

CANADA / JUDGMENT

R. v. K.C.

2023 BCCA 411

COURT

British Columbia Court of Appeal

DECIDED

16 November 2023

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2023 BCCA 411 R. v. K.C.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. K.C.,

2023 BCCA 411

Date: 20231116

Docket: CA48642

Between:

Rex

Respondent

And

K.C.

Appellant

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s. 486.4(2) of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainant or any witness. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Voith

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated
March 11, 2022 (R. v. K.C., 2022 BCSC 754, Vernon Docket 55286).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

M.G. Scott

Place and Date of Hearing:

Vancouver, British Columbia

October 20, 2023

Place and Date of Judgment:

Vancouver, British Columbia

November 16, 2023

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Voith

The Honourable Madam Justice Horsman

Summary:

The appellant challenges his conviction for sexual assault contrary to s. 271 of the Criminal Code. He argues that the trial judge erred in admitting the content of the complainant's prior consistent statement to her parents in which she disclosed the alleged assault, and in relying on that statement for the truth of its contents. He also claims the judge erred by misapplying the legal principles applicable to the assessment of adult witnesses testifying to events that occurred in childhood in discounting the inconsistencies arising from the complainant's evidence. Held: Appeal allowed. The judge relied on the content of the complainant's prior consistent statement to her parents in finding the complainant's evidence to be credible and reliable. The content of the statement should not have been admitted, and the judge made a clear error of law in relying on it to corroborate the complainant's testimony. Moreover, the conviction cannot be upheld under the curative proviso in s. 686(1)(b)(iii) of the Criminal Code; the error is not so harmless or minor that it could not have had any impact on the verdict, since the credibility of the complainant and appellant were central to resolving the key element of consent, and the judge relied on the statement in finding the complainant credible. Further, the evidence against the

appellant was not so overwhelming that any other verdict would have been impossible to obtain. As the first error has been established and is dispositive, the second alleged error is not addressed.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] The appellant was convicted of one count of sexually assaulting the complainant in 2004 contrary to s. 271 of the Criminal Code, R.S.C., 1985, c. C-46 [Code]. On appeal, the central question is whether the judge impermissibly relied on the complainant's prior consistent statements to her parents when she disclosed the events to them in 2008, and if so, whether the curative proviso can be used to uphold the conviction.

Background

- [2] At the time of the events in issue the complainant was 16 years old; she was 34 at trial. The appellant was 36 at the time of the events, and 54 at trial. He was the complainant's hockey coach and the father of B, her best friend and teammate. It was common for the complainant to sleep over with B at the appellant's house. The Crown alleged that the sexual touching occurred during one such sleepover. The appellant acknowledged that he had engaged in acts of sexual touching with the complainant, although he did not agree with the complainant's descriptions of when and how the touching occurred, and maintained that all of the touching was consensual.
- [3] Before describing the complainant's and appellant's versions of events, it is important to clarify that the Crown did not charge the appellant with sexual exploitation under s. 153(1) of the Code, which prohibits any sexual touching by a person who is in a position of trust or authority over the young person. Nor did the Crown argue that consent was vitiated by operation of law due to an abuse of a position of trust or authority, pursuant to s. 273.1(2)(c) of the Code. As a result, consent was the central issue to be determined at trial in proving the charge under s. 271.

The complainant's evidence

- [4] The complainant testified that the appellant engaged in various acts of sexual touching without her consent while she was sleeping over at B's house the night before a playoff game in Kamloops. She was unable to say when in January or February of 2004 this occurred. The complainant said that she and B attended a party that night. B drove her back to the house and dropped her off because B wanted to spend more time with her boyfriend. The complainant recalled that B's mother, the appellant's wife, was not at home that evening as she had gone out with friends. Shortly after arriving at the appellant's home, the complainant was in the kitchen getting a drink of water. The appellant came into the kitchen, and after engaging in some small talk, approached her, pulled her towards him and began to kiss her for a few minutes. She recalled being in a state of disbelief.

- [5] After the kissing in the kitchen, the complainant went upstairs to B's room and went to bed. As she was lying in bed, trying to process what had just happened, the appellant came into the room, sat at the edge of the bed, and started to rub her back and body. She described the appellant touching the outside of her pyjamas and eventually putting his hand underneath her boxer shorts and inserting his fingers into her vagina. The appellant left the room when one of his children sleeping in the room next door began to fuss.
- [6] The appellant returned to where the complainant was sleeping and led her into the master bedroom where he laid her down in the middle of the bed, took off her boxer shorts, and performed oral sex on her. The complainant was not sure how long the oral sex lasted but testified that it could have been anywhere from a few minutes to as long as 20 minutes. At some point she managed to tell the appellant to stop and returned to B's bedroom where she went to sleep.
- [7] The next morning, they travelled to Kamloops to play in the playoff game. She recalled that they lost the game and the team's hockey season was over on that day. After the game, the appellant brought her into a private dressing room and stated that what had happened the night before was not a good thing, and that she should keep it a secret. When the appellant went out of the arena to the parking lot where her father was waiting for her, she broke down sobbing. She did not want to tell him what had happened the night before, so instead told him that she was upset about losing the game.
- [8] The complainant recalled attending a party at the appellant's residence in August 2004 where the appellant was present. She denied that anything occurred between them on that occasion.
- [9] Four years later, in 2008, the complainant approached her mother and father while they were at their place of business. She said she disclosed what the appellant had done to her the night before the playoff game in Kamloops. Defence counsel objected when the complainant began to testify to this, pointing out that the fact and timing of the prior statement to her parents were admissible, but the details of that statement should not be led. The judge disagreed, holding that the content of the statement was admissible for the purpose of "explaining how she broached the subject with her father back in 2008." The complainant then continued, relating what she told her father:

Q: [Complainant], I'm going to ask you to continue. You said, "Hey, Dad, when we were playing hockey in Kamloops."

A: Yeah. I said, "Do you remember when we had our playoff game in Kamloops and how upset I was," and I said, "The night before at the -- at a sleepover [the appellant] had done this to me," and when I was explaining to him, "Do you remember the time in Kam" -- he like stopped me and he knew exactly the moment I was talking about. He knew exactly the time. He knew. Yeah. It was pretty powerful.

- [10] Following the disclosure to her parents, the complainant's mother suggested that the complainant confront the appellant at his place of business. When she did so, the appellant told her that he had a lot of shame and guilt about what he had done.
- [11] Eventually, the complainant obtained a teaching degree and got a job as a teacher at a local school. When she found out that the appellant's grandson was entering kindergarten at that school, she decided she needed closure and arranged to meet with the appellant in January 2020. She said she wanted to know why the appellant had done what he did, and secretly recorded the meeting on her cell phone.
- [12] When the appellant did not subsequently meet with her as he had promised, she reported the 2004 incident to the police in February 2020.
- [13] The Crown also called the complainant's father as a witness. He told the court that in late February 2004, he travelled to Kamloops to watch the complainant's playoff hockey game. He said that after the game the complainant was uncharacteristically upset about losing. In describing what his daughter said to him in 2008 when she disclosed the sexual touching, he said that one of the things she said was "Dad, do you remember that trip to Kamloops? And I knew, my heart [sank] and I knew what it was."

The appellant's evidence

- [14] The appellant admitted that he had sexually touched the complainant and that it was morally wrong to have done so given her age, the fact that she was his daughter's friend, and that he was her coach. But he described not one, but two instances of sexual activity initiated by the complainant. The first occurred in January 2004, the night before a hockey practice in preparation for a tournament in Prince George. He testified that the complainant had come home to his house from a party early, without his daughter B. His wife had gone to pick up the complainant from the party and after returning home, he, the complainant and his wife were all watching television in the living room. At some point his wife went to bed and told the complainant to make her way to bed as well, but the complainant remained with him in the living room until B came home.
- [15] According to the appellant, when B went up to bed, the complainant remained downstairs on the couch in the living room. At some point she told him that she was not feeling well and that she did not want to sleep in B's room. She said she would prefer to sleep on the futon near where they were sitting in the living room. He walked her to the futon, gave her a hug and said goodnight. He said she was wearing jeans and started taking them off. The appellant went to the kitchen to get some water and a bowl for her in case she got sick during the night. When he returned, the complainant had her pants around her ankles. He said that he asked if she wanted him to pull her pants off her ankles and she replied 'yes'. He said that as he pulled them off, she smiled at him in a provocative manner. He asked her if she wanted him to stay, and she said she did and asked him to rub her back. The appellant testified that the complainant started to make "sexual sounds" and provocative movements.

He thought that the complainant was sexually aroused and he was getting aroused as well. He moved his hands down her back to her buttocks and rubbed her buttocks for four to five seconds. He described the touching as consensual, however he realized that what he was doing was wrong and he stopped.

- [16] The appellant said that it was a few weeks later at the Prince George tournament that he took the appellant aside to speak to her about this first incident of sexual touching in an effort to clear the air.
- [17] The appellant said that a further act of sexual touching occurred in August 2004, when there was a going-away party for his daughter at his house and the complainant again slept over. He said he had consumed about a dozen beers that night and was intoxicated. The complainant had been drinking too. When his wife left to drive everyone home, he went into the kitchen for some water and on his way into his bedroom, the complainant followed him in. She sat down close to him on the bed, looking at him and smiling. He said he asked her, "what are we doing?" He asked her if this was their little secret, and she nodded 'yes'. He said the complainant then stood in front of him. He had his hands on her hips and assisted her in taking off her pants. He said they then got into bed together and kissed. He rubbed her breasts and vagina and put his fingers inside her vagina. He said the sexual contact went on for about 15 minutes until he heard a noise like a car door slamming, and the complainant got up and left. He said there was no oral sex and that he thought she was consenting because she followed him into the bedroom and because she smiled when he put his hands on her hips.

Positions of counsel

- [18] The defence took the position that the complainant was neither credible nor reliable and that the judge should have a reasonable doubt as to whether the events she described had occurred--i.e., a single incident of non-consensual sexual touching in January or February of 2004. Defence counsel emphasized the inconsistencies in the complainant's evidence, noting there were several material inconsistencies and omissions between her trial evidence and her statement to police in 2020, just two years before trial.
- [19] The Crown took the position that the case came down to whether the sexual act the complainant described took place, and whether or not she consented to that sexual act. The Crown argued that the complainant was both credible and reliable in her evidence that there was a single incident of non-consensual sexual touching in January or February of 2004.

The trial judge's decision

- [20] The judge reviewed the evidence of each of the three witnesses called at trial and set out the legal principles applicable to the elements of sexual assault. He did not accept the appellant's evidence, finding that it did not raise a reasonable doubt. He rejected the appellant's version of events relating to the two instances of sexual touching, finding that the appellant's evidence about the August 2004 encounter was made up in order to bring the encounter outside the time set out in the indictment: at para. 102.
- [21] The judge provided detailed reasons for rejecting the appellant's evidence, saying:
- [98] I noted that the accused struggled in giving his evidence, particularly in cross-examination, about matters that ought to have been straightforward if he was describing what actually happened. When pressed for details about the January Encounter and indeed the August 2004 Party, he often stumbled, paused for inordinate times before answering and appeared to have difficulty answering questions on important points.
- [99] In the end, I found his evidence had some serious shortcomings. He demonstrated a flat, quiet affect, spoke quietly and had to be asked to repeat his answers. I conclude that some of his testimony was implausible and lacked the type of precision that would be expected if he was explaining actual events that he recalled.

The judge also observed that the appellant's evidence was inconsistent at times, with "numerous examples of the details of his version of the events changing between his direct evidence and when pressed on cross-examination." The judge indicated that he would not recite all of the inconsistencies, but set out eight examples at para. 100 of his reasons. The judge described the appellant as "not a careful witness," finding that he attempted to minimize his role in the sexual encounters by suggesting that the complainant was the instigator and a willing participant. He concluded that "[i]n the result, on the essential matters in dispute," he disbelieved the appellant's evidence: at para. 101.

- [22] The judge also gave his reasons for accepting the complainant's evidence. He described her evidence as "not perfect" but said she "gave a cogent and straightforward story" and did her best to "relay the events in a thoughtful, chronological manner" and "generally describe what she recalled occurring as precisely as she could": at para. 107. He reviewed the inconsistencies in her evidence that had been pressed by the defence, but attributed any weaknesses in her evidence to reliability, not credibility. He concluded that the inconsistencies did not suggest she was fabricating the encounter, but rather were due to the fact that the events occurred 18 years before she testified and when she was only 16.

On appeal

- [23] The appellant raises two grounds of appeal, contending the judge erred:
1. In admitting the content of the complainant's prior consistent statement and in relying on it for the truth of its contents; and

2. By misapplying the legal principles applicable to the assessment of adult witnesses testifying to events that occurred in childhood in discounting the inconsistencies arising from the complainant's evidence.

[24] As I conclude that the first error has been established and is dispositive of the appeal, I will not address the second error. My reasons for acceding to the first ground of appeal follow.

[25] It is helpful to return to the prior statement that the appellant identifies as the source of the judge's error. In her evidence-in-chief, the complainant described feeling that she owed it to her parents to tell them what had happened to her because of how much she had changed and how poorly she was coping with being away at university. She testified that one day in 2007 or 2008, when she was 19, she went to their business premises and disclosed the sexual touching. In giving this evidence, she said:

A I said, "Do you remember when we had our playoff game in Kamloops and how upset I was," and I said, "The night before at the - at a sleepover [appellant] had done this to me," and when I was explaining to him, "Do you remember the time in Kam" - he like stopped me and he knew exactly the moment I was talking about. He knew exactly the time. He knew. Yeah. It was pretty powerful.

Q And was anyone else present at the time?

A My mom was present. I had told both of them.

Q And you said you told him that, without giving the details, you said, "He had done this to me." Did you give any details of what he did?

A I did. I told them that he had touched me.

Q Is that - is that what you said?

A I - no, I did a full disclosure, and it was bad timing because, I mean, it was at their business, during business hours, and I - I told my mom and dad how at the sleepover, yeah, what he had done.

On cross-examination, defence counsel elicited the further detail that the complainant told her parents that she had not consented to the sexual activity with the appellant.

[26] The judge referred to this evidence when he addressed the defence position that there were substantial inconsistencies in the complainant's testimony that caused her evidence to be neither reliable nor credible, saying:

[112] In my view, any weaknesses in [the complainant's] evidence relate to reliability rather than credibility. I am satisfied that these inconsistencies do not suggest she was making up the January Encounter. It occurred 18 years before she testified and it would be expected that some of the events would not be as clear as they once were.

[113] On the core question of whether or not the January Encounter happened as described by [the complainant], she was steadfast in what she says happened. Her version is also corroborated by [her father's] evidence that the Kamloops game was the end of the season for [the complainant's] team and her reaction upon seeing [her father] in the parking lot afterwards. It is consistent with what she told [her father] at the time of the Disclosure.

[Emphasis added.]

[27] It is a well-established principle that prior consistent statements are presumptively inadmissible because they lack probative value and amount to hearsay when considered for the truth of their contents: *R. v. Stirling*, 2008 SCC 10 at para. 5; *R. v. Gill*, 2018 BCCA 275 at para. 65.

[28] There are exceptions to this principle. In the present case, the Crown relied on the "narrative as circumstantial evidence" exception. Under this exception, the statement is admitted for the limited purpose of helping the trier of fact explain how the complainant's story was disclosed: *R. v. Dinardo*, 2008 SCC 24 at para. 37. However, when a prior statement is admitted under the narrative exception, it is only the fact and timing of the prior statement that are admissible for the purpose of assisting the trier of fact in understanding the sequence of events in evaluating the credibility of the witness: *Dinardo* at paras. 37-8. The content and details of the statement are not admissible to corroborate the witness's trial evidence: *R. v. N.P.*, 2021 BCCA 25 at para. 13. Similarly, the relevance of the evidence lies only in the timing of the statement, and the fact that the complainant told someone about the assault occurring. Under this exception to the hearsay rule, the details of the assault are not relevant: *R. v. Brooks*, 2023 BCCA 121 at para. 96.

[29] On appeal, the Crown contends the complainant's testimony about the 2008 disclosure had almost no content and was therefore properly admissible under the narrative exception. The Crown submits further that whatever content was provided had no significance because the appellant had admitted to sexual touching; it follows that the fact that the complainant told her parents she had been touched by the appellant could have had no effect on the resolution of the live issue at trial, which was consent.

[30] Respectfully, I cannot agree with the Crown's characterization of the statement in issue. If the complainant's testimony had been limited to relaying that she told her parents in 2008 that the appellant had sexually assaulted her, it would have been admissible under the narrative exception. But her evidence went beyond that to include that she told her parents the appellant had assaulted her during a sleepover at his house the evening before the playoff game in Kamloops.

[31] The judge was faced with two very different versions of events. The appellant said there were two incidents, one in January and one in August 2004, neither of which occurred before the playoff game in Kamloops. It was a central component of the complainant's evidence that there was only one incident that occurred the night before the playoff game in Kamloops. As the judge observed, the complainant was "steadfast that the sexual assault

took place during the evening before the Kamloops playoff game, which anchors her memory of the date": at para. 104.

[32] Faced with these competing versions of events, the judge relied on the content of the prior consistent statement in finding the complainant's evidence to be credible and reliable. I repeat the critical paragraph of his judgment here for ease of reference:

[113] On the core question of whether or not the January Encounter happened as described by [the complainant], she was steadfast in what she says happened. Her version is also corroborated by [her father's] evidence that the Kamloops game was the end of the season for [the complainant's] team and her reaction upon seeing [her father] in the parking lot afterwards. It is consistent with what she told [her father] at the time of the Disclosure.

[Emphasis added.]

[33] There is no ambiguity in the judge's reasoning. He relied on what the complainant said to her mother and father in 2008 to corroborate her evidence on the core question of whether or not the encounter happened as she described it.

[34] It is because it is so superficially attractive a proposition that the same story told out of court makes the in-court evidence more reliable, that the rule against the admissibility of such statements exists. I agree with the appellant that in the circumstances of this case, the content concerning the timing of the assault should not have been admitted. The judge made a clear error of law in relying on it to corroborate the complainant's testimony.

[35] The Crown argues that the curative proviso should be applied in this case to uphold the conviction.

[36] As the Supreme Court of Canada observed in *R. v. Van*, 2009 SCC 22 at paras. 34-36, not every error in a criminal trial warrants appellate intervention. Once an error has been established, it falls to the appellate court to determine whether a conviction can be upheld with resort to s. 686 (1)(b)(iii) of the Code. The Court described that process at para. 34:

Under this provision, a conviction can be upheld providing that the error has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error. To do so, it must establish that the error of law falls into one of two categories. First, that it is an error so harmless or minor that it could not have had any impact on the verdict. In the second category are serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain: *Khan; R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

- [37] The error in this case is not so harmless or minor that it could not have had any impact on the verdict. The credibility of the appellant and complainant were central to resolving the essential element of consent, and the judge relied on the prior consistent statement in finding the complainant credible.
- [38] The Crown contends that the error was minor and harmless because, by the time the judge got to the assessment of the complainant's evidence and the impugned paragraph, he had already rejected the appellant's version of events on the first step of the analysis set out in *R. v. W.D.*, [1991] 1 S.C.R. 742, 1991 CanLII 93. As a result, submits the Crown, the question of whether there was one incident or two, before a practice in January or before a playoff game in Kamloops later in the year, was no longer a live issue.
- [39] I cannot agree with that submission. W.D. instructs a judge that (1) if they believe the accused's evidence, they must acquit; (2) if they do not believe the accused's evidence but are left in reasonable doubt by it, they must acquit; and (3) even if not left in doubt by the accused's evidence, they must consider if they are convinced of the accused's guilt beyond a reasonable doubt on the basis of the balance of the evidence which they do accept. At each stage of this analysis, the judge has before him the evidence as a whole. Thus, in asking at step one whether he believed the evidence of the appellant, the judge necessarily assessed the appellant's evidence in the context of the entire record before him. Further, even after deciding that he did not believe the appellant, the appellant's suggestion of two incidents could have supported the finding of a reasonable doubt at the second or third stages of the W.D. analysis, i.e., in assessing whether the complainant's evidence raised a reasonable doubt or whether the evidence as a whole did.
- [40] As for the second category of the curative proviso, the evidence against the appellant was not so overwhelming that any other verdict would have been impossible to obtain. Accordingly, I conclude that the verdict cannot be upheld under s. 686(1)(b)(iii).

Disposition

- [41] For the reasons above, I would allow the appeal, set aside the conviction, and order a new trial.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Horsman"

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