

CANADA / JUDGMENT

R. v. Chartrand

2024 BCCA 355

COURT

British Columbia Court of Appeal

DECIDED

16 October 2024

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2024 BCCA 355 R. v. Chartrand

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chartrand,

2024 BCCA 355

Date: 20241016

Docket: CA48711

Between:

Rex

Respondent

And

Troy Alexander Chartrand

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. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Winteringham

The Honourable Justice Donegan

On appeal from: An order of the Provincial Court of British Columbia, dated February 4, 2022 (conviction) (R. v. Chartrand, Abbotsford Docket 92575-1-K).

Oral Reasons for Judgment

Counsel for the Appellant:

B.R. Anderson

Counsel for the Respondent:

M. Shah

Place and Date of Hearing:

Vancouver, British Columbia

October 16, 2024

Place and Date of Judgment:

Vancouver, British Columbia

October 16, 2024

Summary:

The appellant appealed his conviction for sexual assault on a number of bases, including that the trial judge misapplied the rule in *Browne v. Dunn* and misapprehended the evidence. The Crown conceded the appeal. HELD: The Crown's concession is appropriate in the circumstances of this case. The trial judge committed material errors that necessitate a new trial.

DEWITT-VAN OOSTEN J.A.: After a trial in the Provincial Court, the appellant, Troy Alexander Chartrand, was found guilty of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46. He has appealed the conviction. He says the trial judge made more than one error, including improperly applying a legal rule that adversely affected her assessment of the appellant's testimony and misapprehending the evidence.

- [2] The Crown agrees the judge erred. The Crown also agrees that in their cumulative effect, these errors require a new trial. Accordingly, it concedes the appeal from conviction.
- [3] Having reviewed the factums, the reasons for judgment in the Provincial Court, and relevant portions of the trial record, I am satisfied the appeal must be allowed, the conviction quashed, and a new trial ordered.

Trial Judgment

- [4] It is not necessary for purposes of the appeal to set out the entirety of the background to the case. Suffice it to say that the appellant was found guilty of sexually assaulting a former intimate partner in March 2018. The judge found that the complainant fell asleep on a sofa after a movie night with her children. The appellant approached her, woke her up by pulling her pants down from behind, and had sexual intercourse with the complainant without her consent.
- [5] The appellant testified and denied the allegation. Among other things, he said he went to bed early that night and slept until just before noon the next day.
- [6] The judge disbelieved the appellant and found that his evidence did not raise a reasonable doubt. She found the complainant credible and concluded that the Crown proved a sexual assault.
- [7] The judge provided a number of reasons for rejecting the appellant's evidence.
- [8] One of the reasons was that his trial lawyer did not cross-examine the complainant about various parts of the appellant's version of events. Applying the rule in *Browne v. Dunn*, (1893), 6 R. 67 (H.L.), 1893 CanLII 65 (FOREP), the judge decided that the absence of cross-examination affected the weight she could properly assign to the corresponding portions of the appellant's testimony. This included the appellant's assertion that because of a shoulder injury, he was not physically capable of committing a sexual assault in the manner described by the complainant.
- [9] A second reason the judge rejected the appellant's evidence involved his testimony about whether he was awake and at his computer shortly before the alleged sexual assault.
- [10] The complainant testified that she thought the appellant was downstairs and at his computer before the offence. He denied being at the computer. He said he had gone to bed, is a "very heavy sleeper", generally sleeps through the night, and does not get up during the night to perform tasks. He also said it was not possible that he was using his computer because the computer was not working at the material time. Among other things, it required a new power supply. In support of this testimony, the appellant adduced documents showing that he ordered computer equipment three or perhaps four days after the alleged sexual assault, including a power supply.
- [11] In cross-examination, the Crown challenged the appellant's assertions about his sleep pattern and not getting up during the night. Crown counsel noted that one or more of the documents adduced by the appellant was time stamped 1:25 a.m. Crown counsel suggested this was the time the appellant ordered replacement parts for his computer (or shortly before), presumably seeking to impeach his testimony that he routinely sleeps through the night. The appellant said he did not place any orders at 1:25 a.m. Rather, the orders in question (there were two), were placed "during the day on [the complainant's] laptop". Later, he clarified that they were placed from the complainant's laptop in the early evening hours.

- [12] The judge did not accept this aspect of the appellant's testimony on the basis that " by the end of the evidence [he] agreed that he did not know what time he placed those orders".

Analysis

- [13] The parties agree that credibility was the central issue at trial. In that context, the judge's assessment of the appellant's denial of a sexual assault carried obvious significance. If she believed the appellant's denial or found that his evidence raised a reasonable doubt, she was duty-bound to acquit: *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93.
- [14] The Crown concedes that both of the above-noted bases for rejecting the appellant's evidence reflect material error.
- [15] First, the Crown did not raise or assert the rule in *Browne v. Dunn* at the trial as a reason for challenging the credibility or reliability of the appellant's testimony. By way of explanation, this rule:
- [42] provides that a party seeking to rely on contradictory evidence to impeach the credibility of a witness must put the contradictory evidence to the witness so that they have an opportunity to address, and possibly explain, the contradiction

[*R. v. Jajja*, 2024 BCCA 125.]

See also, *R. v. Drydgen*, 2013 BCCA 253 at paras. 13-17, 22.

- [16] If the rule in *Browne v. Dunn* is properly engaged and breached, especially in relation to matters of significance, it is open to a trial judge to diminish (give less weight) to the contradictory evidence, including where that evidence emanates from the accused: *Drydgen* at para. 26, citing *R. v. Paris* (2000), 150 C.C.C. (3d) 162 at paras. 22-24, 2000 CanLII 17031 (Ont. C.A.), leave to appeal ref'd [2001] S.C.C.A. No. 124.
- [17] In this case, the judge invoked *Browne v. Dunn* of her own accord without clearly flagging it as an issue for the parties' consideration. As a result, the appellant did not have an opportunity to make submissions about whether *Browne v. Dunn* properly applied. Nor did he have an opportunity to seek an appropriate remedy to address any prejudice flowing from a possible breach of the rule, such as recalling the complainant so that she could be cross-examined on the appellant's contradictory assertions.
- [18] The Crown accepts that in the particular circumstances of this case, the judge's decision to apply *Browne v. Dunn* without first engaging counsel on the issue amounted to an error of law. Such will not always be the case. There is no automatic rule that an erroneous invocation or application of *Browne v. Dunn* will constitute an error and require a new trial. This is an individualized, case-by-case determination. However, in this case, the judge expressly relied on *Browne v. Dunn* to assign less weight to the appellant's testimony that he was physically incapable of sexually assaulting the complainant in the manner she described. The Crown agrees with the appellant that evidence about his physical capacity to

carry out the alleged assault went to the core of the accusation. In this context, the Crown fairly acknowledges that the appellant should have received an opportunity to address the issue before the judge invoked *Browne v. Dunn* and relied on that rule in assessing credibility and reliability.

[19] In conceding this ground of appeal, the Crown has cited numerous cases relevant to fairness in the application of the rule, including *R. v. R.J.M.*, 2023 MBCA 28. In the latter authority, the Manitoba Court of Appeal held that:

[43] generally speaking, in the absence of a formal objection by a party to a breach of the rule, before invoking the rule, a trial judge should solicit the submissions of counsel on whether the rule was breached and if so, in deciding on an appropriate remedy

[Internal references omitted, emphasis added]

See also, *R. v. Gill*, 2017 BCCA 67 at paras. 29-30.

[20] The second of the Crown's concessions involves a material misapprehension of the evidence.

[21] As noted, the judge disbelieved the appellant's testimony about when he ordered replacement parts for his computer on the basis that he ultimately admitted to not knowing when he submitted the relevant orders. It was the Crown's theory that the documents adduced by the appellant showed that he placed one or both of these orders at 1:25 a.m. (or shortly before). From the Crown's perspective, this fact fundamentally undermined the appellant's testimony that he routinely sleeps through the night.

[22] Before us, the parties agree that the appellant said no such thing when testifying. To the contrary, it was his evidence that the computer equipment was ordered in the early evening hours three or four days after the alleged sexual assault, and he did not waiver from that assertion. He acknowledged to not knowing whether the time stamp of 1:25 a.m. on the documents reflected local (Pacific) time; however, at no point did he say that he did not know when he placed the orders.

[23] The Crown accepts that the judge misapprehended the appellant's evidence on this point. It further accepts that the misapprehension was material and played an essential part in the judge's reasoning process: *R. v. Lohrer*, 2004 SCC 80 at para. 2, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A.). In my view, this is readily apparent from the reasons for judgment in the court below. The Crown's concession is appropriate.

[24] As explained in *R. v. Osinde*, 2021 BCCA 124, when a trial judge has materially misapprehended evidence that played an essential role in their reasoning process, the appellant will not have received a fair trial: at para. 18. A trial judge is uniquely positioned to assess the credibility of witnesses, including the credibility of the accused: *Osinde* at para. 19. However, when those assessments are grounded in a misapprehension of evidence and the misapprehension " played a critical role in reaching a conviction, the assessments and

the verdict will be unsupportable ": Osinde at para. 19, citing R. v. C.LY., 2008 SCC 2 at para. 21.

Disposition

[25] In light of the Crown's position in the appeal, and in the context of this particular case, I am satisfied the appellant has established two material errors that, in their combined effect, require a new trial. As a result, it is not necessary to address any of the remaining grounds of appeal.

[26] I would allow the appeal, quash the conviction for sexual assault, and order a new trial.

[27] WINTERINGHAM J.A.: I agree.

[28] DONEGAN J.A.: I agree.

[29] DEWITT-VAN OOSTEN J.A.: The appeal is allowed, the conviction for sexual assault is quashed, and a new trial is ordered.

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 24 October 2026 · Esheria