

CANADA / JUDGMENT

R. v. Jerace

2020 BCCA 267

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 267 R. v. Jerace COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Jerace, 2020 BCCA 267 Date: 20200923 Docket: CA43763 Between: Regina Respondent And Michael Joseph Jerace Appellant Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant, or witness under the age of 18. This publication ban applies indefinitely unless otherwise ordered FILE SEALED IN PART Before: The Honourable Madam Justice Fenlon The Honourable Mr. Justice Hunter The Honourable Mr. Justice Butler On appeal from: An order of the Supreme Court of British Columbia, dated December 4, 2013 (R. v. Jerace, New Westminster Docket X076065). Oral Reasons for Judgment The Appellant, appearing in person: M.J. Jerace Counsel for the Respondent: D.M. Layton, Q.C. M. Shah Place and Date of Hearing: Vancouver, British Columbia September 23, 2020 Place and Date of Judgment: Vancouver, British Columbia September 23, 2020 Summary: During the appellant's trial for sexual interference with a 14 year old girl, the trial judge appointed counsel to cross-examine the complainant pursuant to s. 486.3 of the Criminal Code. The appellant was convicted and alleges as one his grounds of appeal that the cross-examination of the complainant was deficient. The appellant has filed 12 affidavits setting out his concerns about the cross-examination and seeking to introduce new evidence in this Court to support his appeal. Court-appointed counsel has filed four affidavits in response. The appellant applies for leave to cross-examine court-appointed counsel on her affidavits in advance of the appeal. Held: Application dismissed. Cross-examination of trial counsel is an extraordinary measure. To obtain an order for cross-examination before this Court, a party must establish that there is a reasonable prospect that the proposed cross-examination will produce meaningful evidence to assist the court in fulfilling its role in determining the issues raised by the appeal. The appellant did not meet this burden. The Court will be able to determine the issue raised by the appellant on the material filed.

- [1] HUNTER J.A.: On December 4, 2013, the appellant, Mr. Jerace, was found guilty by a jury of sexual interference with a 14-year-old girl. He has appealed the conviction on a number of grounds, one of which is that counsel who cross-examined the complainant did not do so competently, thereby rendering the trial unfair.

- [2] Mr. Jerace is acting on his own behalf on this appeal, as he did at trial. Although Mr. Jerace conducted the trial on his own, the trial judge appointed Fiona Begg, pursuant to s. 486.3 of the Criminal Code, R.S.C. 1985, c. C-46, to cross-examine the complainant. It is the decisions made by Ms. Begg on her cross-examination and related matters that form the basis of the appellant's fourth ground of appeal.
- [3] The appellant's factum contains an extensive description of the areas in which he considers the cross-examination of the complainant to be deficient. He has identified 22 areas which he considers ought to have been the subject of cross-examination and has also filed 12 affidavits to support his allegation of ineffective court-ordered counsel. Ms. Begg has responded with four affidavits addressing the allegations raised by the appellant.
- [4] Mr. Jerace's appeal is scheduled to be heard on September 25, 2020, two days hence. He has brought an application pursuant to s. 683(1)(b) of the Criminal Code to cross-examine counsel on her affidavits. If he is granted leave to cross-examine, he intends to do so this afternoon. The Crown opposes Mr. Jerace's application on the basis that there is no reasonable prospect that cross-examination will produce meaningful evidence to assist this Court in determining the appeal.
- [5] Section 683(1)(b) reads in relevant part as follows: For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice, ...
- (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
 - (i) to attend and be examined before the court of appeal ...
- [6] Cross-examination of trial counsel before this Court has been characterized as an "extraordinary measure" in *R. v. Au-Yeung*, 2010 BCCA 367 at para. 31. Cross-examination of any witness under this authority was described as an "extraordinary remedy" in *R. v. Mehl*, 2019 BCCA 438 at para. 12, and in *R. v. Hobbs*, 2010 NSCA 32 at para. 45.
- [7] The leading case in this jurisdiction on this point is *R. v. Atzenberger*, 2018 BCCA 224. *Atzenberger* also involved an application to cross-examine counsel who had been appointed under s. 486.3 of the Code to cross-examine a complainant. Mr. Atzenberger had filed affidavits setting out his complaints, and court-appointed counsel had sworn responding affidavits. In dismissing the application to cross-examine, Justice MacKenzie made the following comments:
- [16] In my view, Mr. Atzenberger does not provide a sufficient basis or foundation to support an application to cross-examine Mr. Walker [counsel appointed under s. 486.3]. The evidence Mr. Atzenberger refers to in his affidavits and attaches as exhibits does not advance his application to cross-examine. On the basis of the materials before the Court, we will be able to assess the effectiveness of counsel at trial when we hear this ground of appeal on June 1. There is no basis to conclude cross-examination will elicit further relevant evidence not now before us or in the record. It is an extraordinary measure to call trial counsel before this

Court for cross-examination: R. v. Au-Yeung, 2010 BCCA 367 at para. 31. Mr. Walker fully responded to Mr. Atzenberger's allegations.

- [8] The position of the appellant as set out in his factum is that the credibility of the complainant was the key issue at trial, and Ms. Begg did not adequately challenge her credibility with inconsistencies between the complainant's evidence at the preliminary inquiry and the trial. The appellant has set out these potential areas of questioning in his factum and in his affidavits. We have the transcript of the cross-examination. There is no real dispute as to what Ms. Begg did, and Ms. Begg has explained in her responding affidavit why she took the course of action that she did.
- [9] There were specific areas of potential cross-examination which Mr. Jerace wanted Ms. Begg to pursue, but which Ms. Begg considered either improper or strategically unwise. In many cases, these matters were raised before the trial judge, who provided direction to Ms. Begg. The transcript sets out these exchanges and we will be able to assess counsel's conduct on those issues from the printed record.
- [10] During submissions this morning, Mr. Jerace identified some specific areas where he felt that Ms. Begg's responding affidavit was inadequate, including the reasons she had not cross-examined in relation to a taxicab incident and a text from the complainant. The focus of Mr. Jerace's intended cross-examination as I understood it, was for Mr. Jerace to get a better understanding of why Ms. Begg had failed to cross-examine in these areas. He also considered that her explanations about the s. 276 application and her pursuit of the Youth Court records was inadequate. In my view, Ms. Begg has given an explanation in her affidavits as to why she did not pursue these points. Whether the explanation meets the standard of competent representation is a matter the Court will consider when the appeal is heard and determined.
- [11] I am unable to see how cross-examination of court-appointed counsel before this Court could assist us in determining whether the cross-examination of the complainant was deficient to such an extent as to impair the fairness of the trial.
- [12] Before ordering cross-examination before this Court, there must be a sufficient basis or foundation to support such an order: Mehl at para. 12. The applicant must establish that there is a reasonable prospect that the proposed cross-examination will produce meaningful evidence to assist the court in fulfilling its role in determining the issues raised by the appeal: Hobbs at para. 45; Mehl at para. 12.
- [13] In my opinion, the applicant has not met this burden. I consider that we are in the same position as the Court was in Atzenberger. On the basis of the materials before the Court, we will be able to assess the effectiveness of counsel at trial when the appeal is argued two days from now and we hear submissions on this ground of appeal.
- [14] I would dismiss the application for cross-examination of court-appointed counsel.

[15] FENLON J.A.: I agree.

[16] BUTLER J.A.: I agree.

[17] FENLON J.A.: The application to cross-examine Ms. Begg is dismissed. Mr. Jerace, that means we will proceed with the conviction appeal hearing on Friday. "The Honourable Mr. Justice Hunter"

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