

CANADA / JUDGMENT

R. v. Cartwright

2022 BCSC 1971

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1971 R. v. Cartwright

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cartwright,

2022 BCSC 1971

Date: 20221110

Docket: X080649

Registry: New Westminster

Between:

Rex

And

Matthew Dwayne Cartwright

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Before: The Honourable Madam Justice Murray

Reasons for Judgment on Mistrial Application

Counsel for Crown:

W. Dawson, K.C.

Counsel for Defendant:

D. Ferguson

C. Paquette

Place and Date of Hearing:

New Westminster, B.C.

October 28, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2022

Introduction

- [1] Mr. Cartwright is charged with sexual assault arising from an incident which is alleged to have happened on November 13, 2016. He is being tried for a third time by a judge and jury. The first trial took place in October 2018, and, after an appeal, the matter was sent back for a retrial. The second trial took place in April of this year and resulted in a mistrial as a result of the Crown's improper cross-examination of Mr. Cartwright.
- [2] This trial commenced before the jury on October 18, 2022. The evidence concluded by the end of the day on October 26, 2022. On October 27, 2022, closing arguments were made by the defence and then by the Crown. After the Crown's closing, defence counsel indicated that they had concerns about the Crown's submissions. I adjourned to October 28, 2022, to allow defence counsel time to bring a mistrial application. After hearing submissions on October 28, I granted the mistrial with reasons to follow. These are those reasons.
- [3] Mr. Cartwright applies for a mistrial. He submits that the jury can no longer judge the case fairly given the prejudicial remarks made by Crown counsel in her closing address and argues that no remedial action can rectify the combined effects of the improper remarks.
- [4] In summary, Mr. Cartwright says that the Crown:
- a) asked the jury to rely on multiple facts that are not in evidence;
 - b) turned Mr. Cartwright's constitutional right to be present for his trial against him;
 - c) asked the jury to apply impermissible stereotypical reasoning at length;
 - d) unfairly accused defence counsel of advancing impermissible stereotypical reasoning;
 - e) improperly asked the jury to shift the burden of proof by stating the complainant had no motive to lie;
 - f) misrepresented Mr. Cartwright's police statement;
 - g) misrepresented Mr. Cartwright's evidence; and

h) asked the jury to rely on facts not in evidence to undermine Mr. Cartwright's credibility.

[5] In setting out the bases for the mistrial application I will quote extensively from Mr. Cartwright's written submissions.

Crown counsel presented facts that were not in evidence and that the Court refused to allow the Crown to elicit in re-examination

[6] Following the cross-examination of the complainant, Crown sought to re-examine the complainant to elicit evidence regarding various types of nylons. This was in response to defence questioning in cross-examination where the complainant agreed that her nylons could be described as "skin-tight." The Court held that this was not proper re-examination and did not permit Crown to elicit the evidence in redirect.

[7] When addressing the jury in closing, the Crown called on the female members of the jury to educate the male members of the jury on the varying types of nylons that are available. Crown then presented facts about different types of nylons that were not in evidence at trial. Crown then suggested that the defence was asking the jury to infer that "you would need two people to remove" the skin-tight nylons, an argument defence did not make to the jury. Crown further stated that defence did not elicit evidence from the complainant about the specific type of nylons she was wearing.

[8] In essence, the Crown asked the jury to rely on facts that were not in evidence, which she provided and which she asked the female members of the jury to provide to the male members, regarding nylons to discount the defence case. The impropriety of these remarks is aggravated by the fact that the Court had previously disallowed the Crown from leading this evidence in re-direct.

Crown counsel continually asked the jury to draw inferences from the evidence based on impermissible stereotypical reasoning

[9] Crown counsel repeatedly appealed to the jury to draw inferences from the evidence based on impermissible stereotypical reasoning. For example:

- a) The Crown invited the jury to ask themselves, "Why would you want to save a text message from someone who sexually assaulted you?" The question asked the jury to draw an assumption as to the appropriate reaction of a victim of sexual assault.
- b) When discussing witness CP's evidence in comparison to the complainant's, the Crown suggested that because CP was not the victim of a sexual assault she did not have reason to remember the relevant details from the night of the incident. This suggestion insinuates that the memories of victims of sexual assault are more reliable than those of other people.

- c) After asking the jury not to make judgments about the complainant's activities that night -- specifically, that she was a married woman with children who went out drinking with friends and met up with men from a dating website -- the Crown stated that, while it might "not have been very wise on her part" to have gone out with male strangers, "it did not mean she deserved to be sexually assaulted".
- d) The Crown suggested to the jury that the complainant did not physically respond to Mr. Cartwright in any "caressing" way, thereby asking the jury to infer that there must be intimacy for a sexual activity to be consensual.
- e) While arguing that the complainant had no reason to falsely accuse Mr. Cartwright, the Crown stated, "This is not a woman who has sex and then cries foul. That is not how it happened. She went to her husband and friends and collected documents and then went to police." The Crown therefore improperly asked the jury to rely on there being no apparent motive to lie and relied upon stereotypical reasoning as to how a victim of sexual assault should act.
- f) The Crown suggested that the complainant appeared traumatized and wracked with guilt. The Crown stated that "it's not as if she's one of these complainants that comes to court and put on crocodile tears." This statement is imbued with myths and stereotypes about false rape accusations.
- g) The Crown noted that the complainant was "a responsible parent" who had arranged for her children to stay with her parents on the night of the incident. The Crown reiterated that the complainant testified that she planned on having one drink and listen to the band at the Artful Dodger. When witness CP arrived, the complainant was drinking tea or coffee. When she started drinking alcohol, the complainant arranged for a sober car service to move her car. The Crown told the jury that each of these acts were "responsible acts that [the complainant and her friend] made when they wanted to continue partying." The implication being that responsible parents are less likely to engage in a random sexual encounter and that irresponsible parents are more likely to be the victims of sexual assault or have more responsibility for their own victimization.
- h) The Crown made inappropriate comments about the complainant's character. She characterized the complainant as "kind of like the mom" of her friend group in explaining why the complainant picked up Mr. Cartwright's business card and why the complainant grew worried for Mr. Cartwright's friend when he disappeared after eating magic mushrooms. The inference of characterizing the complainant this way was that such a person would be less likely to consent to a sexual encounter with a near-stranger.

- i) After noting the complainant's evidence that she "froze" when the alleged sexual assault occurred, the Crown posited that this "is a reasonable response by someone being sexually assaulted in a stranger's apartment", particularly in light of the complainant's "lack of sleep and intoxication." The Crown then asked the jury to consider how they might freeze if they came into their house and heard noises that might be an intruder.
- j) The Crown stated that the complainant and Mr. Cartwright were not particularly close, approximately two or three feet away from each other, at the time of the sexual encounter, and that this was not an "intimate" position to have loving sex with someone. Again, this statement invited the jury to infer that only romantic or loving sex can be consensual.
- k) The Crown stated there was no evidence that the complainant had a romantic interest in Mr. Cartwright or his friend, with the implication being that romantic interest is a prerequisite for consensual sex.
- l) The Crown stated that the complainant "did everything you can expect from a complainant in a sexual assault case", despite warning the jury repeatedly that they should not appeal to stereotypical reasoning about how a sexual assault complainant should react.

Crown counsel asked the jury to rely on facts that were not in evidence.

[10] In addition to the Crown's remarks regarding different types of pantyhose, the Crown made several additional statements that asked the jury to rely on facts that were not led in evidence at trial, including the following:

- a) The Crown told the jury that the "police are responsible for asking relevant questions" when interviewing people. This statement is aggravated by the Crown's heavy reliance on Mr. Cartwright's November 24, 2016 statement to the police in attacking his credibility. The Crown's remarks could leave the jury with the impression that the police officer interviewing Mr. Cartwright asked all the relevant questions, and the failure to provide detailed responses to all the relevant questions undermined Mr. Cartwright's credibility. It is noteworthy that the Crown called no police witnesses to testify at trial.
- b) The Crown referred to police warnings to the community that instruct civilians not to resist during robberies. She added that, "if that [logic] applies to outside, it also applies to a stranger's living room". These remarks were made in the context of asking the jury to find that the complainant had a reasonable fear that harm could result if she resisted Mr. Cartwright.
- c) The Crown stated that Mr. Cartwright "got on top" of the complainant during the sexual intercourse. This was not in evidence. The impropriety of this statement is aggravated considering the Crown's repeated reliance on stereotypical reasoning.
- d) The Crown asked the jury to reflect on their own experiences with people who become emotional and cry when intoxicated. This statement was made while addressing the complainant's evidence of being extremely upset and sending a text reading "HELP ME"

along with Mr. Cartwright's address to her husband at 3:36 a.m. on November 13, 2016, after hearing Mr. Cartwright and witness CP engaging in sexual activity. The Crown therefore asked the jury to use facts not in evidence to minimize an appropriate defence challenge to the complainant's credibility.

- e) The Crown suggested that it is generally accepted that sexual assault is an act of physical violence. This fact may be true regarding the legal definition of sexual assault, but to suggest that sexual assault must be an act of violence is potentially prejudicial.
- f) The Crown told the jury that they should draw no adverse inference from the fact that the complainant described the sex as "fairly rough" for the first time on October 13, 2022, almost six years after the incident, because it was the fault of Crown counsel for not previously asking her what she meant by "thrusting." Crown called no evidence to support this assertion.

Crown counsel turned Mr. Cartwright's right to be present for his trial against him.

- [11] The Crown asked the jury to find the complainant credible because she appeared to be testifying from memory. She stated that this was unlike Mr. Cartwright, who was relying on hearing evidence from other witnesses. Mr. Cartwright submits that the Crown used his right and obligation to be present for his own trial against him by asking the jury to make an adverse credibility finding vis-à-vis the complainant.

Crown counsel insinuated that defence counsel was engaging in stereotypical reasoning.

- [12] In closing, the Crown alleged that the defence had engaged in stereotypical reasoning. For example, the Crown said that, "if there is any type of suggestion that she was out to have a hook up with [Mr. Cartwright's friend], that would be speculation." The Crown also said the defence had asked the jury to infer that the complainant leaving witness CP at Mr. Cartwright's apartment was not consistent with the way a sexual assault victim would act.
- [13] Defence counsel submits that no suggestion to this effect was made. Defence counsel was careful to avoid asking the jury to engage in such forbidden reasoning.

Crown counsel suggested the complainant had no motive to lie.

- [14] In closing, the Crown stated that the complainant had "no motive to lie", on the basis that her marriage "was already on the rocks" and she "didn't have any plans to separate." Mr. Cartwright argues that these remarks not only engage stereotypical reasoning, but they ask the jury to reverse the burden of proof from the Crown to the accused.

Crown counsel misrepresented Mr. Cartwright's statement to the police.

- [15] The Crown did not lead Mr. Cartwright's statement as part of the evidence in the Crown case. The statement was used solely for the purposes of cross-examination.

[16] In her closing, the Crown stated that Mr. Cartwright told Constable Moisan during his November 24, 2016 interview that all he could say was that the complainant "just laid there." In fact, Mr. Cartwright told the police the following:

Q: Okay, at any point did she-

A: Not at all.

Q: ...Or, like, is her, like, physical behaviour, was showing something?

A Not at all, she didn't push me--

Q Okay.

A ...She didn't do nothin'. She just laid back, and... She... She was moaning, she was, like ... She was making sounds like somebody has sex. Somebody that has sex makes sounds like, you know?

[17] Throughout the use of the statement in cross-examination, Mr. Cartwright continually referred to the fact that he had told the officer that it appeared to him that the complainant was enjoying the sexual activity. To suggest that Mr. Cartwright told the officer the complainant "just laid there" while he engaged in sexual activity is a grave mischaracterization of his police statement.

Crown counsel referred to Mr. Cartwright's police statement on several occasions as if it had been led as part of the Crown case.

[18] Finally, Crown counsel referred to the police statement on several occasions as if it had been led as part of the Crown case. For example, in discussing the fact that he had made comments about the complainant making noises in his police statement, the Crown argued that "noises could also be a woman making noises in pain." The Crown never put anything to Mr. Cartwright about the complainant making noises of pain; in fact, his evidence was the opposite. In addition, the complainant herself never described the sex as painful at the time.

[19] The Crown also repeatedly referred to Mr. Cartwright "grabbing [the complainant's] butt" in her closing address. Mr. Cartwright did not adopt this evidence; he stated that what he said in his police statement was not accurate. Although the Crown is entitled to point to this inconsistency, the Crown cannot suggest that Mr. Cartwright agreed that he "grabbed her butt."

The Law

Mistrials

[20] A trial judge possesses the discretionary power to grant a mistrial where the fairness of the trial process has been compromised. A mistrial should only be granted where there is a "real danger of prejudice to the accused or danger of a miscarriage of justice": R. v. Burke, 2002 SCC 55 at para. 74; R. v. Cawthorne, 2016 SCC 32 at para. 39.

- [21] The law regarding mistrials in the context of jury trials was succinctly set out by Smart J. in *R. v. Sipes*, 2012 BCSC 1720:
- [8] The decision as to whether a mistrial should be granted is a discretionary one. However, the power to declare a mistrial should only be used "in the clearest of cases", where there has been a "fatal wounding of the trial process" which cannot otherwise be remedied: *R. v. Dueck*, 2011 SKCA 45, at para. 30; *R. v. Arabia*, 2008 ONCA 565, at para. 52; and *R. v. Lising*, 2004 BCCA 33, at para. 59.
- [9] Another way this test has been expressed is: whether the impugned evidence "could have affected the jury to the point that the entire trial was compromised and that no remedy other than a new trial was available": *R. v. Khan*, 2001 SCC 86, at para. 32.
- [10] Thus, in considering whether to grant declaration of mistrial, the court must assess the possible impact of the evidence on the jury and the effectiveness of "any corrective measure which has been brought, or could be brought ... to remedy the irregularity": *Khan*, at para. 80. In considering the possible impact of the evidence, the applicant is entitled to advance his or her case "on the basis of the real possibility of the worst-case scenario": *Khan*, at para. 33.
- [22] A mistrial may be directed where an improper closing address by Crown counsel would render the trial unfair.

Closing Addresses

- [23] The Ontario Court of Appeal in *R. v. Clyde*, 2021 ONCA 810 at para. 34, recently summarized the limits imposed on the Crown in giving closing addresses:
- "The Crown occupies a special position in the prosecution of criminal offences, which 'excludes any notion of winning or losing' and 'must always be characterized by moderation and impartiality': *R. v. T. (A.)*, 2015 ONCA 65 at para. 26, citing *R. v. Boucher*, [1955] S.C.R. 16 at paras. 21 and 24.
 - The Crown should not "engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness": *R. v. Mallory*, 2007 ONCA 46 at para. 340.
 - The Crown must not "express personal opinions about either the evidence or the veracity of a witness": *R. v. Boudreau*, 2012 ONCA 830 at para. 16, leave to appeal refused, [2013] S.C.C.A. No. 330. The Crown must not invite speculation by the jury or rely on anything within their personal experience or observations that is not in evidence: *R. v. McGregor*, 2019 ONCA 307 at para. 179; *R. v. Pisani*, [1971] S.C.R. 738 at p. 740.
 - The Crown must not misstate the evidence or the law: *Boudreau* at para. 16.

[Emphasis added.]

- [24] In *R. v. Clyke*, the Ontario Court of Appeal found that the Crown's invitation to the jury to engage in impermissible reasoning based on the discreditable conduct of the two accused was sufficiently serious to direct a mistrial, as the effect of the invitation was to encourage moral and reasoning prejudice.
- [25] In *R. v. J.H.*, 2020 ONCA 165 [*R. v. J.H.*], the Ontario Court of Appeal found that asking the jury to reverse the burden of proof was sufficiently serious to warrant a curative instruction from the judge:
- [148] There is no closed list of circumstances that may require a trial judge to provide corrective instructions when counsel in their closing addresses have made submissions about a witness' motive to fabricate. The obligation may be engaged where counsel suggests that the presence or absence of a motive to fabricate has been proven, but no such proof exists. Or where counsel invites the jury to focus on what had not been proven, such as a credible motive to lie, rather than what had been proven - creating a risk that the jury would reason that failure to demonstrate a motive to lie means the witness was telling the truth. Or where the address suggests that the accused has the burden of demonstrating a motive on the part of a prosecution witness to fabricate evidence: *Batte*, at para. 121; *L.L.*, at paras. 42, 47-50; *R. v. M.B.*, 2011 ONCA 76, 267 C.C.C. (3d) 72, at paras. 31-32.
- [Emphasis added.]
- [26] Where the Crown has said something untoward in their closing, and the defence has already given their closing address, the trial judge generally has two options. The first is to address the issue with a corrective instruction to the jury. The second is to declare a mistrial: *R. v. Rose*, 1998 CanLII 768 (SCC), [1998] 3 S.C.R. 262 at para. 66; *R. v. Lai*, 2018 BCSC 2518 at para. 6.

Analysis

- [27] This case turns on the issue of consent. The jury has to decide whether the complainant consented to the sexual activity, and, if not, whether Mr. Cartwright had an honest but mistaken belief that she communicated consent. The credibility of the complainant and the accused are key to the jury's determination.
- [28] Throughout her closing submission, Crown counsel repeatedly invited the jury to engage in forbidden reasoning to assess credibility, including that only romantic or loving sex is consensual, and that the complainant reacted just as one would expect a sexual assault victim to do and did everything one can expect from a victim following a sexual assault. It has long been recognized that there is no "usual" way victims of sexual assault behave during or after an assault. Nor are there "usual" types of sexual assaults.
- [29] The courts have for many years strongly cautioned both counsel and the court to be aware of stereotypical thinking and to avoid forbidden reasoning as it can lead to unjust outcomes. The caution applies equally to victims and accuseds. In this case, by repeatedly engaging

dangerous stereotypical reasoning, the Crown was telling the jury that Mr. Cartwright's version of events could not be true and that the complainant should be believed. What made it all the more dangerous is that throughout her lengthy two-day cross examination of Mr. Cartwright, Crown counsel engaged the same impermissible reasoning numerous times despite being cautioned.

- [30] The Crown's use of the accused's statement to police is a serious issue. As mentioned above, the Crown elected not to put the statement in as part of its case, choosing instead to use it extensively to attack the accused's credibility in cross-examination. Crown counsel repeatedly read long passages of the statement without laying a foundation for its use. Again, as a result, the jury was excused continually and Crown counsel was cautioned on the use of the statement.
- [31] Throughout her closing, despite the fact that the accused never adopted the statements and had explanations for them, Crown counsel presented passages of the accused's statement to police as evidence on key points. This included evidence upon which the jury's decision would turn: namely, the way Mr. Cartwright first touched the complainant and what the complainant was doing during the sexual activity that led the accused to believe that she was consenting.
- [32] Furthermore, in her closing Crown counsel sought to educate the jury as to what police officers do: "ask relevant questions." The clear implication was that Mr. Cartwright's failure to provide detailed responses to all the "relevant questions" meant he was lying, which Crown counsel suggested throughout her cross-examination. This is particularly dangerous because the jury did not have the statement in evidence, so they were unable to assess the validity of Crown counsel's assertions.
- [33] In addition to the above, there are three submissions Crown counsel made regarding the complainant's credibility that raise concern.
- [34] The first is that Crown counsel explained away a significant inconsistency in the complainant's evidence: that she described the sexual intercourse as "rough" for the first time in six years, including two police statements and three times testifying in court. Crown counsel told the jury that the complainant's failure to do so was the fault of the Crown, as the Crown never asked the complainant to describe the thrusting.
- [35] The second is that by stating that the complainant's testimony is more credible because she was testifying from memory, as opposed to the accused, who had heard the other witnesses testify, the Crown turned the accused's constitutional right to know the case and the requirement in law that he be present for his trial into a weapon against him.
- [36] The third is Crown counsel's submission that the complainant had no motive to lie. While this remark engages forbidden stereotypical reasoning, it is also highly problematic because it asks the jury to reverse the burden of proof, which is impermissible for the reasons articulated in *R. v. J.H.* quoted above.

Conclusion

[37] Due to the volume and extent of Crown counsel's improper submissions, I am satisfied that trial fairness has been fatally compromised and that neither curative instructions nor allowing the accused a reply, or both, can remedy the harm done.

[38] Accordingly, I direct a mistrial.

"The Honourable Madam Justice Murray"

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