

CANADA / JUDGMENT

R. v. Chen

2020 BCCA 329

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 329 R. v. Chen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chen,

2020 BCCA 329

Date: 20201116

Docket: CA46305

Between:

Regina

Respondent

And

Min Chen

Appellant

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Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated
October 5, 2017 (R. v. Chen, Victoria Registry 167560-2).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

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(appeared on November 16, 2020 only)

Place and Date of Hearing:

Vancouver, British Columbia

November 4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 16, 2020

Summary:

The appellant challenges her conviction for sexual assault and sexual touching of a minor, S.H. At trial, the appellant did not deny this sexual incident occurred, but asserted S.H. had assaulted her. She flatly denied that a second alleged sexual incident occurred, and was acquitted on counts related to that incident. On appeal, she argues that the jury charge invited the jury to use prohibited myths and stereotypes when assessing her credibility, which shifted the burden of proof, and that the jury rendered inconsistent verdicts. Held: Appeal allowed. The judge's charge did not adequately caution the jury against the use of prohibited myths and behavioural stereotypes in assessing the appellant's credibility, including impermissible reasoning in connection with whether the appellant cried out, avoided S.H. after the fact, and demonstrated visible trauma. Clear, specific, and contemporaneous cautions were required when the jury was invited to consider such evidence in relation to the appellant's credibility. The charge also invited the jury to consider whether there was evidence that supported the appellant's assertion that she was assaulted, impermissibly shifting the burden of proof. Given these errors, it is unnecessary to consider the issue of inconsistent verdicts. The convictions are set aside, and a new trial ordered on the first two counts of the indictment.

- [1] DICKSON J.A.: In November 2015, the appellant, Min Chen, was living with her young son in a transition house in Victoria. S.H., a 13-year-old boy, was living at the same transition house with his mother at the same time. According to S.H., on two occasions that month, he and Ms. Chen had sexual intercourse in her bedroom, both times initiated by Ms. Chen, both times with his willing participation. According to Ms. Chen, she and S.H. had sexual intercourse once, but S.H. was the aggressor and she did not consent.
- [2] Following a jury trial on an indictment charging her with two counts of sexual assault and two counts of sexual touching, the jury convicted Ms. Chen on the two counts related to the first sexual incident and acquitted her on the two related to the second. Ms. Chen appeals the conviction on two grounds: first, that the trial judge's instructions invited the jury to use prohibited myths and behavioural stereotypes in assessing her credibility and, in doing so, shifted the burden of proof; and, second, that by convicting her on the first two counts and acquitting her on the second two, the jury rendered inconsistent verdicts.
- [3] For the reasons that follow, I would allow the appeal, set aside the conviction, and order a new trial on counts 1 and 2.

Facts

- [4] In November 2015, Ms. Chen was a 29-year-old woman. She was 5 feet tall and weighed approximately 100 pounds. As noted, S.H. was a 13-year-old boy. He was approximately 5'9" to 5'10" tall and weighed approximately 155-160 pounds.
- [5] Ms. Chen and S.H.'s mother formed a friendly relationship during their stay at the transition house. The same was true, to some extent, of Ms. Chen and S.H. However, according to a staff member at the transition house, their relationship and interactions were inappropriately close, which she found concerning. For example, she testified, Ms. Chen and S.H. sometimes sat very near to one another, laughed a lot together, and spent time together in the kitchen. S.H. also asked regularly to use Ms. Chen's laptop computer and, contrary to house rules, spent time using it in her room.
- [6] On the evening of the first incident, Ms. Chen and S.H. spent time together in the transition house T.V. room. Ms. Chen was watching T.V. and S.H. was using her computer. After her two-year-old son fell asleep, Ms. Chen testified, she told S.H. that they were going to bed and he offered to carry her computer upstairs to her bedroom. She accepted his offer and, when they went in to the bedroom, she laid her sleeping son down on a single bed there.
- [7] Ms. Chen went on to testify that S.H. asked if he could continue using her computer in the bedroom. She said she agreed and he sat on the bed beside her sleeping son with the computer on his legs. For her part, she said, she laid down on the other bed and played with her phone for a while. Eventually, she said, she fell asleep.

- [8] According to Ms. Chen, she awakened to find S.H. on top of her. She said she wanted to scream, but could not, and, when she tried to say "no", she felt paralyzed and nothing came out. She testified that S.H. pulled up her shirt, kissed her body, and removed her shorts and panties, then briefly had intercourse with her, collapsed and apologized. She said she started to cry and S.H. told her not to tell anybody because she would go to jail, to which she replied "No, you raped me". In response, she said, S.H. told her that it did not matter and he was the minor, at which point she told him she would kill herself. Thereafter, she said, S.H. got dressed, repeated that she should not to tell anyone what had happened and left the bedroom.
- [9] Ms. Chen testified that this was the only time she and S.H. had any sexual contact. She said she spoke to S.H.'s mother about the incident after he left the house but she did not report it to police because she was frightened given that S.H. was a minor and she did not make "a big noise" when it happened. She also said that she did not try to avoid S.H. after the incident because she wanted to keep him happy and not "piss him off". She testified further that her father sexually abused her throughout her childhood, that her mother did not believe her when she told her about the abuse, and that she did not report an abusive adult partner to police until he was in custody, but then recanted because she was scared.
- [10] S.H.'s account of his sexual contact with Ms. Chen was markedly different. As to the first incident, he testified that she invited him to come to her bedroom and he accepted. According to S.H., as he began to leave, Ms. Chen told him to come over and sit next to her on the bed, which he did. Then, he testified, Ms. Chen took his hand, kissed him, removed his clothes and her own, got on top of him and started "going up and down". He said he thought it was "kind of weird" but he "just went with it" and, when he finished, he told her to get off. After the intercourse ended, he said, he got dressed, talked with his friends on Ms. Chen's computer and left the bedroom.
- [11] S.H. went on to say that, a few days later, he and Ms. Chen had sexual intercourse again in her bedroom. He testified that the second incident was much like the first, except that, this time, he was on top of Ms. Chen. He also testified that Ms. Chen told him not to tell anyone and that, if he did, she would kill herself.

Jury Charge

- [12] The judge provided the jury with standard instructions on matters such as the presumption of innocence, the burden of proof and reasonable doubt, then turned to the charges on the indictment. She dealt first with the two counts related to the first incident of alleged sexual assault and, in doing so, addressed each of the essential elements of the offence. These included the elements of consent and the intentional application of physical contact.
- [13] The judge explained to the jury that, regardless of whether he participated willingly, S.H. could not consent to sexual activity with Ms. Chen because he was 13 years old when it happened. As to Ms. Chen's intention, she explained that the physical contact must be

intentional "as opposed to accidental or done under force or compulsion". She went on to say that intention is a state of mind and thus "you will have to use your common sense to infer from all of the evidence that you have heard, including anything Ms. Chen said and did, whether Ms. Chen intended to apply physical contact to [S.H.]".

- [14] After telling the jury to use its common sense to draw inferences from the evidence, the judge summarised the competing accounts of the first incident. Then, she said this:
- [38] Alleged offences of this nature often occur when no one else is present other than the man, or boy in this case, and woman involved. Where there are conflicting stories, it may be difficult to determine the truth. In such a case, the supporting evidence or testimony from independent sources other than Ms. Chen or [S.H.] may assist you in deciding whether Ms. Chen willingly engaged in sexual relations with [S.H.]. Examples of the supporting evidence I will now outline to you are matters which you may taken into account in determining Ms. Chen's credibility on the issue of intent. I do not pretend that these examples are exhaustive. It is entirely up to you to decide whether these examples, or any others of a similar nature arising from independent evidence, support her testimony that she did not willingly engage.
- [39] People do not necessarily willingly participate because they submit or fail to resist. On the other hand, evidence that a person struggled with an attacker and resisted sexual advances is very significant.
- [40] Another aspect of Ms. Chen's conduct that may be relevant in assessing the credibility of her claim is how she reacted during the sexual activity. For example, you might expect a person who is being sexually assaulted against her will to scream or cry out for help. Such behaviour is consistent with lack of consent. On the other hand, a person being sexually assaulted may have good reason not to cry out. That person might reasonably think nobody is within hearing range, or might have reason to fear that an outcry would provoke a violent response from the attacker. But if you find as a fact that Ms. Chen made no outcry, even though the circumstances were such as it would be reasonable for her to do so, you may take that into account when deciding - when deciding whether her evidence that she was sexually assaulted by S.H. is credible.
- [41] Evidence of Ms. Chen's condition and behaviour at or after the alleged assault are relevant as well. This may include evidence regarding what other persons saw of her physical or emotional condition at or after the time. As an example, evidence that the incident left her emotionally upset may also be regarded by you as supporting Ms. Chen's testimony as to lack of consent. You may consider whether the physical and emotional condition of Ms. Chen, her conduct and her relationship after the fact with [S.H.] were consistent with her evidence that [S.H.] sexually assaulted her against her will. You will also want to take into consideration her background and life experiences, including the fact that she testified that she had been sexually abused by her father and how that may impact the way she behaved and acted.

[42] It is for you to decide whether there is any evidence from which you can infer some ulterior motive on the part of Ms. Chen. If you can draw such an inference from the evidence, then you should examine her testimony with care when assessing her credibility.

[15] Next, the judge summarised the nature of the defence and the findings on each essential element of sexual assault required to support a conviction in respect of the first incident. She also summarised the essential elements of sexual touching and the required findings to support a conviction for that offence, then repeated the process in respect of the second incident alleged by S.H. She went on to review the evidence in detail and provided standard instructions on various matters, including the assessment of evidence, hearsay and the nature of direct and circumstantial evidence.

[16] Under the heading "Other Evidence", the judge dealt with the issue of myths and stereotypes in sexual assault cases:

[185] It would be understandable if one or more of you came to this trial with assumptions as to what constitutes sexual assault, what kind of person may be the victim of sexual assault, what kind of person may be a perpetrator of a sexual assault, or what a person who is being, or has been, sexually assaulted will do or say. It is important that you leave behind any such assumptions about the nature of the offence.

Experience tells the courts that there is no one way in which a sexual assault happens. There is no one model or stereotype of a perpetrator of sexual assault or a victim of sexual assault. We know that victims of sexual assault may react in many different ways. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways.

[186] With that caution in mind, I wish to address some evidence that you heard in this trial.

[187] There was evidence elicited about how Min Chen dressed at the transition house. Reima-Lee Sellars testified that when Ms. Chen stopped by the office on the evening of November 12, 2015, she was dressed in a way that Ms. Sellars thought was inappropriate. Ms. Sellars testified that she had never seen Ms. Chen dressed like that before and it caused her concern. That evidence was led to explain why she, Ms. Sellars, subsequently went to check on Ms. Chen.

[189] How Ms. Chen dressed is irrelevant to the issues before you. You are not to place any weight on that evidence. It would be improper for you to infer that if Ms. Chen was dressed in a certain way, she was more likely to engage in sexual activity with [S.H.].

[193] The reason for this instruction is clear: we do not want Ms. Chen or anyone to be convicted on stereotypes, innuendo or mistaken inferences. What one person may find to be inappropriate may be quite acceptable to another. How a person dresses or acts can mean many things. Accordingly drawing negative inferences from this kind of evidence is dangerous.

- [194] To be entirely clear, you may not use evidence regarding the way Ms. Chen dressed or observations of her relationship with [S.H.] to infer that she was likely to have engaged in sexual activity with him.
- [17] The judge concluded her charge with summaries of the Crown and defence theories of the case and several standard final instructions. After deliberating for approximately one day, the jury found Ms. Chen guilty on counts 1 and 2 (the first incident) and not guilty on counts 3 and 4 (the second incident).

On Appeal

- [18] Counsel for Ms. Chen contends that the judge erred in law by instructing the jury that they could use prohibited behavioural stereotypes with respect to sexual assault victims in assessing her credibility. In particular, he says, in giving examples of evidence that may be relevant to their credibility assessment she suggested the jury consider whether Ms. Chen screamed or cried out and whether her emotional condition and conduct around S.H. after the fact were consistent with her claim of sexual assault. However, in his submission, those examples are based on discredited myths and stereotypes about the expected behaviour of sexual assault victims and the judge failed to warn the jury not to draw improper inferences on that basis. The judge is also said to have erred in law by directing the jury to look for corroborative evidence in support of Ms. Chen's account when assessing her credibility. Finally, counsel submits, the jury reached unreasonable and inconsistent verdicts giving rise to a miscarriage of justice.
- [19] Crown counsel responds that, read as a whole and in the context of the entire proceedings, the charge did not suggest that the jury could or should discount Ms. Chen's credibility based on impermissible myths or stereotypes, nor did it shift the burden of proof to the defence. Rather, he submits, citing *R. v. Percy*, 2020 NSCA 11, the judge correctly instructed the jury to assess Ms. Chen's credibility critically, based on the totality of the evidence and its consistency, or lack thereof, with her claim that she was the victim of a sexual assault at the hands of S.H. As to the verdicts, he submits that they were not inconsistent because each incident was factually different and they were separated in time.
- [20] In support of his submission, Crown counsel emphasizes the charge was modelled on and consistent with a sample jury instruction on supporting independent evidence designed to assist juries in assessing the credibility of the evidence of a sexual assault complainant. It was also consistent, he says, with leading authorities such as *R. Ewanchuk*, [1999] 1 S.C.R. 330, *R. v. ADG*, 2015 ABCA 149, and *R. v. Quartey*, 2018 SCC 59. He says further that the judge clearly cautioned the jury about sexual assault myths and stereotypes later in the charge, which must be viewed in its entirety. She also provided counsel with an opportunity for input into the charge and, following its delivery, defence counsel stated that he was "content".

Discussion

Standard of review

- [21] Appellate courts consider jury charges fairly, contextually and as a whole. They adopt a functional approach to reviewing a charge and ask whether, when viewed as a whole, it enabled the jury to decide the case according to the law and the evidence. The salient question for determination is whether the trial judge instructed the jury properly, not whether the judge instructed the jury perfectly: *R. v. Calnen*, 2019 SCC 6 at paras. 6-8.
- [22] Trial judges are afforded considerable discretion and flexibility in crafting their jury charges. No particular set of words is mandatory and, when reviewing a charge, an appellate court will focus on its content, not its form. As Justice Stromberg-Stein stated in *R. v. Visslai*, 2015 BCCA 495, "[j]uries can be trusted to properly weigh the evidence so long as they are given clear instructions on how to use the evidence": at para. 26. Where a cautionary instruction is required, appellate intervention is not warranted unless it was not given or the cautionary instruction that was given did not serve its intended purpose: *R. v. Khela*, 2009 SCC 4 at para. 13; *R. v. Baker*, 2019 BCCA 199 at para. 34.

Did the judge invite the jury to use prohibited myths and behavioural stereotypes in assessing Ms. Chen's credibility or shift the burden of proof?

- [23] As Justice Benotto recently reminded in *R. v. Cepic*, 2019 ONCA 541, the use of a common-sense approach to assessing credibility in sexual assault cases is fraught with danger. This is because so-called "common sense" can mask reliance on stereotypical assumptions and pre-conceived views about how victims of sexual assault can be expected to behave: *Cepic* at paras. 13-14. Although the law has sought for decades to eradicate such myths and stereotypes, they are remarkably persistent, pervasive, and invidious. In consequence, when instructing juries on how to assess the credibility of a sexual assault complainant, a judge must provide clear limiting instructions to guard against the use of impermissible reasoning based on discredited myths and stereotypes and thus ensure a fair trial: *R. v. A.L.*, 2020 BCCA 18 at para. 230.
- [24] I will not review the many myths and stereotypes about victims of sexual assault and their expected behaviour that are subtly woven into the fabric of "common sense" in our society. For present purposes, it is sufficient to note they include the notion that sexual assault victims can reasonably be expected to resist or cry out during an attack, avoid their attacker thereafter and manifest signs of the trauma they endured for all to see and understand. However, it has long been recognized that, in reality, there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" and stereotypical assumptions to the contrary have been soundly rejected as a proper basis upon which to draw inferences: *R. v. DD*, 2000 SCC 43 at paras. 63-65. As Justices Paperny and Schultz put it in *R. v. A.R.J.D.*, 2017 ABCA 237:

- [44] Stereotypicality is never a legitimate anchor on which to tie crucial credibility assessments in the context of sexual assaults. And, counter-stereotypicality must never translate to less credibility.
- [25] Needless to say, reliance on impermissible generalizations or stereotypes about sexual behaviour in a credibility assessment of either an accused or a complainant would be a serious error of law: *R. v. Paulos*, 2018 ABCA 433 at para. 26.
- [26] In my view, considered functionally and read as a whole, the judge's charge did not adequately caution the jury against the use of myths and behavioural stereotypes in assessing Ms. Chen's credibility. As a result, the charge did not enable the jury to decide the case according to the law and the evidence, free from the risk of impermissible reasoning.
- [27] The judge provided the jury with a generic caution regarding myths and stereotypes about sexual assault victims and their expected behaviour. She also provided a specific example of how stereotypical reasoning would operate in relation to Ms. Chen's mode of dress. However, she did not alert the jury to the pervasive stereotype that sexual assault victims predictably cry out when attacked or instruct the jury not to infer that Ms. Chen's testimony was less credible because a sexual assault victim in her circumstances would be expected to cry out. Rather, having invited the jury to use its common sense, she stated that, if it found it would be reasonable in the circumstances for Ms. Chen to cry out, the jury could take that into account in deciding whether her evidence of sexual assault was credible. In my view, at the least, a clear, specific and contemporaneous caution about impermissible reasoning based on behavioural stereotypes in this regard was required.
- [28] Nor did the judge caution the jury about persistent myths and stereotypes related to the emotional and avoidant behaviour to be expected of victims when they have been sexual assaulted. Rather, she invited it to consider whether Ms. Chen's emotional condition and conduct after the fact were consistent with her evidence of sexual assault. Although she specifically referred to Ms. Chen's history of sexual abuse, she did not instruct the jury that evidence of a lack of avoidant behaviour by a complainant tells a trier of fact nothing about a sexual assault allegation: *A.R.J.D.* at para. 39. Again, in my view, a clear, specific and contemporaneous caution to avoid impermissible reasoning based on discredited stereotypes in this regard was required.
- [29] Further, in modelling the portion of the charge related to Ms. Chen's intention, qua accused, on a sample jury instruction designed to assist juries to assess the credibility of a sexual assault complainant, qua witness, the judge invited the jury to look for independent evidence that supported her testimony. In my view, doing so in this unusual context, in effect, subtly and erroneously shifted the burden of proof to the defence.
- [30] As noted above, the judge instructed the jury that "supporting evidence or testimony from independent sources other than Ms. Chen or [S.H.] may assist you in deciding whether Ms. Chen willingly engaged in sexual relations with [S.H.]." In a typical sexual assault trial in which the complainant is a Crown witness, such an instruction may well be helpful to the

credibility assessment that is required. However, in this unusual context, in which the complainant was also the accused, the salient question was whether her evidence raised a reasonable doubt. In these circumstances, in my view, the jury may have understood the instruction as imposing an obligation on Ms. Chen that she did not have and suggested a need to support her account with independent evidence.

[31] Given the foregoing, in my view, the charge to the jury was insufficient to serve its intended purpose. As a result, the conviction must be set aside. That being so, it is unnecessary to consider the second ground of appeal.

Conclusion

[32] I would allow the appeal, set aside the conviction, and order a new trial on counts 1 and 2.

[33] SAUNDERS J.A.: I agree.

[34] FITCH J.A.: I agree.

[35] SAUNDERS J.A.: The appeal is allowed, the conviction is set aside, and a new trial is ordered on counts 1 and 2.

"The Honourable Madam Justice Dickson"

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