

CANADA / JUDGMENT

R. v. C.M.C.

2023 BCSC 1097

COURT

Supreme Court of British Columbia

DECIDED

26 June 2023

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2023 BCSC 1097 R. v. C.M.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. C.M.C.,

2023 BCSC 1097

Date: 20230626

Docket: 32964-4

32964-5

Registry: Vancouver

Rex

v.

C.M.C.

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Before: The Honourable Mr. Justice Gomery

Ruling on Application to Quash the Indictment

Counsel for the Crown:

A. Gal-Or

Counsel for the Accused:

J. Myers

S. Purtons

Place and Date of Hearing:

Vancouver, B.C.

June 5, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2023

Overview

- [1] In this trial, the charges against Mr. C include a count encompassing many incidents of alleged sexual assaults of his spouse, Ms. J, committed over a six-year period. For almost all of that time, they were sharing a bedroom in a townhouse in Richmond, British Columbia. The period covered by the count is from 2015 through 2020. It is not disputed that there was also consensual sexual intercourse in this period.
- [2] The trial began on May 29, 2023. The jury was excused during a voir dire that took most of the first two days. The Crown opened late in the day on May 30 and called Ms. J as its only witness on May 31. Counsel for the defence, Mr. Myers, began his cross-examination on the afternoon of June 1.
- [3] On the morning of Friday, June 2, Mr. Myers delivered a written notice of application seeking an order that the count of sexual assault in the indictment "be quashed, divide[d], or further particularize[d]". Alternatively, he sought a mistrial. Crown counsel, Mr. Gal-Or, prepared written argument over the weekend and the motion was argued in the absence of the jury on Monday, June 5.
- [4] After taking some time following the argument on June 5, I dismissed the defence motion for reasons to follow. These are my reasons.
- [5] By way of overview, the sexual assault count satisfies the requirement of s. 581(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], that each count in an indictment "shall in general apply to a single transaction". It is clear from authority binding upon me that allegations of diverse incidents of sexual abuse committed by a single accused person against a single complainant over many years may satisfy the Code's requirement. It makes no difference if incidents of sexual assault were interspersed with episodes of consensual sexual interactions.

- [6] Notwithstanding the lateness of the application, it would be open to me to order that the count be divided pursuant to s. 590(2)(b) of the Criminal Code or particularized pursuant to s. 587(1)(f), if the interests of justice required it for the conduct of a fair trial and the avoidance of prejudice to Mr. C. However, I am not persuaded that there is a risk of significant prejudice in this case. Mr. C has not been taken by surprise by anything in the evidence adduced by the Crown. While the defence has available to it more lines of defence to some of the incidents alleged by Ms. J than to others, the positions that may be taken are consistent and may be raised in unison or in the alternative, as the defence thinks fit. This is a fair trial.
- [7] Allegations of sexual assault that took place at intervals over a lengthy period of time present difficulties, because complainants cannot be expected to provide a precise and fully particularized account of incidents and dates, and it is often difficult for defendants to provide an affirmative exculpatory account of their own actions, regardless of what happened. Our law nevertheless accepts that such cases should be tried. It knows no statute of limitations for criminal conduct, and does not impose detailed technical or formal requirements on the Crown in the preparation of the indictment.
- [8] It follows that none of the alternative orders sought by the defence is justified. Neither a division of counts, particulars, nor a mistrial is necessary to ensure trial fairness and in the interests of justice. I dismiss the application.

Analysis

Is count 1 a proper criminal pleading?

- [9] Count 1 of the indictment provides as follows:

Count 1:

[C.M.C.], from the 1st day of January, 2015 to the 31st day of December, 2020, inclusive, at or near Richmond, in the Province of British Columbia, did sexually assault S.J., contrary to Section 271 of the Criminal Code.

- [10] Section 581(1) requires that "each count in an indictment shall in general apply to a single transaction". Mr. C contends that count 1 violates the single transaction rule and is so drastically defective as to constitute a nullity. He emphasizes the length of the period covered by the count and diversity of sexual interactions between Mr. C and Ms. J potentially encompassed by the charge. He submits that it is important that sexual interactions potentially constituting incidents of sexual assault were separated by incidents of consensual sex.
- [11] The case law does not support Mr. C's argument. Indictments alleging sexual offences committed over lengthy periods of diverse incidents considered as a single transaction have repeatedly passed muster in the appellate jurisprudence: *R. v. Hulan*, 1969 CanLII 306 (O.C.A.); *R. v. G.L.M.*, 1999 BCCA 467 at paras. 11-12; *R. v. Sandhu*, 2009 ONCA 102 at paras.

19-23; R. v. Chamot, 2012 ONCA 903 at para. 49; R. v. Stover, 2020 BCCA 368 at para. 18. In G.L.M., four incidents of indecent assault over a period of four years were considered as a single transaction. In Sandhu, four incidents of sexual assault over a period of six years constituted a single transaction. Chamot involved many more incidents of sexual assault, again over a six year period. In Stover, a single count resulted in a conviction for sexual assault based on two incidents separated by 17 months where the complainant and the accused were "non-marital partner[s] of 20 years".

- [12] The single transaction rule is nevertheless a substantive requirement. It requires that the individual incidents grouped together in the count share some connection; R. v. Schoer, 2019 ONCA 105 at para. 62. The necessary connection may be established by some combination of similar acts, a similar course of conduct, identity of parties, and continuity of a relationship between the parties. In a case involving alleged incidents of assault or sexual assault as between partners in a familial relationship, the single transaction rule does not set a high bar. This is so for pragmatic reasons articulated by Kelly J.A. more than 50 years ago in Hulan. He stated:

The long period over which the incidents, occurred, the practical impossibility of a complainant of this age being able to recall the specific dates of the incidents, the position of influence of the prisoner, the undesirable effect on the mind of the complainant of forcing a too-detailed recall of individual incidents, all point to the necessity of a not-too-rigid application of the procedural requirements unless possible prejudice to the prisoner demands otherwise.

- [13] Hulan involved sexual abuse of a minor, but the reasoning is not limited to cases where the complainant is a child; Sandhu at para. 23. Within the context of a familial relationship, repeated incidents of unwanted sexual touching may be sufficiently connected because they were "successive and cumulative"; G.L.M. at para. 12.
- [14] It makes no difference, in principle, in the case of an adult complainant, that incidents of unwanted sexual touching may have been interspersed with consensual sexual relations. Stover was such a case. As Crown counsel pointed out in argument, there would be no reason not to consider false evidence interspersed with episodes of truth telling as a single count of perjury, or isolated good faith dealings as preventing consideration of an ongoing series of fraudulent dealings as a single transaction. In principle, incidents of sexual assault interspersed with episodes of consensual sexual activity are no different.
- [15] In short, there is nothing wrong with count 1 on its face. However, it would still be appropriate to quash the count if the manner in which it is pleaded, alleging diverse episodes of sexual assault over a six-year period, gives rise to prejudice that cannot be remedied in some other way.

Does the manner in which count 1 is pleaded prejudice the accused?

- [16] There are cases in which an apparently proper pleading gives rise to prejudice because the accused is embarrassed in their defence, or limited in their ability to know the case against them. The response in such a case may be to quash the count, to order it divided pursuant to s. 590(2) of the Code, or to order the prosecutor to furnish particulars, pursuant to s. 587(1). If the prejudice cannot be remedied in any other way, it may necessitate a mistrial, though a mistrial is a remedy of last resort that should only be granted in extreme circumstances; *R. v. Cartwright*, 2022 BCSC 618 at paras. 15-16.
- [17] Mr. C submits that he is embarrassed by the breadth of the pleading and that the appropriate remedy is to quash count 1. He seeks division of the count or particulars in the alternative, or a mistrial in the further alternative. He submits that his defence is embarrassed because he has different defences for different incidents, citing *R. v. Lilly*, 1983 CanLII 153, [1983] 1 S.C.R. 794.
- [18] In *Lilly*, a real estate broker was convicted by a judge and jury of theft of deposits transferred to his brokerage's general account. As to some of the deposits, his defence was that he was unaware of the transfers. As to others, it was that he thought he was lawfully entitled to transfer the funds. The trial judge mistakenly instructed the jury to address the question of his entitlement to transfer the funds objectively, without regard to his subjective understanding of his entitlement. This undermined the entire conviction, because, while it was clear that the jury had rejected his defence that he was unaware of certain transfers, it was impossible to tell whether he might have succeeded on the defence that he understood he was entitled to the fund in respect of those transfers, had the jury been properly instructed.
- [19] While *Lilly* illustrates the interaction of different defences under a particular fact pattern, it does not assist Mr. C's argument. The prejudice suffered by Mr. Lilly was not a consequence of the accumulation of different disputed transfers in a single count of theft. The prejudice resulted from the trial judge's mistaken instruction to the jury.
- [20] In her evidence, Ms. J describes various incidents of sexual assault by Mr. C. They fall into categories, including: vaginal penetration while Ms. J was sleeping; vaginal intercourse continuing in the face of Ms. J's protests; forced fellatio; and sexual relations to which Ms. J agreed out of fear of what Mr. C might do to her.
- [21] Mr. C has more lines of defence available in respect of some of categories than others.
- [22] For example, Ms. J's allegation that they had sexual relations to which she agreed only out of fear engages consideration of s. 265(3)(b) of the Code. Mr. C might dispute that she only consented out of fear, or that, having made reasonable inquiries, he had no basis to know and did not know that she was only consenting out of fear (engaging consideration of ss. 265(4) and 273.1). Or he may dispute that there were any such sexual relations.

- [23] In contrast, in respect of the alleged incidents of vaginal penetration while Ms. J was asleep, Mr. C's only line of defence is to deny that such incidents occurred. The effect of s. 273.1 is that no consent-based defence is available.
- [24] In the circumstances of this case, Mr. C is not prejudiced by the presence of different categories of defence in a single count. All of the defences available to Mr. C dispute the Crown's ability to prove one or more elements of its case. They are not affirmative defences. To the extent that consent-based defences are available, Mr. C can present them in succession: thus, to the extent that there were sexual relations, he may argue that they were consensual, and if consent was lacking, he may argue that he made reasonable inquiries and had no reason to know it.
- [25] Nor is Mr. C prejudiced in his defence by the fact that episodes of alleged sexual assault were interspersed with episodes of consensual sexual relations, because the law requires that each episode be considered separately, and consent must be present on each occasion; Code, s. 273.1(1.1).
- [26] Well prior to trial, Mr. C obtained disclosure of the evidence in the Crown's possession as required by *R. v. Stinchcombe*, 1991 CanLII 45, [1991] 3 S.C.R. 326. I am advised by Crown counsel that the Crown made disclosure in July 2021 and that the disclosure package included a transcript of a full statement given by Ms. J. It is not suggested that Ms. J added anything of substance to her allegations in the statement, when she testified in chief.
- [27] Mr. C submits that there is prejudice in this case through the operation of the rule that, while a jury verdict must be unanimous, the jury need only achieve unanimity as to the elements of the offence, and not as to how those elements have been proved; *G.L.M., R. v. R.G.S.*, 2023 BCCA 52 at paras. 74-85. In *R.G.S.* at para. 93, Justice Bennett spoke for the court in declining to refer the unanimity rule to a five-judge division of the Court of Appeal for reconsideration. Describing the rule as "well-settled at the level of the intermediary courts of appeal" (at para. 94), she also observed:
- [93] Preferring an indictment or information that has a wide range of dates covering a multitude of allegations may well be problematic for an accused. However, experience also tells us that when there are long ongoing events, often seen in sexual assault cases where the child is the complainant, it is difficult, if not impossible, to precisely define the dates and the events.
- [28] I view Justice Bennett's comment in *R.G.S.* as an acknowledgment that the operation of the unanimity rule may possibly give rise to prejudice in a case such as this, involving a multitude of incidents grouped under one count as a single transaction. This must be the exception rather than the ordinary course of events, because the Court of Appeal views the possibility of prejudice as insufficient grounds to warrant a re-examination, by a five-judge division, of the well-settled rule.

- [29] I am not persuaded that there is a significant risk of unusual or exceptional prejudice to Mr. C through the operation of the unanimity rule in the circumstances of this case. Having heard Ms. J's evidence in chief and, at the time this application was heard, a portion of her cross-examination, it did not appear to me that the variety of incidents and interaction of differing lines of defence in relation to different categories of incident would give rise to particular difficulties in charging the jury or for the jury in its consideration of count 1. (I might add that nothing occurred during the continuation of the trial, after I decided this application, to change my impression.) This case is not out of the ordinary.
- [30] I therefore conclude that Mr. C is not prejudiced by the manner in which count 1 is pleaded in a way that would justify any of the relief sought by Mr. C. To the extent that there is any prejudice, it is a consequence of well-established rules and common practices in the pleading and presentation of this kind of criminal case.
- [31] These are my reasons for dismissing Mr. C's application.

"Gomery, J."

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Prepared on 27 October 2026 · Esheria