uneven scrutiny

[97] Given that in my view, a new trial need be held, it is not necessary to address this ground of appeal relating to the judge's assessment of the evidence.

Issue #4: Inconsistent verdicts

[98] Mr. Brooks submits that the verdicts are inconsistent because of the acquittal in relation to the P.O. count and the convictions in relation to F.B. and J.B. The judge clearly outlined his reasons for not accepting the evidence of P.O. The evidence of the sexual assault and the manner of the assault with respect to P.O. was connected to her insistence that she was wearing a hospital gown. There was independent evidence of a zipper pull on the X-ray that contradicted the evidence of what she was wearing. That was sufficient for the judge to have concerns about relying on her evidence to convict Mr. Brooks. There is no inconsistency in his conclusions with respect to the other complainants.

Fresh evidence application

[99] As there will be a new trial, there is no need to consider the fresh evidence application, which was in relation to a statement made by J.B. for the first time in her victim impact statement.

Conclusion

[100] In my opinion, the judge erred in admitting the evidence of A.A. as similar fact evidence. The evidence played a significant role in the assessment of the credibility of F.B. and J.B. Thus, a new trial must be ordered.

[101] I would allow the appeal, set aside the convictions on count one and count two, and order a new trial.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Grauer"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/23/01/2023BCCA0121.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-brooks-2023>

Prepared on 25 October 2026 · Esheria