

CANADA / JUDGMENT

R. v. Chien

2024 BCCA 189

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 189 R. v. Chien

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chien,

2024 BCCA 189

Date: 20240516

Docket: CA48978

Between:

Rex

Respondent

And

Kuo Liang Paul Chien

Appellant

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Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Horsman

The Honourable Justice Winteringham

On appeal from: An order of the Provincial Court of British Columbia, dated
July 19, 2022 (conviction) (R. v. Chien, Richmond Docket 64588-3-C).

Counsel for the Appellant:

J.J. Saulnier

E. Holzman

Counsel for the Respondent:

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Place and Date of Hearing:

Vancouver, British Columbia

March 12, 2024

Place and Date of Judgment:

Vancouver, British Columbia

May 16, 2024

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Horsman

Summary:

Appeal from conviction for sexual assault during a therapeutic massage. The central issue at trial was credibility. The appellant alleges the trial judge erred: by declining to consider particular inferences on the (incorrect) basis that they advanced prohibited myths and stereotypes; and by impermissibly using the contents of text messages to bolster the complainant's credibility.

Held: Appeal dismissed. The judge's reasons were comprehensive as she explained, correctly, the legal principles governing her credibility assessment and the use to be made of controversial evidence. The reasons reveal she considered the appellant's submissions but was not persuaded by them. Her credibility assessment is entitled to deference. Second, the appellant has not demonstrated any error regarding the use the judge made of post-event text messages.

Reasons for Judgment of the Honourable Justice Winteringham:

- [1] The appellant, Kuo Liang Paul Chien, was convicted of sexually assaulting M.T. during a therapeutic massage. M.T. had received massage therapy from the appellant twice before. On the day of the assault, M.T. described a massage that started like the others. However, as the session progressed, and without her consent, the appellant rubbed her breasts and vaginal area--under the pretense of legitimate massage treatment. She described confusion as the massage proceeded. When the appointment was over, M.T. left the room, paid for the massage, and left a tip when prompted by the payment terminal.
- [2] Later that day and the next, M.T. and the appellant exchanged text messages. The appellant's messages were arguably incriminating. In his evidence at trial, the appellant provided a different account of what he understood and intended to communicate in the text messages. With respect to the massage itself, the appellant denied any wrongful touching. He testified that he believed M.T. consented to the treatment he applied to the left side of her breast. He denied that he otherwise touched M.T.'s breasts or her vaginal area.
- [3] The appellant appeals his conviction, raising two grounds. First, it is said the judge erred by declining to consider particular inferences suggested by the appellant on the (incorrect) basis that they advanced prohibited myths and stereotypes and that in doing so, the judge failed to consider all of the evidence. Second, it is said the judge erred by impermissibly using the contents of the text messages to bolster the complainant's credibility.
- [4] For the reasons set out below, I would dismiss the appeal.

Background

Trial evidence

- [5] On June 7, 2018, M.T. attended the appellant's place of business for massage therapy. She booked an appointment for a full-body massage. This was her third appointment with the appellant. At the time of M.T.'s appointment, the appellant's wife was providing massage services to another client downstairs.
- [6] When M.T. arrived, the appellant took her to a massage room located on the second floor of the office and instructed her to remove her clothes, including her bra, and to lie face-down on the massage table. After massaging her back, the appellant asked her to turn over. The front of her body was covered by a towel and the appellant put a towel over her face. The appellant began massaging her arms and shoulders, which M.T. considered normal. Then M.T. described feeling the towel taken away. She testified she felt the appellant massage and cup her breasts, pinch and pull at her nipples, and then put his hand inside her underwear, rubbing her clitoris. At first, M.T. wanted to believe the appellant was being professional, but when he started touching her genital area she believed she was being sexually assaulted. She testified that she panicked, did not know how to respond, and was in disbelief about what the appellant was doing.

- [7] M.T. described feeling a hard object pressing against her right arm, which she believed to be the appellant's erect penis. When she felt his hand trying to enter her vagina, M.T. told him, "I do not want this massage anymore" (at para. 40). He stopped touching her genital area and started massaging her head, neck, and shoulders. He then removed the towel she had placed over her exposed breasts and once again started grabbing, rubbing, and cupping both breasts and pinching her nipples.
- [8] When the session ended, M.T. put her clothes back on, went downstairs, and paid her bill. She testified that she wanted to get away from the appellant as quickly as possible. She left a tip when prompted by the payment machine and did not take the receipt. M.T. testified she tipped because she wanted to leave as quickly as possible and that her mind was "blank" (at para. 45). She said she saw the tip as "part of the process", and a gesture she must do in Canada (at para. 50).
- [9] M.T. testified that after she left the appointment, she deleted all of her text messages with the appellant. She testified that she had plans to go to a dance class but decided not to go and went home instead. Once at home, she had a shower and noticed red marks on her body and felt some discomfort from the water. She testified that the red marks were normal for her following a massage but the discomfort was not. This time, M.T. stated, the massage did not feel like any massage she had previously experienced.
- [10] After her shower, M.T. described doing some online research about sexual assaults at massage clinics. Her research suggested that without video evidence, there was little prospect of a conviction. She told a few friends about what had happened and then, later that evening, initiated a text message exchange with the appellant.
- [11] The appellant provided a very different account of his services. He testified that M.T. was lying on her stomach for the entire 90-minute appointment. He described performing a therapeutic massage to M.T.'s armpit area that included the lateral part of her left breast. He said this part of the massage was done with M.T.'s explicit consent. He denied cupping her breasts, touching and pulling her nipples, touching her vagina, and rubbing her clitoris. He testified that he never touched any other part of her breast and never touched her genital area. He denied that his penis came into contact with her body. He said it was possible M.T. felt a massage tool press against her. He testified that he kept that tool in his pants pocket and there was a good chance it had touched her arm. He testified that after the massage ended, M.T. paid for his services (and left a tip) and he called her when he noticed she had forgotten her water bottle.
- [12] The appellant agreed that he exchanged text messages with M.T. later that day and the next. The Crown and the appellant sought to rely on these messages in support of their theory of the case. The text messages were not written in English. Both the Crown and the appellant provided translations (from Mandarin to English) of the text messages. No issue was taken with the judge's preference for the appellant's translation.

[13] M.T. initiated the text exchange on June 7, 2018. The exchange proceeded as follows:

M.T.: About today's massage, I feel you were disgusting. Don't do it to other people again.

Appellant: I won't do such kind of things again. I only asked you because I wanted to help you. I dare not do it again in the future. Are you ok.

Appellant: I am regretful too.

M.T.: You were not helping me. You were sexually harassing me Imagine if your wife and daughter are sexually harassed by others like this how would you feel disgusting

Appellant: I will remember. I am very self-blaming. I did something wrong. I will always remember. I do not know what to say, either.

[14] After this text exchange, M.T. reported the incident to the police. The text exchange continued after her police report. M.T. responded to the appellant's most recent text, stating:

M.T.: Of course you don't know what to say but you will always remember my breast(s) was poked and rubbed by you and all the lower part was touched by you

M.T.: I think you are a devil

Appellant: I had talked to you about it how come you also said ok. Please forgive me Your description of me made me feel really bad I am feeling really painful,

M.T.: What do you mean how come I also said ok It is me who is really painful. Your touch of me like that made me feel disgusting about myself.

Appellant: I myself feel more sad.

Appellant: All of it not admitted one thing - please let it go -- please respect yourself -- good to you and good to me.

[15] The appellant explained some of the content on the basis that he had not read the messages fully or carefully before he responded. He testified that he felt cheated by M.T. since she was accusing him of wrongdoing when he had provided a legitimate therapeutic massage. He said he was not good at sending text messages and did not include important punctuation. He testified that he felt angry, not remorseful, because he knew he had done nothing wrong. When he expressed regret in the message, he testified it meant he regretted being "cheated" by a client, not that he had done anything wrong. The appellant submitted the messages were not incriminating when interpreted in the way he suggested.

[16] The appellant's wife testified. She confirmed that she had been working in the room below the room occupied by M.T. and the appellant. She believed that if something unusual had happened, she would have heard it. However, her evidence was unclear about the extent to which she could hear voices in the room above her.

Positions of counsel

- [17] In closing submissions, the appellant submitted that there were features of M.T.'s testimony that detracted from her credibility, including the fact that she had left a tip. He submitted that "[t]ipping somebody is voluntary and it does show some degree of being satisfied with one's services." While acknowledging it would be improper to measure M.T.'s conduct against myths about the expected behaviour of sexual assault victims, the appellant submitted that the fact tipping occurred was important contextual evidence that could be considered in the judge's credibility analysis.
- [18] The appellant submitted that the presence of the appellant's wife and others in the building was a factor the judge could consider in her credibility analysis, suggesting it would have been risky for the appellant to sexually assault M.T. when his wife was in close proximity.
- [19] Regarding the text messages, the appellant submitted that the judge should consider the inconsistencies between the text messages and M.T.'s testimony at trial. He also suggested that M.T. had a motive to fabricate based on her Google research suggesting it was difficult to secure a conviction in sexual assault cases involving massage therapists. The appellant also submitted that M.T. continued to send text messages to the appellant after reporting him to the police and that the judge could draw an inference that M.T. was trying to generate evidence against the appellant by texting him.
- [20] With respect to what use could be made of the text messages, the appellant referred to *R. v. Gill*, 2018 BCCA 275, and spoke of narrative as circumstantial evidence and as an exception to the inadmissibility of prior consistent statements. He submitted:
- I'm trying to rely on the -- on the text messages because [M.T.] already testified that she sent those [final] two messages after she found out [the appellant] was not arrested but I just wanted to emphasize the importance of the circumstances and timing when the text was sent.
- [21] The Crown submitted that M.T. was a credible and reliable witness and that her conduct immediately after the incident did not detract from her credibility. The Crown submitted that M.T. had credibly explained how she had processed what had happened to her during and following the massage, why she had tipped the appellant, sent him the text messages, and then reported him to the police and sent him further text messages.
- [22] The Crown addressed the appellant's submission about risk of detection by the appellant's wife by reviewing the circumstances of the alleged assault. The Crown pointed out that the appellant was alleged to have committed this offence behind closed doors, on a different floor than the other inhabitants of the building, during an inherently private appointment that involved the appellant's being in a position of trust over someone in a vulnerable position. The Crown submitted that the risk of detection involved in these circumstances was quite limited.

- [23] Regarding the text messages, the Crown encouraged the judge to be cautious in using them. With respect to the appellant's communications, the Crown submitted the judge could rely on the texts as admissions (an exception to the hearsay rule) and could use M.T.'s texts to provide context in evaluating the meaning of the appellant's messages.
- [24] The Crown also submitted that M.T.'s texts could be used pursuant to two exceptions to the rule against the admissibility of prior consistent statements. First, she could consider the texts as narrative as circumstantial evidence. Pursuant to that exception, the judge could consider the circumstances and timing of the messages. Second, M.T.'s texts could be used to rebut the suggestion that M.T. had recently fabricated her evidence. The Crown, however, expressly disavowed any reliance on the truth of the contents of the assertions or any suggestion that the complainant's credibility was enhanced because the allegations had been repeated. The Crown cautioned the judge about the use that could be made of the prior statements and cited recent case law to assist the Court, including a lengthy excerpt from Chief Justice Bauman's dissent in *R. v. Langan*, 2019 BCCA 467 at para. 103 (dissent), rev'd 2020 SCC 33 (endorsing dissent).

Reasons for judgment

- [25] The judge began by setting out a brief overview of the evidence tendered and the parties' positions with respect to it. At the outset, the judge recognized that the only people capable of giving direct evidence about what happened during the appointment were M.T. and the appellant (at para. 6). Both had testified and had given conflicting versions of what happened during the massage. The judge stated that her decision was "not a matter of deciding which of the conflicting versions of evidence I prefer" (at para. 6).
- [26] Next, she turned to the fundamental principles that governed her decision-making, including the presumption of innocence (at paras. 7,11-12), and that the Crown must establish "each essential element of the charge against the accused beyond a reasonable doubt". She set out each of the elements constituting the offence of sexual assault. She explained the meaning of "proof beyond a reasonable doubt", citing *R. v. Lifchus*, [1997] 3 S.C.R. 320, 1997 CanLII 319; *R. v. Starr*, 2000 SCC 40; and *R. v. J.M.H.*, 2011 SCC 45, and quoted from *R. v. Darnley*, 2020 ONCA 179, at paras. 7,13-18.
- [27] The judge went on to explain that because the appellant had testified, she "must apply the framework set out in *R. v. W.(D.)* ([1991] 1 S.C.R. 742, 1991 CanLII 93) and subsequent cases in assessing the credibility and reliability of witnesses" (at paras. 8,19) to determine whether the allegation has been proven beyond a reasonable doubt. She instructed herself that in sexual assault cases: "[c]ourts must guard against applying false stereotypes concerning the expected conduct of complainants" (at para. 23).
- [28] The judge recognized that the issue before her was whether the Crown had proven beyond a reasonable doubt that the appellant sexually assaulted M.T.

- [29] Having stated the foregoing principles, the judge turned to the evidence of M.T. She reviewed in some detail M.T.'s testimony about what occurred during the massage. She described the testimony about the beginning of the massage, including the appellant's instruction to M.T. that she remove her bra. M.T. testified that she had left on her underwear and put on the massage pants provided. The judge noted that the massage commenced as it had during M.T.'s two previous sessions with the appellant. At first, she was lying face down on the massage table with a towel covering her and the appellant commenced by massaging her back. The judge noted that M.T. had testified that she might have consented to the massage of the side of her left breast (at para. 26).
- [30] The judge set out M.T.'s description of what occurred after the appellant asked M.T. to turn onto her back. The judge did so by laying out the sequence of events as described by M.T. and how she was feeling as a result of some aspects of the massage. The judge noted that once on her back, the appellant massaged her arms. Then he removed the towel covering her chest which M.T. felt was strange. After massaging the side of the left breast, M.T. testified he proceeded to massage both of her breasts. Though she felt strange, she said she accepted his suggestion that there was something wrong with her left breast requiring massage. However, she started feeling nauseous as he proceeded to pinch and rub her nipples. At one point, he cupped both of her breasts and pulled them upward, "grabbing the entire breast area in a circular motion, pinching her nipples and cupping and pulling her breasts" (at para. 33).
- [31] The judge noted M.T.'s evidence that the massage seemed to return to normal--at least briefly. The appellant then massaged her belly. M.T. pulled the towel up to cover her breasts because she did not want to keep her breasts exposed. The judge then turned to M.T.'s testimony about what occurred after the appellant massaged M.T.'s belly, including her evidence that the appellant directly reached his hand under her underwear and started rubbing her clitoris. She said he put his hand directly on her vagina (at para. 37). She also described "being stiff and completely stunned" (at para. 38). The judge noted M.T.'s evidence that she felt him rubbing her clitoris with one hand and her nipple with another. She also felt a hard foreign object press against her right arm and thought it was his erect penis (at para. 39).
- [32] At this point in her reasons, the judge addressed the appellant's submission that M.T.'s testimony differed from her statement to the police about whether the appellant ever inserted his finger inside her vagina. The judge rejected this submission, finding that M.T. had been "clear and unequivocal in her evidence that [the appellant] did not touch inside her vagina [though] [s]he was afraid he might enter her vagina ..." (at para. 42).
- [33] The judge then set out M.T.'s description about how the massage ended and M.T.'s views about it, "[s]he did not feel that it was a massage. She felt messed around with, played with and assaulted" (at para. 44). She "wanted him to finish as soon as possible" (at para. 45).

- [34] The judge next addressed the appellant's submission that M.T.'s testimony was not credible because she had tipped the appellant after the massage. The judge set out M.T.'s explanation that she had a "blank mind", was looking down at her cell phone, and wanted to leave as soon as possible. The appellant called M.T. to tell her she left her water bottle and she returned to retrieve it. Regarding the submission about tipping, the judge said:
- [48] The defence argues that [M.T.] is not credible because she tipped [the appellant] after the massage. Courts must guard against applying false stereotypes concerning the expected conduct of complainants. The defence expressly does not rely on such myths and stereotypes. Rather, the defence raises a possible inconsistency to the extent that the act of tipping conveys a message that [M.T.] was happy with the service that on her other evidence amounts to a sexual assault.
- [49] I conclude that no adverse inference can be drawn from [M.T.'s] conduct after the massage. She acknowledges tipping [the appellant]. She acknowledges accidentally leaving her water bottle on the reception desk. Her evidence was cogent and consistent with a blank mind and wanting to leave as soon as possible. Based on the evidence before me, to infer otherwise is to rely on a myth and stereotype.
- [35] The judge explained why she accepted M.T.'s explanation about tipping and why she rejected the appellant's characterization that M.T. had been evasive in explaining why she tipped the appellant.
- [36] Next, the judge turned to M.T.'s testimony about what she did after she left. She described taking a shower. The judge found that " her evidence that her nipples were touched is consistent with her other evidence that her nipples felt painful to the touch of her hand or water during a shower shortly after the massage" (at para. 54).
- [37] Regarding the appellant's submission about proximity of risk, the judge considered the evidence on this point. She rejected, as a myth, the suggestion that a perpetrator would not take such a risk with his wife downstairs (at para. 59). The judge went on to address two features of this evidence. First, regarding proximity, the judge found that the testimony of the appellant's wife did not undermine M.T.'s evidence about what occurred including M.T.'s evidence that the appellant spoke to her during the session. His spouse's testimony that she did not hear any sounds did not reconcile with the evidence of the appellant or M.T., both of whom testified that the appellant spoke to M.T. during the session.
- [38] The judge addressed a second feature of this evidence. This was not raised in submissions but the judge noted it arose during the appellant's testimony. The judge stated:
- [60] Second, to the extent that an issue is being raised about [M.T.'s] conduct during the massage, no adverse inference can be drawn from the fact that [M.T.] did not cry or leave during the massage because that is based on myth and stereotype of the expected behaviour of victims of sexual assault. [M.T.'s] evidence provides a cogent and credible explanation for why she did not leave before the massage concluded.

- [61] I am not suggesting that counsel raised this argument because they did not. Rather, it was raised in the evidence of [the appellant] and his wife. [The appellant's spouse] testified that she did not hear any noise. [The appellant] testified to his expectation that his client would have made noise had they been sexually assaulted during a massage.
- [39] With respect to the text messages, the judge dealt with the issue of translation, preferring the translation provided by the expert called by the appellant. She then set out the translated messages and decided how she could use them.
- [40] With respect to the texts written by the appellant, the judge found they constituted admissions against interest and were admissible for the truth of their contents (at para. 81). In her words:
- [82] I find [M.T.'s] evidence is externally consistent with the text messages of [the appellant]. He says that he is regretful, self-blaming, and did something wrong. He says that he "won't do such kinds of things again", "dare not do it again", "are you okay" and "please forgive me." These admissions from [the appellant] are consistent with [M.T.'s] evidence. His statements are relevant and probative because they tend to prove the truth of a fact probative to the Crown's case, that being the occurrence of inappropriate conduct during a massage.
- [41] The judge then turned to M.T.'s messages and found she could rely on them to provide context to the appellant's messages. She also assessed M.T.'s text messages for possible inconsistencies with her evidence at trial (at paras. 81 and 83).
- [42] The judge observed that she could not rely on M.T.'s prior consistent statements to bolster her trial evidence based on mere repetition. The evidence was presumptively inadmissible and " [just because] a witness repeats a statement does not make it true" (at para. 96). The judge found, however, that M.T.'s messages were admissible under two exceptions to hearsay: to rebut an inference of recent fabrication and as narrative as circumstantial evidence.
- [43] The appellant submitted that M.T. had fabricated her evidence and the judge was required to address this submission. The judge found that she could use M.T.'s text messages to rebut the allegation of recent fabrication.
- [44] The judge found she could also use M.T.'s messages under the narrative as circumstantial evidence exception to consider the fact, timing, and circumstances of M.T.'s complaint. In her analysis:
- [104] The messages at issue, exchanged between the complainant and the accused, following a massage have probative value, not because [M.T.] made the same allegation at a prior point in time but because the timing and nature of the conversation between the only two witnesses, in this case, assist in assessing the credibility of two conflicting versions of the key event: *R. v. Langan*, 2019 BCCA 467, para 98.

- [105] The probative value of a 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. Their use for this purpose is permissible: *R. v. Dinardo*, 2008 SCC 24, pg. 798, para. 23; *R. v. Langan*, 2019 BCCA 467, paras. 82 to 105. In other words, the messages of [M.T.] provide context to the text messages of [the appellant]. There is probative value in their conversational nature.
- [106] Thus, in assessing her overall credibility, I have considered the timing and circumstances of [M.T.'s] disclosure to [the appellant] in the text messages.
- [Emphasis added.]
- [45] The judge went on to find that the timing and circumstances of the messages yielded inferences which supported the truthfulness and reliability of M.T.'s testimony and helped to rebut positions taken by the appellant. For example, the appellant argued that M.T. fabricated the allegation, and that the timing of the messages detracted from her credibility because she sent them to the appellant after she reported him to the police. The judge rejected these arguments, finding that the timing of M.T.'s first message to the appellant, within hours of the massage appointment, made the appellant's theory of fabrication less likely (at para. 108). Further, the appellant's messages containing admissions against interest were sent to M.T. before she reported him to the police (at para. 111).
- [46] The appellant also argued that the complainant had a financial motive to fabricate an allegation of sexual assault, based on the fact she was seeking monetary restitution (revealed during cross-examination on her victim impact statement). The judge did not accept this argument because the complainant sent the text messages and reported the appellant to the police in 2018 but did not seek restitution until 2020. The appellant also argued that the complainant had a motive to fabricate the sexual assault allegation based on the fact that she had researched the likelihood of conviction before making her report to the police. The judge rejected this argument, finding it was more likely the complainant's research would have discouraged her from reporting the offence, given the reported difficulty in proving sexual assault in the circumstances.
- [47] Finally, the judge concluded that the messages were "conversational" in nature and there was no support for the appellant's position that M.T. intentionally sent messages to the appellant for the purpose of collecting evidence (at para. 112).
- [48] The judge found that M.T. was a candid and forthright witness (at para. 26). In contrast, the appellant's evidence contained several material inconsistencies and was contradicted by his text messages. After reviewing his evidence, the judge determined that she did not believe his evidence, nor was she left in reasonable doubt by it (at para. 201).
- [49] After summarizing the evidence, the judge set out the W.(D.) framework, noting the distinction between findings of credibility and proof beyond a reasonable doubt. She said:

- [129] Under the first step of W.(D.), if I believe [the appellant's] evidence, I must find him not guilty. Under the second step of W.(D.), if I do not believe [the appellant's] evidence but I am left with a reasonable doubt based on his evidence or other evidence, I must find him not guilty. Finally, under the third step of W.(D.), even if I am not left in doubt by [the appellant's] evidence, I must ask myself whether, based on the evidence I do accept, I am satisfied beyond a reasonable doubt that he is guilty of the offence. In other words, I must not convict [the appellant] unless I am satisfied beyond a reasonable doubt, based on all of the evidence, that he sexually assaulted [M.T.]. There is a fourth step that has been mentioned in other cases that refers to the scenario where, if I do not know whom to believe, then I must acquit the accused.
- [50] Applying the W.(D.) framework, the judge concluded that she could not accept the appellant's evidence on the basis of internal inconsistencies in his testimony, which she found demonstrated a "deliberate attempt to mislead this Court" (at para. 141). She also found that the appellant's testimony was inconsistent with his own text messages. For these reasons, the judge concluded that the appellant's evidence did not raise a reasonable doubt.
- [51] The judge next considered whether the appellant's evidence and other evidence gave rise to reasonable doubt, even though she disbelieved his evidence. The other evidence included the text messages and the evidence of the appellant's wife. The judge accepted the appellant's translation of the text messages, but found that this evidence tended to support the Crown's case rather than the appellant's. She found the evidence of the appellant's wife to be of limited value because she was not an eyewitness to the events. The judge concluded that there was no other evidence that raised a reasonable doubt.
- [52] The judge turned to the question of whether, based on the evidence she did accept, she was satisfied of the appellant's guilt beyond a reasonable doubt. The judge explained her reasons for finding M.T.'s evidence to be believable. M.T. was a credible witness and her testimony was both internally consistent and externally consistent with the text messages, including the statements against interest. Finally, as set out above, the timing and circumstances of the messages yielded inferences supporting M.T.'s testimony.
- [53] Based on the evidence presented, the judge was satisfied the Crown had proven the elements of sexual assault beyond a reasonable doubt.

First ground of appeal: Did the judge err by failing to consider some of the evidence characterized (incorrectly) as a myth or stereotype?

- [54] The appellant submits the judge erred by failing to consider permissible inferences he advanced which were relevant to credibility. In so doing, the appellant contends the judge failed to consider all the evidence. The appellant submitted there were two instances where the judge refused to consider the appellant's submission because she categorized the submission, incorrectly, as requiring reliance on a myth or stereotype.

- [55] First, the appellant submits the judge erred by declining to infer the complainant was "happy" with the service provided by the appellant because she left him a tip after the appointment. The judge refused to accept that the act of tipping was inconsistent with the complainant's allegation of assault. The appellant contends the judge did not accede to this submission because it was based on a myth or stereotype.
- [56] Second, the appellant submits the judge erred by refusing to infer that the appellant was unlikely to have assaulted the complainant while his wife was downstairs. The appellant contends the judge erred in concluding that this submission required mythological reasoning.

Legal principles

- [57] Assessments of credibility are findings of fact that are not to be interfered with unless it is established that they cannot be supported on any reasonable review of the evidence: *R. v. Burke*, [1996] 1 S.C.R. 474, 1996 CanLII 229 at paras. 5-7. Credibility findings are entitled to deference unless palpable and overriding error can be shown: *R. v. Gagnon*, 2006 SCC 17 at paras. 10-11; *R. v. M.D.*, 2021 BCCA 339 [M.D.] at para. 55.
- [58] Appellate deference to credibility and factual assessments by a trial judge is required. If there is a reasonable basis for the trial judge's findings, an appellate court should not substitute its own view: *R. v. G.F.*, 2021 SCC 20 at para. 5; *M.D.* at para. 54. In *Gagnon*, the Court noted:
- [20] Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.
- [59] In recent years, judges have been cautioned about relying on myths and stereotypes in assessing credibility. Days before the hearing of this appeal, the Supreme Court of Canada released *R. v. Kruk*, 2024 SCC 7. In *Kruk*, the Supreme Court of Canada addressed the scope of appellate review in respect to credibility assessments. In doing so, the Court overturned a line of authority that had treated ungrounded "common-sense" assumptions as constituting an error of law. The Court stated that mere assumptions drawn in the course of credibility and reliability assessments, like other findings of fact, must remain reviewable for palpable and overriding error.
- [60] The decision also addresses the role of "common sense" in assessing the credibility of witnesses. As affirmed again in *Kruk*, credibility findings by trial judges are entitled to deference:
- [83] Trial judges have expertise in assessing and weighing the facts, and their decisions reflect a familiarity that only comes with having sat through the entire case. The reasons for the deference accorded to a trial judge's factual and credibility findings include: (1) limiting the cost, number, and length of appeals; (2) promoting the autonomy and integrity of trial

proceedings; and (3) recognizing the expertise and advantageous position of the trial judge. In light of the practical difficulty of explaining the constellation of impressions that inform them, it is well-established that "particular deference" should be accorded to credibility findings ... Appellate courts are comparatively ill-suited to credibility and reliability assessment, being restricted to reviewing written transcripts of testimony and often focussing narrowly, even telescopically, on particular issues as opposed to seeing the case and the evidence as a whole ...

[Internal references omitted.]

- [61] In his oral submissions, the appellant took the position that Kruk did not alter his grounds of appeal but supported his position. That is, that the judge prevented the appellant from advancing his theory because she characterized the submission as advancing a myth or stereotype when in fact, it did not.
- [62] The appellant pointed to paras. 64-65 of Kruk as supporting the position he advanced. In those paragraphs, Justice Martin made it clear that the rule against resorting to myths and stereotypes is not unbounded. The legal rules in place require careful and close attention to the purpose for which any given piece of evidence is tendered. In Kruk, the Court explained:
- [65] For example, just because the evidence happens to align with a myth or stereotype does not necessarily mean that any inferences that can be drawn from that evidence will be prejudicial. While it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate (see, e.g., *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61 C.R. (7th) 326, at paras. 9-15) -- indeed, where the defence adduces evidence on this point, a trial judge is obliged to consider it to give full effect to the presumption of innocence, and a failure to do so constitutes reversible error. Furthermore, while s. 276 of the Code prohibits the use of prior sexual history to support either twin myth, it clearly does not prohibit such evidence point-blank and for all purposes. So long as it is properly screened by s. 276, such evidence may be used, for instance, to resolve inconsistencies between the complainant and the accused's testimony as to their relationship.

[Italics in original.]

- [63] In other words, trial judges must avoid reliance on stereotypical assumptions about how victims "should behave" after a sexual assault. Different people will react differently to the same event. The error here, asserts the appellant, is that the judge refused to consider legitimate inferences that could be drawn from the fact the complainant left a tip for her alleged assailant and from the fact that it was unlikely a perpetrator would commit a sexual assault with his spouse in close proximity. The appellant stated it this way in his factum:

the trial judge felt that she was not permitted to consider in any way the post-allegation conduct of the complainant. To be clear, a trial judge must exercise caution assessing a complainant's after-the-fact conduct in recognition that there is no inviolable rule about how people who are

the victims of trauma like sexual assault will behave: *R. v. D. (D.)*, 2000 SCC 43 at para 65. It is still essential for a trial judge to assess all of the complainant's evidence, compare it to all the evidence in the case, and ask if credibility and reliability have been proven beyond a reasonable doubt. If a judge refuses to consider all the evidence, the trial judge has erred in the credibility assessment and this is sufficient to necessitate a new trial.

R. v. C.M.M., 2020 BCCA 56, at paras. 120, 122, and 131.

Analysis

- [64] Dealing first with the tipping argument, I do not agree with the submission that the judge declined to consider this argument. The judge did consider it. She characterized the argument as raising "a possible inconsistency to the extent that the act of tipping conveys a message that [M.T.] was happy with the service that on her other evidence amounts to a sexual assault" (at para. 48). The judge then relied on M.T.'s evidence and made a factual finding to resolve the issue, stating that "[M.T.'s] evidence was cogent and consistent with a blank mind and wanting to leave as soon as possible. Based on the evidence before me, to infer otherwise is to rely on a myth and stereotype." (at para. 49).
- [65] During the hearing, the appellant took the position that the judge fell into error because she took the view that the fact of tipping, in and of itself, constituted a prohibited myth so the evidence could not be considered further. With respect, that is not what the judge did. Though she referred to myth-based reasoning in this part of her decision, she went on to resolve the issue. I agree with the Crown's submission that this observation by the judge was superfluous, since she had already considered M.T.'s explanation as to why she tipped the appellant. The judge found her evidence to be entirely credible, thereby resolving the factual issue.
- [66] Though the judge referred to myths and stereotypes in this part of her reasons, she did so within a specific context. The reasons, read wholly and contextually, show that the judge considered the evidence about tipping and rejected the factual premise as advanced by the appellant. She did not fall into error when she did so.
- [67] I come to the same conclusion with respect to the argument about the appellant's wife's proximity. Here, the appellant submits that the judge erred by rejecting his argument that it was implausible he would risk sexually assaulting M.T. while his wife was in the room on the floor below him.
- [68] The judge declined to rely on a generalization about how much risk a sexual assault perpetrator might be willing to take in circumstances such as this case. She noted that the "suggestion that a perpetrator would not take such a risk with his wife downstairs is a myth" (at para. 59). In *R. v. A.P.G.*, 2023 BCCA 486 at para. 23, this Court held that "[s]exual assault perpetrators may well have varying levels of tolerance for the risk of detection, and generalizations in this regard are not matters of common sense". (Emphasis in original.)

- [69] However, the judge went on to evaluate the case-specific evidence that was before her relevant to the risk of detection. She found that the evidence did not support the inference sought by the appellant. The appellant's wife agreed that she was working with a different patient and on a different floor at the time of the appellant's appointment with M.T. The judge found the evidence of "risk" to be limited in these circumstances.
- [70] Moreover, in her testimony, the appellant's wife said she did not hear any sounds coming from the room above her. The judge found that this evidence " [did] not reconcile with the evidence of [the appellant] who testified that he spoke to M.T. during the massage." (at para. 59.)
- [71] The judge's reasons, read wholly and contextually, reveal that she assessed the evidence before her and was not persuaded by the argument that the appellant would not have taken the risk of sexually assaulting M.T. with his wife nearby. I do not agree that she refused to consider this submission. Rather, she was unpersuaded by it. The proximity of the appellant's wife to observe what was happening was very limited.
- [72] In sum, the judge made factual findings regarding the submissions about tipping and risk of detection. I disagree that she neglected or refused to deal with this evidence because myths or stereotypes prevented her from doing so. I would dismiss this ground of appeal.

Second ground of appeal: Did the judge err in her use of post-event text messages?

- [73] The appellant does not challenge the admissibility of the text messages. In the appellant's submissions, the judge was correct to consider the text messages but contends the judge exceeded the scope of permissible use. The appellant stated his position this way:

The trial judge neither erred in admitting the text messages, nor in broadly considering the text messages exchanged after the incident. [The appellant] agree[s]:

- The content of the [a]ppellant's messages constitute potential admissions against interest;
- [M.T.'s] in-court testimony could be compared to the content of the [a]ppellant's messages to assess whether [M.T.'s] in-court testimony was externally corroborated or contradicted;
- Along the same lines as the above bullet, considering [the appellant's] position that [M.T.'s] messages were inconsistent with her in-court testimony (this is not a hearsay use); and
- Considering [M.T.'s] messages to be prior consistent statements rather than some other type of evidence.

- [74] The appellant submits the judge erred by admitting the text messages for the truth of their contents under either exception--narrative as circumstantial evidence or as evidence to rebut recent fabrication. The appellant submits the contents of M.T.'s messages were unnecessary to understanding the unfolding of events and were not properly admitted to rebut recent fabrication.

Legal principles

- [75] Questions about the admissibility and use of a complainant's prior statements raise a question of law, reviewable on the correctness standard, *R. v. C.M.M.*, 2020 BCCA 56 [C.M.M.] at para. 144.
- [76] Prior consistent statements are presumptively inadmissible: *R. v. Dinardo*, 2008 SCC 24 at para. 36. They are hearsay and potentially amount to oath-helping in the sense that repetition may become a "badge of testimonial trustworthiness": *R. v. D.K.*, 2020 ONCA 79 [D.K.] at para. 35, *R. v. Khan*, 2017 ONCA 114 at para. 25. It is impermissible for a trier of fact to reason that a prior consistent statement corroborates in-court testimony or that consistency enhances credibility: *Khan* at para. 41. Repetition does not "enhance the value or truth of the testimony": *R. v. Ellard*, 2009 SCC 27 at para. 31.
- [77] There are several exceptions to the prohibition against admitting prior consistent statements, two of which are relevant on this appeal: first, to rebut an allegation of recent fabrication, and second, to adduce facts as part of the narrative as circumstantial evidence: *R. v. Stirling*, 2008 SCC 10 at para. 5; *R. v. Bagherzadeh*, 2023 ONCA 706 at para. 26.
- [78] A prior consistent statement may be admitted to rebut an allegation of recent fabrication, to provide a direct response to the suggestion, express or implied, that the witness concocted allegations after the event being testified about (and before the alleged recent fabrication). The statement is admitted to show that details were not added after the point in time suggested by opposing counsel: *Stirling*, *R. v. R.M.*, 2023 BCCA 455, *Khan*, D.K.
- [79] The appellant spent considerable time addressing Langan, in his factum and again at the hearing, to support his position on the second hearsay exception at issue, that being narrative as circumstantial evidence. It is therefore useful to describe that case in more detail.
- [80] Langan was a sexual assault case. The issue was consent. Text messages sent by the complainant to the accused were admitted into evidence. The trial judge convicted.
- [81] On appeal, a majority of this Court would have set aside the conviction on the basis that the trial judge used the text messages for the improper purpose of bolstering the complainant's credibility. Chief Justice Bauman dissented, finding that the trial judge's reasons did not clearly show that he used them for that improper purpose. A majority of the Supreme Court restored the conviction, adopting the reasons of Chief Justice Bauman. With respect to permissible use, he reasoned:
- [99] It is well-established that prior consistent statements may be used to assess credibility. Proper use turns on whether the statements are used to find a witness credible because of specific, permissible inferences of credibility, such as: "evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint" (*Khan* at para. 43); understanding "the sequence of events from the alleged offence to the prosecution so that [the trier of fact] can understand the conduct of the complainant and assess her

truthfulness" (R. v. F. (J.E.), 1993 CanLII 3384 (Ont. C.A.) at 476, cited in Dinardo at para. 38); or assessing if there is "evidence that an individual has a motive to lie" (R. v. Stirling, 2008 SCC 10 at para. 12).

[100] These uses are all distinct from the impermissible use of finding credibility through repetition.

[82] Similar guidance about permissible use was set out by this Court in C.M.M.:

[157] The judge was allowed to place the statement "on the scale" because it carried probative value beyond the fact of repetition: Khan at para. 44. It removed the suggested "motive to fabricate" (Stirling at para. 11). It also formed part of a body of evidence surrounding the sequence and timing of events and the emotional state of the complainant at the time of the utterance" Khan at para. 44. In the latter role, the evidence provided important context that the judge was entitled to consider: Khan; Dinardo, at para 37.

[83] Even when a prior consistent statement is admissible under one of these exceptions, the trial judge must nevertheless use caution to prevent the evidence from being used for impermissible purposes: Ellard at para. 42, Dinardo at paras. 37-39.

[84] Where there was a permissible purpose for the statement to be admitted, appellate courts are not to speculate that the trial judge used it improperly without clear indications: Langan at para. 103 (dissent).

Analysis

[85] The appellant acknowledges that the judge set out a legitimate basis for admitting the messages, but submits she nonetheless strayed into impermissible reasoning.

[86] At trial, the appellant relied heavily on the text messages and on the sequence of events relating to the text exchange. The appellant emphasized the issue of the importance of the circumstances and timing of M.T.'s messages to support his argument that her post-event conduct undermined her credibility. As a result, the judge was required to consider the messages, particularly in light of how the submissions unfolded. His position was that the text messages were relevant to inconsistencies in M.T.'s evidence, demonstrated a motive to lie, and demonstrated the implausibility of M.T.'s account.

[87] In this sense, the judge was required to work through the appellant's various submissions. She relied on the text messages throughout her reasons to respond to these submissions. All of this was relevant to M.T.'s credibility, but it did not have anything to do with a repetition of her statement. These factors were relevant to the judge's credibility assessment because the appellant made them so. Particularly where the appellant took the position that M.T.'s conduct from the very beginning of this sequence of events (tipping the appellant, conducting Google searches about similar sexual assaults), and at the very end sending him further text messages after reporting the incident to the police, were important factors for the judge to consider.

- [88] In my view, the judge did not rely on the text messages for an impermissible purpose. She specified the ways in which she was relying on the messages under the "narrative as circumstantial evidence" exception. Her reasons were directly responsive to the appellant's arguments about the circumstances and timing of the messages. The judge precisely identified what she could do with the text messages and the limits of the use:
- [104] Second, I find that the messages of [M.T.] are admissible through the "narrative as circumstantial evidence" exception to the hearsay rule. The messages at issue, exchanged between the complainant and the accused, following a message have probative value, not because [M.T.] made the same allegation at a prior point in time but because the timing and nature of the conversation between the only two witnesses, in this case, assist in assessing the credibility of two conflicting versions of the key event: *R. v. Langan*, 2019 BCCA 467 para. 98.
- [105] The probative value of a 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. Their use for this purpose is permissible: *R. v. Dinardo*, 2008 SCC 24, pg. 798, para. 23; *R. v. Langan*, 2019 BCCA 467, paras. 82 to 105. In other words, the messages of [M.T.] provide context to the text messages of [the appellant]. There is probative value in their conversational nature.
- [Emphasis added.]
- [89] In my view, the judge was not addressing the substance or content of M.T.'s prior statements in the impugned paragraphs. Rather, she was addressing the complainant's comments about the steps she took--her conduct immediately after the assault--as part of her credibility assessment. For this limited purpose, the judge was entitled to consider the context and timing of the texts. The judge did not use the text messages as "repetition" to bolster M.T.'s credibility.
- [90] The judge concluded the text messages were also admissible under the recent fabrication rule. She said she was invoking this exception because the appellant had challenged M.T.'s evidence as a fabrication. The appellant advanced two submissions in this context. First, it was said M.T. had a financial motive to fabricate based on a victim impact statement she completed two years after the event. This submission rested on M.T.'s evidence about seeking financial compensation. During her cross-examination on a victim impact statement, M.T. conceded that she was seeking compensation of well over \$100,000. In response to the appellant's submission, the judge was required to consider the timing of the complaint and the making of the financial claim. In this context, it was probative of the issue for the judge to consider the evidence of how and when M.T. had initially come forward to evaluate the strength and significance of the relatively recent evidence of the financial motive. The judge did not use evidence of M.T.'s initial accusations for the truth of their contents or allow the texts to bolster M.T.'s credibility due to repetition.

- [91] The appellant's second submission about fabrication related to M.T.'s evidence about her Google research and his submission that she was motivated to secure a conviction. With respect to the latter, the appellant argued that M.T. had a motive to fabricate this allegation of sexual assault based on the fact that she had researched the likelihood of conviction before reporting the incident to the police. The judge rejected this submission, noting the tenuous connection between M.T.'s Google research and her motive (or lack thereof) to fabricate.
- [92] The judge examined the issue of fabrication as she weighed the timing and circumstances of M.T.'s complaint along with the other evidence probative of the issue. The judge concluded that there was no evidence of motive to fabricate. In the end, she treated this factor as neutral in the circumstances of this case (at para. 103).
- [93] The judge did not use the evidence of M.T.'s initial complaint for the truth of the contents; nor did she use the text messages to bolster M.T.'s credibility. The circumstances and timing of the statements were properly part of the evidence.
- [94] In this case, the judge's reasons were responsive to the submissions before her. Her reasons comprehensively set out in the basis for admitting certain types of evidence and the limited use that could be made of the evidence. She demonstrated caution in her approach.
- [95] I conclude that the judge did not improperly use the text messages under either exception: narrative as circumstantial evidence or recent fabrication.
- [96] I would not accede to this ground of appeal.

Conclusion

- [97] In this case, the judge was tasked with assessing the credibility of M.T. and the appellant. The reasons were comprehensive as she explained, correctly, the legal principles governing her credibility assessment and the use to be made of controversial evidence. The reasons reveal she considered the appellant's submissions. Her assessment of credibility is entitled to deference. Similarly, the appellant has not demonstrated any error regarding the use the judge made of post-event text messages.
- [98] For these reasons, I would dismiss the appeal.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Horsman"

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