

CANADA / JUDGMENT

R. v. Chow

2025 BCSC 2200

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2200 R. v. Chow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chow,

2025 BCSC 2200

Date: 20251107

Docket: 37950

Registry: Vancouver

Rex

Respondent

v.

Chih Hwa Leo Chow

Appellant

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Before: The Honourable Justice J. Walker

On appeal from: An order of the Provincial Court, dated December 23, 2024

(R. v. Chow, File No. 266763).

Reasons for Judgment

Counsel for the Respondent :

D. Meagher

Counsel for the Appellant:

T.M. Arbogast, K.C.

Place and Date of Hearing:

Vancouver, B.C.

October 15, 2025

Place and Date of Judgment:

Vancouver, B.C.

November 7, 2025

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Introduction

- [1] The appellant Mr. Chih Hwa Leo Chow was prosecuted summarily on one count of sexual assault and was found guilty following his trial before a provincial court judge. Mr. Chow appeals his conviction. He alleges that his trial was unfair or appeared to be unfair due to the numerous intercessions of the trial judge during the testimony of the witnesses, which culminated in cross-examination of the appellant. The appellant argues that the trial judge improperly assumed the role of an advocate and investigator during the course of the trial.
- [2] Crown counsel acknowledges that the trial judge's frequent interventions were unusual but emphasizes that judicial interventions are not in and of themselves a reviewable error. There is a high onus on the appellant to establish a miscarriage of justice, and the appellant has not pointed to any prejudice arising from the interventions. Many of the trial judge's intercessions were in the nature of clarifying questions and the trial judge did not display any bias during the trial.

The facts

- [3] The appellant was 65 years old at the time of the offence and the complainant M.D. was 21 years of age. M.D. had never met the appellant, but her mother N.D., knew the appellant as a friend. N.D. and M.D. lived outside of the Vancouver area and were in Vancouver for the weekend.
- [4] In the early morning hours of September 16, 2022, N.D. and M.D. visited the appellant at the Brickhouse in Vancouver, an establishment he owned. The Brickhouse was known as a place for hospitality industry professionals to socialize. Both N.D. and M.D. worked in the hospitality industry and M.D. was a mixologist.
- [5] Both N.D. and M.D. testified that they were at the Brickhouse for about 3 ½ hours and consumed a number of alcoholic drinks prepared by the appellant. They had also consumed some alcoholic beverages prior to arriving at the Brickhouse.
- [6] M.D. testified that she was not feeling well, and the appellant assisted her to lay on a couch. The appellant laid down beside her and moved his hand underneath her clothing and touched her thigh and rear end. M.D. left the couch ran to the washroom where she vomited.
- [7] At some point, M.D. returned to the couch and again the appellant laid down beside her. She testified that the appellant moved his hand under her bra and fondled her breasts. The appellant also grabbed her wrist and brushed her hand against his crotch area.
- [8] M.D. then returned to the upstairs bathroom where she vomited again. After exiting the bathroom, she saw the appellant at the bottom of the stairs and his penis was exposed. The appellant took her hand and closed her fingers around his penis. The appellant then pushed her up against a wall and digitally penetrated her vagina.

- [9] M.D. ran down the hallway where she saw her mother sitting in the bar area. She explained that the appellant had sexually assaulted her, and they immediately left the premises.
- [10] N.D. did not witness any of the interactions between the appellant and M.D. She acknowledged that she was intoxicated and her recollection of some parts of the evening was hazy.
- [11] The appellant testified. He claimed that the sexual activity with M.D. was consensual. He acknowledged that M.D. had consumed several drinks and he was aware that she had vomited; however, M.D. did not appear to be intoxicated. While lying on the couch with her, M.D. moved her leg over the appellant's leg and began to thrust and grind her pelvic area against his leg. At the same time, she began to French kiss the appellant. As this activity continued, he put his hand on her breast, over her clothing. The appellant believed M.D. was consenting to this activity since she kissed him first and was "dry humping" his leg.
- [12] The sexual activity came to an end when M.D. got up to use the washroom. He was concerned with how long she was gone for, so he went to the bottom stair area. The appellant saw M.D. come out of the washroom and noted that she was a bit "wobbly", but he thought she was only moderately intoxicated. He asked her if she was okay and she replied that she was. She then began to French kiss him again. She gyrated her pelvic area against his left leg and gently massaged his groin area over his clothing. His penis was never exposed.
- [13] The appellant said he had his hand on M.D.'s rear end and pulled her towards him. He put his other hand inside her pants and touched her vagina briefly. They returned to the sitting area, and he sat on the couch between N.D. and M.D. The appellant and M.D. again began French kissing, and she was intensely grinding her pelvic area against his leg. The appellant responded by putting his hand underneath her clothing and massaged her bare breast.
- [14] Suddenly M.D. sat up and confronted the accused stating: "you assaulted me" and told her mother that they had to go. The appellant was stunned, angered and hurt by M.D.'s reaction since she had initiated the sexual activity. He was surprised and flattered by it because of the big age difference between them.

The trial judge's reasons for conviction

- [15] After summarizing the evidence of the three witnesses in detail and setting out the guiding legal principles, the trial judge noted that in order to assess the sufficiency of the evidence to determine whether the Crown had proven the offence beyond a reasonable doubt, the credibility and reliability of the complainant and the accused were significant. The complainant testified that she did not consent to any of the sexual activity, while the appellant testified that it was all consensual.

- [16] The trial judge found M.D. to be a credible witness and found that she did not consent to any sexual activity with the appellant. The trial judge did not accept the appellant's evidence. He also found that the appellant had failed to take reasonable steps to ensure that M.D. was consenting to the sexual activity.
- [17] As a result, the trial judge found that the complainant did not voluntarily agree to any sexual activity with the appellant and the Crown had proven beyond a reasonable doubt that the appellant sexually assaulted M.D. on September 16, 2022.

The trial judge's interventions

- [18] Many of the trial judge's intercessions were aimed at clarifying the evidence or were made to put the Crown witnesses at ease. The appellant takes no issue with those interventions. However, he points to other interventions which on their own are innocuous but when considered cumulatively, the interventions amount to an appearance of unfairness and constitute a miscarriage of justice. The appellant argues that the trial judge's questioning of the appellant in and of itself was unfair.

N.D.'s testimony

- [19] The first witness to testify was N.D. and the appellant notes that early on in her examination in chief, the trial judge started to make his presence known by providing the witness with some direction about how to give her evidence. For example, the judge directed Crown counsel to assist the witness prepare a sketch of the bar area:

What I am going to say, [Crown counsel], for all of our benefit, at the break . . . she can do a sketch as best she can of the bar area . . . so we are going to have you without any parroting or prodding by - anyone, just to take a piece of paper [Crown counsel] will provide it to you . . . because I need to know about this couch and who was situated and where . . . do me a little graph at the morning break.

- [20] The appellant argues that this was "out of bounds" it was not for the trial judge to direct how Crown counsel chose to elicit the evidence, and neither was it proper for him to express his view about what he needed to know.
- [21] The examination of N.D. continued and the appellant points to other improper interventions, for example when N.D. explained that she was having a hard time remembering, the trial judge said:

THE COURT: So what I am going to direct you to do is do the best you can, listen to the question and answering the question about your recollection after the cigarette. As I said, people are human. In other words . . . unlike an expert witness, you are lay witness. If you had troubles recalling what happened due to alcohol consumption and so on, you can certainly advise me of that circumstance and do the best you can at trying to recall. . . if you can't recall something, called there is nothing wrong with saying "I actually do not recall" rather than stray into the area

of speculation.

A: I don't. This is where I really run into a struggle. There are some things -- like some things that come to you and then most of it's not there, like its' black.

- [22] After N.D. gave that answer the trial judge provided further direction to the witness: "I want to know what you recall . . . because I have to determine credibility and reliability". N.D. then provided some detailed inculpatory evidence.
- [23] Defence counsel was able to cross-examine N.D. uninterrupted. The cross-examination comprises 23 pages of the transcript. After cross-examination was complete the trial judge asked several questions of the witness that take up two pages of the transcript. The appellant argues that the questions were not clarifying questions, but instead the trial judge introduced new concepts including eliciting evidence about intoxication and the impact of alcohol on individuals based on N.D.'s experience in the service industry. M.D.'s level of intoxication was a live issue at trial and was important to the issue of whether M.D. lacked the capacity to consent to sexual activity. Both counsel were permitted to ask further questions arising from the trial judge's questions and defence counsel chose to do so.

M.D.'s testimony

- [24] M.D. was clearly a nervous and anxious witness and the trial judge intervened at the outset to put her at ease. These interventions were not objectionable; however, the appellant notes that minor appropriate intercessions escalated to improper interventions. For example, in describing her level of intoxication when she arrived at the Brickhouse, M.D. said that she was not drunk, was coherent and would not describe herself as intoxicated. Before Crown counsel could ask the next question, the trial judge asked: "would you have driven a car"?
- [25] After allowing Crown counsel to ask a few more questions, the trial judge largely took over the questioning of the witness for a period of time. The appellant points out that the questions were leading questions - they suggested the answer.
- [26] It appears that the witness became anxious, and the trial judge instructed the witness to advise him if she required a break and urged M.D. not to be self-conscious. He indicated that everyone understood that this was an emotional situation. The trial judge then explained that he wanted the witness to tell her story. The appellant does not take issue with the trial judge's comments, but argues that the judge then went too far and stepped outside of his role when he provided further instructions:

So you are not interrupted by [Crown counsel] or [defence counsel] jumping to his feet. You tell me the story because it can be a lot easier for you to get that story out and then [Crown counsel] can come back with other questions. So we are probably close to telling the story, but that's how I do things. And it's going to help you out to explain it, then [Crown counsel] can expand on that.

- [27] Following this explanation, the trial judge examined the witness, not allowing Crown counsel to ask questions, despite her attempt to do so. His examination of the witness comprises approximately four pages of the transcript.
- [28] After the break, Crown counsel was able to question the witness briefly, but the trial judge again took over the questioning and elicited details that Crown counsel had not sought to elicit. The judge directed M.D. to look at the diagram that he had compelled N.D. to draw. Crown counsel explained that she did not want to question the witness with reference to N.D.'s diagram and preferred to have the witness draw her own diagram. However, after the break Crown counsel explained that M.D. was not going to draw her own diagram. The trial judge then, with reference to N.D.'s diagram, questioned M.D.
- [29] Cross-examination of M.D. proceeded without any interruption by the trial judge. After cross-examination was concluded, the trial judge asked M.D. three follow up questions. One question related to the lighting in the bar area, which had not been canvassed in either direct or cross-examination of M.D. The appellant argues that this was a critical issue and only introduced after defence counsel had completed his cross-examination. The trial judge gave counsel the opportunity to ask further questions arising from his questions.

The appellant's testimony

- [30] Defence counsel was mainly able to question the appellant without interruption except that the trial judge interjected periodically to ask some questions. For example, the judge asked which hand the appellant used to touch M.D.'s breast, which way he was facing, how old he thought M.D. was, and whether he was having a conversation with N.D. while kissing M.D. All questions that challenged the appellant's description of the events. When the appellant described the kissing with M.D. as "passionate", the trial judge asked whether it was "French kissing", a description not used by appellant but ultimately adopted by him.
- [31] At the conclusion of the appellant's direct examination, before Crown counsel could commence her cross-examination, the trial judge asked the appellant several questions. The questions were clarifying in nature; however, the appellant says they were critical to the unfolding of the events. As a result of the trial judge's questions defence counsel sought and was permitted to ask a clarifying question.
- [32] Cross-examination of the appellant proceeded without interruption for a period of time, amounting to almost 12 pages of the transcript, before the trial judge became involved in questioning the appellant. While not explicitly objecting, defence counsel intervened when the trial judge made suggestions to the appellant.
- [33] During Crown counsel's cross-examination, the trial judge interjected and directly challenged the appellant's evidence. For example, when the appellant testified that M.D. obviously wished to be close to him, the judge asked: "why do you say obviously"? This was followed by the trial judge posing a hypothetical to the appellant.

[34] When the appellant agreed with Crown counsel's suggestion that M.D. did not say she wanted the appellant to stay on the couch with her, the trial judge followed up by asking:

And there were no non-verbal cues, and by that she didn't sort of pat you and say --right on the thigh or on the arm, there was nothing physical at that point, correct?

[35] The trial judge then challenged the appellant's answer:

But there's no -- there was no touching by her sort of in the - to -- your arm or thigh or any part of your body other than she moved

[36] After the appellant gave his answer, defence counsel intervened:

DEFENCE COUNSEL: Your Honour, I -- I'm sorry, and I don't want to in-

THE COURT: I know.

DEFENCE COUNSEL: This is my friends cross-examination -

...

CROWN COUNSEL: I was getting there, so.

DEFENCE COUNSEL: Oh, you know where I'm going?

CROWN COUNSEL: Yes, I think you're -- asking Your Honour to perhaps give me a chance to ask my question?

[37] The appellant characterizes defence counsel's interjection as an objection to the trial judge's cross-examination of his client.

[38] Nevertheless, the trial judge continued to interject with his questions, following up on the cross-examination questions asked by Crown counsel:

CROWN COUNSEL: So it's your evidence today for the first time that she took a deep breath to accommodate your hand going down her pants.

A: That's correct, ma'am.

THE COURT: And to be clear that was down her pants and also into the underwear, is that correct?

A: That's correct.

...

THE COURT: For this maneuver you'd have to go into the pants and also through the waistband of the underwear, is that a fair assumption?

A: That's correct, sir. Was very tight.

[39] In the course of the questioning of the appellant (by the Crown and the trial judge) about this critical part of the evidence, the trial judge directed the appellant to stand up and show him "what hand, the way it went in as best as you can recollect".

[40] After describing how he put his hand in M.D.'s pants the appellant said he touched the very top of her vagina. Crown counsel attempted to further question the appellant about this; however, the trial judge interjected:

THE COURT: Did you get into -- you know what a cervix is?

A: Yes.

THE COURT: What is it your -- which finger did you touch this area of the cervix?

A: Will be this one.

[41] Crown counsel returned to this topic later in her cross-examination and asked the appellant why he did not just remove M.D.'s pants. Before he could answer, the judge added:

THE COURT: Or pull them down?

A: Oh, because when my hand was on her tummy, she took a -- she inhale.

THE COURT: And you viewed that as a green light to go into her pants?

A: Yes. . .

[42] Crown counsel played the appellant's recorded police statement. After it was concluded, before the Crown could question the appellant, the trial judge questioned the appellant about what he had said and suggested to the Crown that it would be worth following up on his questions.

[43] Crown counsel questioned the appellant about his alleged consensual kissing and touching of N.D. and the trial judge then followed up with leading questions challenging the appellant's evidence. Defence counsel objected to the line of questioning on the basis that it was not relevant to the determination of whether the appellant had sexually assaulted M.D.

[44] Following defence counsel's brief re-examination, the trial judge conducted his own cross-examination of the appellant. The questioning spans over three pages of the transcript. Defence counsel attempted to object to the questioning:

DEFENCE COUNSEL: May I --

THE COURT: Nope.

DEFENCE COUNSEL: sorry.

[45] The appellant points out that the probing questions asked by the trial judge were sophisticated and boxed the appellant in, for example:

THE COURT: You're an intelligent man, you're a businessman, you've been running a business for a long time. You're 66 years of age. You probably got an education. It's not as if -- you're nodding.

A: Yes, sir. Yes, Your Honour.

THE COURT: What's your education? Background? You've gone through high school and college?

...

THE COURT: I'm almost done, but you never asked her if she was okay. You gave her water, but you didn't say, "By the way, [M.D.], how are you feeling you okay with what's going on?"

A: I ask her when she came back - pardon me, I ask her when she came down from the washroom when I was waiting by the hostess stand, I say, "Are you okay?" she say, "yeah, I'm good."

THE COURT: That's the only occasion that you had that conversation about her being okay. No other conversation.

A: No, Your Honour.

THE COURT: And you've testified that over the years you're very experienced in mixology, how to make drinks and so on, you know the impacts of alcohol upon the human condition.

A: Yes, Your Honour

THE COURT: And for some people the impacts are more severe, for other people less severe depending upon the body construction and their capacity, correct?

A: Yes, Your Honour

THE COURT: You never asked [N.D.] or [M.D.] at anytime whether they maybe had too much to -- like a few too - or "You [N.D.] or you, [M.D.], have you had too much to drink, do you think?" 'cause you took the shooters away. But you never asked.

A: No, I've known [N.D.] for a long time. We - she works in the business, I work in the business, and I know between her and I if something she need, I will provide. I will do my ultimate best.

THE COURT: But you --

A: We're like old friends that you don't have to ask. I'm going to give you water and I will not be able to hurt your feelings.

THE COURT: But you knew nothing about [M.D.] with respect to her capacity with alcohol.

A: No, I don't. So I took the road of providing water rather than more alcohol . . .

[46] As explained below, the trial judge relied on evidence he elicited from the appellant in his reasons for judgment.

The applicable legal principles

- [47] Pursuant to s. 686(1)(a)(iii) of the Criminal Code, R.S.C. 1985, c. C.-46 which applies by virtue s. 822(1) of the Criminal Code, a conviction appeal may be allowed where the appellate court is of the view that "on any ground there was a miscarriage of justice", including on the basis that the trial was unfair. "The question to be decided in this regard is whether the irregularity was so severe that it rendered the trial unfair or created the appearance of unfairness": *R. v. Khan*, [2001] 3 S.C.R. 823 at para. 69.
- [48] Allegations of irregularities rising to a miscarriage of justice require an examination of the whole of the circumstances to determine whether the trial has been rendered unfair in reality or in appearance. In doing so, the appeal court must bear in mind that an accused is not entitled to a perfect trial, it is inevitable that minor irregularities will occur from time to time, and the trial cannot be held to a standard of perfection: *Khan*, at para. 72.
- [49] Where it is alleged that a miscarriage of justice has occurred on the basis of an appearance of unfairness, the irregularity must be evaluated in relation to a reasonable and objective observer, by asking whether a well-informed, reasonable person considering the whole of the circumstances would have perceived the trial as being unfair or as appearing to be so: *Khan* at para. 73.
- [50] In cases where undue intervention of the trial judge is in issue, the ultimate question is whether the interventions would create the appearance of an unfair trial to a reasonable person present throughout the proceedings and not whether a reasonable observer could come to the same conclusion: *R. v. Murray*, 2017 ONCA at para. 97; *R. v. Parmar*, 2005 BCCA 187 at para. 33. The assessment is contextual and undertaken with reference to the trial as a whole: *R. v. Redden*, 2021 BCCA 230 at para. 102; *R. v. Corby*, 2016 BCCA 76 at para. 40.
- [51] Appellate courts should be reluctant to interfere on the ground that a trial judge improperly interfered during the course of a trial. A strong presumption exists that a trial judge has not intervened unduly at trial: *Murray* at para. 95.
- [52] Trial judges may intervene to ask questions of witnesses to clear up ambiguities, to explore some matter which the witness' answer has left vague, or to ask questions that should have been asked by counsel on relevant matters. On occasion a trial judge may be required to question a witness to ensure that justice is done: *R. v. Brouillard*, [1985] 1 S.C.R. 39 at para. 44; *R. v. Stucky*, 2009 ONCA 151 at para. 64; *Redden* at para. 100.
- [53] However, there are definite limits on this right. The discretion to ask questions must be exercised judicially, trial judges must exercise cautious restraint and confine themselves to their own responsibilities, leaving counsel to perform their respective function: *Redden* at para. 101; *R. v. Walton*, 2025 ONCA 368 at para. 23. Generally, clarifying questions should be put to a witness after counsel has completed his or her examination of the witness and the witness should not be cross-examined by the trial judge: *Walton*, at para. 26.

- [54] When an accused testifies and a trial judge chooses to question the accused, "prudence and the resulting judicial restraint must be all the greater": Brouillard at para. 24.
- [55] Judicial overstepping that has led to the quashing of convictions includes, but is not limited to:
- a) Questioning an accused or witness in such a way as to convey an impression that the judge aligns themselves with the case for the Crown;
 - b) Questioning witnesses in such a way as to make it impossible for counsel to present the defence case;
 - c) Intervening to such an extent that in the testimony of the accused that it prevents the accused from telling their story; and
 - d) Inviting the jury to disbelieve the accused or other defence witnesses.

Redden at para. 101; Walton at para. 28

The appellant's arguments

- [56] The appellant argues that the trial judge inserted himself improperly into the trial and failed to confine himself to his role. He argues that a reasonable and objective observer would conclude that the appellant's trial appeared to be unfair. While the trial judge's interventions started with routine questioning, it evolved to invasive cross-examination of all witnesses including the appellant.
- [57] The appellant argues that the nature of the trial judge's questioning of the witnesses created an appearance of unfairness. The questions went beyond clarifying the testimony, they elicited evidence that supported the Crown's case and that detracted from the appellant's defence. The trial judge improperly usurped counsel's role and took on the role of investigator.
- [58] The trial judge's cross-examination of the appellant was particularly egregious and in fact resulted in an unfair trial because the trial judge relied on evidence he elicited from the appellant to convict him.
- [59] In support of his position, the appellant relies on Walton:
- [24] In this light, I point out that examination-in-chief and cross-examination are and must remain the responsibility of counsel; a trial judge should not become an investigator. A trial judge must not cause a reasonable person to believe that he has "placed the authority of his office" on either side, particularly that of the prosecution, and must also be careful not to usurp the role of counsel because the overall impression created may be fatal to the appearance of trial fairness.

- [25] Although the trial judge may ask questions that should have been asked by counsel, the trial judge must not usurp counsel's role. The judge must not "leave his or her position of neutrality as a fact-finder and become the cross-examiner." When the trial judge does intervene in questioning a witness, "it is important that they use care and not create an impression through the questioning process of having adopted a position on the facts, issues or credibility."
- [26] As this court instructed in Chippewas, at para. 239, a trial judge should try to avoid interfering with the organization and flow of the evidence, because judicial intervention might impede counsel in following an organized line of inquiry. This is especially important during examination-in-chief. Obviously, the trial judge should never cross-examine a witness. Rather, when the trial judge believes that it is necessary to question a witness, the judge's questions should be asked after counsel has completed his examination, or at least after counsel has finished a particular line of questioning. An exception would be a fast clarification that does not become a digression.

[emphasis added]

- [60] The appellant also argues that it is important to consider that a suggestion made to a witness by a judge takes on added authority and import. This is an important consideration in this case, because the trial judge did not ask open ended questions and instead made suggestions to the witnesses. A witness is more likely to agree to a suggestion made by the judge as opposed to one made by counsel considering the power imbalance.
- [61] The appellant argues that the trial judge's questioning of the appellant was significantly unfair. While a direct link between the trial judge's interventions and his reasons for conviction is not necessary, there is such a link in this case. The trial judge relied on evidence he elicited to convict the appellant.
- [62] In summarizing the appellant's evidence, which he rejected, the trial judge directly referred to evidence he elicited during the appellant's cross-examination:
- [155] In the following exchange the accused described what was going through his mind as this scenario played out:

Q. What was going through your mind when this was happening?

A. This is really bizarre. Initially, surprise, flatter due to the age difference. Number two, the mother is to my immediate right. She can see everything and I'm having a positive, jovial conversation with the mother. It was bizarre.

THE COURT: And then you'd stop your conversation, go back to making out with [N.D.]'s daughter and then having more conversation with Mom again?

A. Yes, Your Honour.

THE COURT: Starts and stop situation.

A. When [N.D.] asked me a question, "So how are things during COVID," it's ordinary conversation and I stop what I'm doing and I answer back. It was a continuous conversation, it never happen to me before. It was bizarre.

[63] The trial judge also referred to the appellant's evidence he elicited about his belief that the complainant had consented to the sexual activity:

[162] He agreed the complainant did not verbally consent to him putting his hand under her clothing and then onto her vaginal area. However, when she took the deep breath his hand was on her stomach. He viewed her taking a deep breath as a "green light" or an "invitation to proceed".

[64] The phrase "green light" was a description put to the appellant by the trial judge when he interrupted Crown counsel's cross-examination to ask his own questions.

[65] The trial judge returned to this evidence when he set out his reasons for rejecting the appellant's evidence that M.D. had consented to the sexual activity:

[257] He testified it was his impression he had a "green light" to proceed with his sexual encounters with the complainant at the hostess station. He denied he was crossing any boundaries.

[66] The trial judge then went on to compare the "green light" evidence with the statement the appellant made to the police and relied on inconsistencies he found to reject the appellant's evidence on this point.

[67] The appellant argues that the trial judge's use of the answers he obtained through the questioning of the appellant resulted in an unfair trial or the appearance of an unfair trial. The cross-examination of the appellant in and of itself, but when viewed in conjunction with the trial judge's interventions throughout, would lead an objective observer to conclude that the trial judge aligned himself with the case for the Crown.

Crown counsel's response

[68] Crown counsel argues that the appellant has not met the high threshold required to set aside his conviction because he has not shown that he has suffered any prejudice resulting from the trial judge's interventions.

[69] He submits that the trial judge's interventions do not display any bias or unfairness. The trial judge was mainly engaged in fact finding or asked questions he was obliged to because counsel had not.

[70] Crown counsel notes that the trial judge afforded counsel the opportunity to question the witnesses after he had asked his questions. The Crown submits that defence counsel did not object to the trial judge's interventions and emphasises that in a judge alone trial appellate scrutiny is different.

- [71] The Crown also notes that the trial judge's interventions were not at all like the trial judges' interventions in the authorities relied on by the appellant. For example, in *Walton*, the trial judge "hounded" the appellant, voiced his scepticism and asked for proof of her evidence. Neither is this case like *Stucky*, where the judge challenged the evidence of the appellant and his witness by using sarcasm to demonstrate that he did not believe their evidence. Nor is it similar to *R. v. Hambleton*, 2025 ONSC 4626, where the judge asked the appellant the same question repeatedly, suggesting that he disbelieved the appellant's evidence.
- [72] With respect to the use of evidence the trial judge himself elicited from the appellant, Crown counsel argues that it is important to look at the trial judge's use of that evidence in context. Although the trial judge relied on answers he received from questions he asked, in light of the appellant's evidence the questions asked were more in the nature of clarifying. The answers given by the appellant were consistent with answers provided to questions asked by counsel.

Discussion

- [73] In my view, the appellant has established that a reasonable observer would conclude that the trial judge's questioning of the witnesses, and particularly his questioning of the appellant, created the appearance of an unfair trial.
- [74] The trial judge's frequent interventions occurred throughout the trial; he did not wait until the conclusion of cross-examination to ask clarifying questions. A significant number of his questions were not in the nature of clarifying questions, but suggested the answer or challenged answers given. His questioning of the appellant was quintessential cross-examination, and the judge challenged the veracity of the appellant's version of events often using sophisticated questions. The questioning went directly to the appellant's credibility - the central issue at trial.
- [75] The role of a trial judge is unquestionably demanding. The authorities recognize that on occasion, a trial judge may become frustrated and in turn assume the role of counsel. However, when judges choose to question witnesses on their own, particularly when questioning an accused, trial fairness concerns require that a trial judge exercise extreme caution and restraint: *Brouillard*, at paras. 12 and 24.
- [76] The trial judge did not exercise cautious restraint in his cross-examination of the witnesses and the appellant. He usurped counsel's role and as a result the judge did not appear to be neutral, particularly when he elicited evidence that assisted the case for the Crown. The impression created is fatal to the appearance of a fair trial.

- [77] I do not accept that the trial judge was required to intervene to ensure that justice was done or because counsel failed to elicit relevant evidence. The trial proceedings do not support that suggestion. It is apparent that defence counsel and Crown counsel were more than capable. Their questions were clear, and counsel were undoubtedly strategic in their questioning. Crown counsel's cross-examination of the appellant was effective, and there was no need for the trial judge to take it over or to supplement it.
- [78] Furthermore, I do not accept that defence counsel failed to object to the trial judge's interventions or that he ought to have objected more. It is difficult for counsel to object to a judge's questioning, but in this case defence counsel attempted to do so. Notably, when the trial judge embarked on his cross-examination of his client, defence counsel tried to intervene, but the trial judge ignored counsel's intercession and proceeded to conduct his own effective cross-examination of the appellant.
- [79] I accept that the trial judge's manner of questioning was not abusive, he did not "hound" the appellant or appear to use sarcasm. The trial judge's questions did not display an overt bias against the appellant; however, the sheer magnitude of the interventions and the nature of the questions led the trial judge to slowly but surely elicit significant evidence. The evidence he elicited was then used by him explicitly and implicitly to convict the appellant, thus creating the impression that the trial judge was not neutral.
- [80] I am not convinced that the trial judge was in fact biased, and I accept that he meant to be impartial. Despite the frequent interventions the appellant was not prevented from calling his defence; however, the trial judge unduly interfered with the unfolding of the events and at very least risked jeopardizing the appellant's defence.
- [81] I accept that the analysis of a trial judge's interventions must take into consideration the mode of trial. Interventions will be approached differently in a judge alone trial where no jury is present: *R. v. A.N.*, 2015 QCCA 1109 at para. 27. In a jury trial, there is a risk that interventions by a trial judge may invite a jury to disbelieve the accused. However, in this case the absence of a jury does not alleviate the trial fairness concerns due to the extent and nature of the trial judge's interventions.

Conclusion

- [82] The result in this case does not turn on whether the trial judge was actually biased or whether the appellant suffered actual prejudice as a result of the trial judge's interventions. However, the law rightly demands that trial process be seen as fair. I am of the view that a reasonable and informed observer, looking at the matter realistically and practically, and having considered the matter would conclude that the appellant's trial appeared to be unfair.
- [83] Accordingly, the appellant's conviction appeal is allowed, his conviction is set aside, and the matter is remitted for a new trial.

"J. Walker J."

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