

CANADA / JUDGMENT

R. v. Henry

2023 BCCA 388

COURT

British Columbia Court of Appeal

DECIDED

19 October 2023

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2023 BCCA 388 R. v. Henry COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Henry, 2023 BCCA 388 Date: 20231019 Docket: CA48025 Between: Rex Respondent And Christopher James Henry Appellant Restriction on publication: A publication ban has been mandatorily imposed under

- s. 486.4(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant. Restriction on publication: A publication ban has been automatically imposed pursuant to ss. 278.95(1)(a) and (b) prohibiting publication, broadcast or transmission in any way of information given and representations made during the
 - s. 278.93 and s. 278.94 hearings at trial. Further a publication ban has been imposed pursuant to inherent jurisdiction prohibiting the publication of any reference to the complainant's occupation. These publication bans apply indefinitely unless otherwise ordered. Before: The Honourable Mr. Justice Harris The Honourable Justice Griffin The Honourable Mr. Justice Grauer On appeal from: An order of the Supreme Court of British Columbia, dated August 31, 2021 (conviction) (R. v. Henry, 2021 BCSC 1943, Nanaimo Docket 86212-2). Counsel for the Appellant: T.C. Paisana S.K. Pringle Counsel for the Respondent: M.A. Street Place and Date of Hearing: Vancouver, British Columbia September 21, 2023 Place and Date of Judgment: Vancouver, British Columbia October 19, 2023 Written Reasons by: The Honourable Mr. Justice Harris Concurred in by: The Honourable Justice Griffin The Honourable Mr. Justice Grauer Summary: The appellant was convicted of sexual assault. He submits that the judge misapprehended the evidence before him or relied on illogical reasoning, leading to a conclusion that the appellant made admissions against interest via text message. The appellant also contends that the judge erred in his treatment of good character evidence. Held: Appeal dismissed. The conviction does not rest on any of the legal errors advanced. Reasons for Judgment of the Honourable Mr. Justice Harris: I. INTRODUCTION
- [1] This is an appeal of a conviction for sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46. The only live issue at trial was whether the Crown had proved an absence of communicated consent. There is no suggestion on this appeal that the judge misapprehended the legal meaning of consent. The appeal turns principally on an alleged

misapprehension of the evidence or an illogical chain of reasoning in rejecting Mr. Henry's evidence about the meaning of certain text messages that he exchanged with the complainant shortly after the sexual incident in issue. He says that the judge erred in law in finding that the messages contained an admission against interest that Mr. Henry had engaged in sexual contact with the complainant while uncertain about whether she had communicated consent to that activity. Mr. Henry also alleges error in the judge's treatment of certain good character evidence. II. FACTUAL BACKGROUND

- [2] The conduct alleged to amount to non-consensual sexual touching occurred on the morning of 17 January 2019. Both Mr. Henry and the complainant testified at trial. They gave very different accounts of the incident.
- [3] Mr. Henry and the complainant were, at least, friends whose relationship included occasional sexual activity. No issue arises about the admission of this evidence, the basis of which is explained in the trial judgment. The couple spent part of the previous day together, including having dinner, drinking and watching a movie.
- [4] The complainant acknowledged some consensual sexual activity on the evening of 16 January, but decided that she was too drunk to continue and went to bed. Her evidence of the incident is succinctly set out in the reasons:
- [15] When G.K. woke up, she testified that Mr. Henry was in bed beside her. He was "feeling me up, touching my breasts and stuff" with his hand. He was "kinda feeling down my body." When she first woke up she thought, "Where am I?" She thought she was at the place of someone else she "was kinda seeing at the time." Then she thought, "Oh no, this is Chris." She said to him, "No, I don't want to have sex with you." He said, "But we didn't get to last night." Then the thought in her head was, "Oh, thank God," because for a split second she thought "Did we end up having sex?" because they were so drunk. And then she repeated to him, "No, I don't want to have sex with you." She then felt the movement of Mr. Henry getting out of the bed.
- [16] G.K. testified that at this time she felt hungover. She knew it was morning because she could see some light from outside coming into the room, but she rolled over to the edge of the bed and fell back to sleep. She next awoke to Mr. Henry on top of her. She was on her stomach, and Mr. Henry was straddling her and penetrating her vaginally. She did not say anything. She kept her eyes shut. She thought that if she pretended to be asleep he would stop. He did not. He was thrusting and made moaning sounds during the intercourse, which she estimated lasted five or ten minutes. She could smell latex, which indicated to her that he was wearing a condom. When he finished, G.K. felt him get off her and then heard his footsteps leaving the room.
- [5] Mr. Henry's evidence was different. He disputed that G.K. was drunk and said they went to sleep together in the spare bedroom without any sexual intercourse because they were tired. The judge continued his summary:

- [21] The following morning, at about 8:00 a.m., Mr. Henry says that he rolled over and said, "hey." G.K. put her hand on his head and brought him closer. He could see that she was awake. He started massaging one of her shoulders, her back, and her front. He could tell she was enjoying it, and he continued the massage down to her hips. He left for the bathroom to get a condom, and she was still awake when he returned. He said he then "went down on her for a while." He could see that she was enjoying it, because he was looking up at her to make sure. They then engaged in vaginal intercourse, with him on top. When they finished, they cuddled for about ten minutes. He kissed her on the cheek, she smiled, and he said, "I'll text you later." Mr. Henry estimated that 35 to 40 minutes had elapsed since their interactions in the morning began. He left the spare bedroom, went to his bedroom and disposed of the condom, then showered and finished packing for his trip to Victoria. When he left the house at about 9:40 a.m., he looked in on G.K. She was still in bed, sleeping. He denied that she at any time said "no," or said that she did not want to have sex, or that he said, "But we didn't get to last night." He denied that she was laying unresponsive during intercourse.
- [6] Both witnesses agreed that Mr. Henry left the house after the sexual activity. There then followed later that day an exchange of text messages concerning what had happened that morning. These messages are critical to the issue on appeal. I will set them out in the context of analysing the judge's reasoning. III. REASONS FOR JUDGMENT
- [7] First, it is important to recognize that the parties agree that the judge correctly identified the need to analyse and apply the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93. The judge accepted G.K.'s evidence that on the morning of 17 January 2019 she said no, then fell asleep and woke up to Mr. Henry having intercourse with her. He accepted that Mr. Henry has a propensity for being respectful and honest, but found that his character lapsed on the morning of 17 January 2019 and when giving evidence about that morning at trial. The judge did not believe Mr. Henry's evidence on the consent issue and was not left in any reasonable doubt by it about G.K. not consenting to the sexual touching. On the third step, he said:
- [53] Third, I have gone on to consider whether, on the basis of the evidence that I do accept -- i.e., the evidence of the complainant and the admissions against interest by the accused and the character evidence that the accused has a propensity to act in a respectful manner towards others -- whether I am convinced beyond reasonable doubt of the guilt of the accused. I am. And, this is not a case where, after careful consideration of all the evidence, I am unable to decide whom or what to believe: I accept the complainant's evidence and I reject the accused's evidence.
- [8] Since the primary ground of appeal relates to whether the judge misapprehended the evidence of the text messages or relied on illogical reasoning in concluding they contained admissions against interest, I will set those messages out and then summarize the judge's treatment of them. The messages started at about noon on 17 January 2019. Mr. Henry said he was shocked by the allegations made against him. He said his messages reflected an effort to understand where G.K. was coming from because he had done nothing wrong.

They also reflect his efforts to try to call her on 17 and 18 January, but she did not answer his calls. The texts, as set out in para. 17 of the reasons, read: 12:04 from Mr. Henry: I am so fucken tired lol 12:18 from G.K.: What you did this morning wasnt okay. I didn't want to have sex with you and I was asleep and woke up to you ontop of me. 12:37 from Mr. Henry: I thought you where into it ? 12:38 from Mr. Henry: I'm sorry. You said you wanted to last night. And I thought you were into it. 12:38 from Mr. Henry: I honestly thought you were awake and enjoying it 12:39 from Mr. Henry: I massaged you first. And wanted to give you a nice morning. I'm really sorry I.miss understood truly sorry [redacted first name of complainant] 12:57 from Mr. Henry: Do you want me to call you ? 13:07 missed voice call 13:10 from Mr. Henry: Can you talk to me please 13:48 missed voice call 14:52 from Mr. Henry: I'm really sorry [redacted first name of complainant] 16:07 from Mr. Henry: Do you still want to come tmrw 22:59 from Mr. Henry: R you not talking to me

- [9] The texts and missed calls for the next day, detailed at para. 18 of the reasons, follow: 08:48 missed voice call 09:42 from Mr. Henry: What are you up to today? 10:35 from Mr. Henry: Are you going to come down ? Because I'll let my mom know. If you are a yes or a no. 10:37 from Mr. Henry: I'm really upset that I screwed it up yesterday. I was trying to do something nice .and I fucked it up Are you going to forgive me ? 10:37 from G.K.: You raped me when I was sleeping. Never talk to me again. 10:37 from Mr. Henry: No I didnt 10:37 from Mr. Henry: What are you talking about 10:37 missed voice call 10:37 missed voice call 10:38 from Mr. Henry: Can you talk to me 10:38 from Mr. Henry: I woke you up 10:38 from Mr. Henry: [redacted first name of complainant] ..can you talk.to me. 10:39 from Mr. Henry: Please 10:39 from Mr. Henry: I didn't mean it to be like that . 10:39 from Mr. Henry: Can you talk.to me. 10:41 from Mr. Henry: That was stupid of me. I thought I woke you up.when I was massaging you .and I used my finger on you. I honestly thought you where aware of what I was doing. 10:41 from Mr. Henry: Please talk to me 10:45 missed voice call
- [10] Mr. Henry was cross-examined about what he meant in these messages. He denied that they communicated his awareness that G.K. was not awake when he started and continued the sexual touching. Much of the cross-examination focused on whether Mr. Henry was acknowledging that he simply thought she was awake and consenting rather than knowing that she was.
- [11] The judge set out the details of the cross-examination and the basis for the conclusions he reached based on his interpretation of their meaning, in light of the cross-examination and Mr. Henry's evidence generally. It is worthwhile to quote the judge's analysis:
- [24] Mr. Henry's text messages to the complainant after the assault are admissions against interest because they indicate uncertainty about whether she was awake at the time of the sexual touching. There is no question that they are admissible for this purpose. Their use in cross-examination as prior inconsistent statements is also uncontroversial. I pause here to make it clear that the only purpose for which I am using G.K.'s two post event text messages to Mr. Henry is to provide context for Mr. Henry's responses. I appreciate that G.K.'s prior consistent statements cannot be used to support the prohibited inference that her testimony

is more likely to be true because it has been repeated. And, I do not accede to the Crown's suggestion that I ought to use G.K.'s messages as "narrative as circumstantial evidence" to buttress her credibility. On the subject of use of prior consistent statements, see *R. v. Tso*, 2020 BCCA 358 at para. 39.

- [25] The essence of Mr. Henry's evidence is that when the sexual touching occurred on the morning of 17 January 2019, he knew that G.K. was awake, aware, and enjoying it, and he explained how he was sure that she was awake and aware. His texts on 17 and 18 January 2019, considered individually or collectively, carry a markedly different message: "I thought you were into it?" "I'm sorry. You said you wanted to last night. And I thought you were into it." "I honestly thought you were awake and enjoying it" "I'm really sorry [I misunderstood] truly sorry" "I'm really upset that I screwed it up yesterday" "I was trying to do something nice [and] I fucked it up" "That was stupid of me" "I thought I woke you up when I was massaging you and I used my finger on you" "I honestly thought you [were aware] of what I was doing."
- [26] I was urged by defence counsel not to "parse" these text messages. My conclusions are not the product of parsing. I have drawn my conclusions about what he meant by these messages after considering all of what he said in the texts he sent on 17 and 18 January, and I have considered each message in the context of the whole dialogue and the surrounding circumstances. While examining the individual messages is part of this process, I have not lost sight of the need to consider the individual messages in context. And, I appreciate that in the midst of these messages, Mr. Henry specifically denied G.K.'s allegation that he raped her when she was sleeping. Taken together, however, Mr. Henry's texts carry a meaning that simply does not square with his evidence that he knew that G.K. was awake and aware. Mr. Henry testified in chief that his text responses to G.K.'s allegations were truthful. When confronted with these same messages in cross-examination, Mr. Henry testified that they were "a little off," and that he was mystified by G.K.'s allegation and was trying to open up lines of communication to clear up the misunderstanding. If his responsive texts were truthful, they are evidence of his uncertainty about whether G.K. was awake and aware. If they are "off" -- i.e., at odds with his trial evidence about his awareness of her consent -- then the problem for Mr. Henry is that he has not provided a cogent explanation for the discrepancy between his trial evidence and these texts. [Emphasis in original.] IV. ON APPEAL
- [12] Mr. Henry says the conclusions reached by the trial judge rest on legal errors derived from the use made of the text messages by the judge. He says the trial judge failed to give proper effect to the evidence in three ways: (1) by reading meaning into the messages that was not there; (2) by neglecting other aspects of the conversation that belied this interpretation; and (3) by failing to consider the wider context that framed the text conversation.

- [13] On the first point, Mr. Henry submits that the judge found equivocation in the messages that was not there. On a proper reading of the evidence, Mr. Henry asserts that he did not appreciate the difference between thinking something to be the case and knowing it to be so. At the most, Mr. Henry's reference to thinking something to have been so indicates only a questioning of his perception after the event, but not during.
- [14] On the second point, Mr. Henry claims that the judge compounded the error by giving no practical effect to his categorical denial of raping G.K. while she was asleep. His messages can only, per Mr. Henry, be read as consistent with his trial evidence that he knew she was awake, aware, and consenting. Mr. Henry asserts that the judge fell into the error of parsing the evidence and did not grapple with reconciling the messages he concluded indicated uncertainty with the categorical denial when Mr. Henry was confronted with an explicit accusation.
- [15] Finally, on the third point, Mr. Henry asserts that both the judge's interpretation of the messages and his consequential rejection of Mr. Henry's evidence was infected by his failure to interpret the messages in light of the context of the relationship. Mr. Henry says he was in love with G.K. and considered her to be his girlfriend. His messages were intended to address G.K.'s concerns in a respectful manner without inflaming a situation he did not comprehend by engaging in categorical or harsh language.
- [16] Mr. Henry says all of this supports the conclusion that the trial judge interpreted the messages in a manner that was divorced from context and contrary to their literal and ordinary meaning. He read in meaning that was not there, and disregarded meaning that was there. This was, in a very classic sense, a misapprehension of evidence. The judge's interpretation of the messages was clearly critical to his conclusion that Mr. Henry's evidence could not be believed and did not give rise to a reasonable doubt. The messages were exculpatory, not inculpatory. Moreover, the judge's interpretation was illogical. Largely for the reasons already discussed, the messages are incapable of supporting an inference that Mr. Henry was uncertain about whether G.K. was awake. The verdict was also demonstrably incompatible with evidence that is not otherwise contradicted or rejected. Even if Mr. Henry's repeated statement that he "thought" G.K. was awake could connote uncertainty, uncertainty cannot be inferred from Mr. Henry's resolute denial of the complainant's accusation when it was put to him directly in the text exchange.
- [17] I am, with respect, unable to accede to Mr. Henry's argument.
- [18] First, it was accepted at trial that the text messages were admissible as evidence, in the form of statements by the accused, relevant to determining what had happened on the morning of 17 January. As such, they were capable of being inculpatory and amounting to an admission against interest. They were also capable of being exculpatory or having a mixed effect.

- [19] Second, it is for a trier of fact to interpret the meaning of the statements in order to reach conclusions about what was said and, in particular, what they evidence about an accused believes happened or what they knew about the events constituting the alleged offence. Those conclusions are findings of fact. They are reviewable on a standard of palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 23-25), not, as suggested by Mr. Henry, on a correctness standard (see, e.g., *R. v. R.S.B.*, 2020 BCCA 33 at para. 10).
- [20] Third, if a statement is a mixed statement, in the sense that it contains both inculpatory and exculpatory elements, the accused is entitled to the benefit of any exculpatory elements. The law is clear that if the Crown, as here, led the evidence of the text messages, an accused is entitled to the benefit of any exculpatory potential. As explained by Justice DeWitt-Van Oosten in *R. v. Sanhueza*, 2020 BCCA 279 [Sanhueza]:
- [23] On this point, the appellant cites *R. v. Graham*, [1974] S.C.R. 206 at 213, for the principle that when the Crown elects to adduce an out-of-court declaration made by the accused: the declaration then becomes evidence for the prisoner as well as against him. If in such a case the declaration is capable of being construed as an explanation which might reasonably be true, the accused is, of course, entitled to all the advantages of it. [Internal citations omitted.]
- [24] In *R. v. Rojas*, 2008 SCC 56, the Supreme Court affirmed the principle, explaining it this way:
- [37] Of course, the general rule that excludes out-of-court exculpatory statements is not without exceptions. One such exception is relevant here -- the mixed statement exception. Just as in England, it has long been established that where the Crown seeks to tender an accused's out-of-court statement which contains both inculpatory and exculpatory parts, it must tender the entire statement, and the exculpatory portions are substantively admissible in favour of the accused: *R. v. Hughes*, [1942] S.C.R. 517, at p. 521. Fairness to the accused is the obvious rationale for the mixed statement exception. The exception is also based on the more pragmatic consideration that it is often difficult to determine which parts of a statement are inculpatory and which parts are exculpatory. [Emphasis added.] See also *R. v. Sunshine*, 2013 BCCA 102 at para. 47 and *R. v. Evans*, 2012 BCCA 209 at para. 48.
- [25] The appellant submits that to give meaningful effect to *Graham*, *Rojas* and like authorities, a trial judge must apply the W.(D.) analytical framework to the out-of-court statement. In other words, they must approach the statement as they would testimony from the accused and ask themselves whether they believe any exculpatory parts. If so, the accused is entitled to an acquittal. If the judge does not believe the exculpatory parts, but those portions of the statement raise a reasonable doubt, the accused is also entitled to an acquittal. Finally, even if the exculpatory parts do not raise a reasonable doubt, but leave the judge unable to decide whom to believe in assessing the Crown's burden of proof, the judge must acquit: *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.).

- [21] As Justice DeWitt-Van Oosten went on to point out at para. 27, a denial may be a truthful reaction to an allegation and be persuasive evidence of innocence. But it may also be an untruthful reaction attempting to avoid admitting culpability. A judge is required to make findings of fact about what an accused has said and then factor those into the W.(D.) framework: see Sanhueza at para. 37. See also *R. v. Narwal*, 2023 BCCA 328.
- [22] As I read the judgment, the judge did not fall into legal error. First, I do not accept that interpreting the messages as acknowledging uncertainty about whether Mr. Henry knew G.K. was awake during the sexual touching is unreasonable. Those particular messages, referring to what he thought, are capable of being interpreted as the judge did. At best, he thought she was awake. That is not sufficient to establish that he knew at the material time that G.K. had communicated consent. I can detect no palpable and overriding error in that aspect of the judge's analysis.
- [23] Second, I do not think it fair to say that the judge parsed the text messages. He says he did not. In my view, the reasons, as expressed, confirm that the judge analysed the messages in light of all of the evidence, including Mr. Henry's explanation of them at trial and the context of the relationship as he described it. To repeat what the judge said at para. 26: My conclusions are not the product of parsing. I have drawn my conclusions about what he meant by these messages after considering all of what he said in the texts he sent on 17 and 18 January, and I have considered each message in the context of the whole dialogue and the surrounding circumstances. While examining the individual messages is part of this process, I have not lost sight of the need to consider the individual messages in context. And, I appreciate that in the midst of these messages, Mr. Henry specifically denied G.K.'s allegation that he raped her when she was sleeping. Taken together, however, Mr. Henry's texts carry a meaning that simply does not square with his evidence that he knew that G.K. was awake and aware.
- [24] Third, the judge expressly acknowledges Mr. Henry's explicit denial that he raped G.K. while she was asleep. I agree that the judge did not set out the details of the principle in *R. v. Rojas*, 2008 SCC 56, cited above. But trial judges are presumed to know the law (see *R. v. Burns*, [1994] 1 S.C.R. 656 at 664, 1994 CanLII 127). In my view, the judge, given the reasons as a whole, must be taken to have rejected that Mr. Henry was being truthful in his denial of culpability, and to have been satisfied that the fact of the denial did not raise a reasonable doubt about Mr. Henry's culpability. I cannot read the reasons as failing to give Mr. Henry the benefit of whatever exculpatory potential the denial had in reaching a just verdict.
- [25] I turn now to the suggestion that the judge failed to give proper effect to the good character evidence led on behalf of Mr. Henry. Good character evidence is admissible to support both credibility and an inference that an accused is unlikely to have committed the offences charged (see *R. v. Charlebois*, 2000 SCC 53 at para. 29). Mr. Henry contends that the judge failed to explain how he reconciled the good character evidence relating to the appellant's propensity for honesty with his adverse credibility finding. He says it was necessary for the judge to explain why the exculpatory evidence he accepted could not raise a reasonable

doubt, and that failing to do so renders the reasons deficient.

- [26] I would not accede to this argument. The judge accepted that Mr. Henry is disposed to treating others with respect and that he has a propensity to be honest. The judge took that evidence into account in assessing Mr. Henry's credibility. In doing so, he gave Mr. Henry the benefit of accepting his view of the nature of his relationship with G.K. Having done so, he wrote:
- [31] However, his post-event text messages are another matter. His messages, and his evidence about the messages, leaves me without any confidence in the truth of his evidence on the consent issue. To put it bluntly, on the whole of the evidence, including the character evidence, I do not believe Mr. Henry's witness box account of what occurred with G.K. on the morning of 17 January 2019, as it pertains to consent and it does not raise a reasonable doubt about consent. I accept that Mr. Henry has a propensity for telling the truth, but I find that he did not do so in the witness box at this trial.
- [27] It seems to me that the judge adequately explained that, although he accepted a finding of Mr. Henry's good character in general, he could not, on all of the evidence, accept (nor did it raise a reasonable doubt) that on the morning of 17 January, Mr. Henry had acted in a manner consistent with his general propensity. The judge found that that in face of the allegations against Mr. Henry, he had not told the truth, either in denying his culpability in a portion of the text messages or in his evidence at trial. Both the "what" and the "why" of the judge's reasoning is adequately explained, in my view. The judge concluded that in respect of these important matters on these occasions, Mr. Henry fell short of standards he otherwise generally met. V. CONCLUSION
- [28] In the result, I do not think the verdict rests on the legal errors alleged and I would dismiss the appeal. "The Honourable Mr. Justice Harris" I agree: "The Honourable Justice Griffin" I agree: "The Honourable Mr. Justice Grauer"

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Prepared on 29 October 2026 · Esheria