

CANADA / JUDGMENT

R. v. Kavanagh

2022 BCCA 225

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 225 R. v. Kavanagh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kavanagh,

2022 BCCA 225

Date: 20220617

Docket: CA47217

Between:

Regina

Respondent

And

Charles Michael Kavanagh

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under section 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated

June 8, 2018 (conviction) (R. v. Kavanagh, 2018 BCSC 1118,

Vancouver Docket 27368).

Oral Reasons for Judgment

Counsel for the Appellant

(appeared via teleconference June 17, 2022):

T.J. Russell

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

June 13, 2022

Place and Date of Judgment:

Vancouver, British Columbia

June 17, 2022

Summary:

The appellant was found guilty of four offences: sexual interference, two counts of trafficking in drugs, and breach of a recognizance. He appealed the convictions, challenging the trial judge's assessment of credibility and reliability of the complainant's evidence. HELD: appeal dismissed. The judge's credibility assessment was supported by the record. It was open to the judge to find that evidence independently confirming the complainant's testimony was corroborative; that evidence of the complainant's emotional state soon after the sexual incident was informative of the credibility analysis; that the complainant did not have a motive to lie about the sexual activity; and that the complainant did not mistakenly believe that sexual activity occurred. The judge did not engage in impermissible cross-count consideration of evidence. The appellant has not demonstrated reversible error that warrants a new trial.

[1] DEWITT-VAN OOSTEN J.A.: Following a trial in the British Columbia Supreme Court, the appellant, Charles Michael Kavanagh, was found guilty of four offences: sexual interference; two counts of trafficking in drugs (cannabis and methamphetamine); and breach of a recognizance.[1]

[2] The sexual offence occurred in July 2016. The judge found that Mr. Kavanagh performed oral sex on the complainant. The complainant was 15 years old and did not have the legal capacity to consent.

- [3] Mr. Kavanagh did not seriously contest the trafficking charges or the breach of a recognizance. Instead, he focused his defence on the allegation of sexual interference, arguing that the evidence in support of that charge was neither credible nor reliable. Mr. Kavanagh did not testify.
- [4] The judge accepted the complainant's evidence, finding him to be an honest and forthright witness.
- [5] Mr. Kavanagh has appealed his convictions. He says the judge committed errors in principle that resulted in a demonstrably flawed assessment of the complainant's credibility and reliability, and necessitate a new trial.

Evidence at the Trial

- [6] The reasons for conviction are indexed as 2018 BCSC 1118.
- [7] By the age of 14, the complainant had become addicted to methamphetamine. He stopped going to school; was struggling in his relationship with his family; and was getting into trouble with the law. In May 2015, he was placed into foster care.
- [8] Mr. Kavanagh, who was then 57 years old, befriended the complainant through Facebook. At the time, Mr. Kavanagh was subject to a recognizance prohibiting him from being with children under the age of 16. He began spending time with the complainant. Mr. Kavanagh was aware of the complainant's personal circumstances, including a court order that he not use drugs or alcohol. During his relationship with Mr. Kavanagh, the complainant spent time in custody and treatment centres and moved between foster homes. Mr. Kavanagh knew this.
- [9] From May 2015 to July 2016, Mr. Kavanagh had fairly regular communication with the complainant: in-person, through Facebook and by text message. The complainant referred to him as "uncle". Mr. Kavanagh supplied the complainant with cannabis and methamphetamine; allowed the complainant to traffic drugs for him; had the complainant at his room in a downtown Vancouver boarding house, even though doing so was prohibited because of the complainant's age; repeatedly told the complainant that he supported and cared for him; arranged part-time work for the complainant; and lied to others about the nature of their relationship. Mr. Kavanagh told the complainant's father and a foster parent that he was an "outreach worker". He told others that he was the complainant's uncle. Both characterizations were patently false.
- [10] The complainant testified that in mid-July 2016, while he was staying at a foster home operated by TP, he went to Mr. Kavanagh's room at the boarding house. This attendance occurred somewhere between July 16 and 19, 2016. They smoked methamphetamine and got high. Mr. Kavanagh asked the complainant if he ever had a "blowjob". The complainant said "not by a male". They sat down on a bed. Mr. Kavanagh asked the complainant to turn up the volume on the television. The complainant did that. Mr. Kavanagh said "it would be better" with a needle. Mr. Kavanagh performed oral sex on the complainant. The complainant

passed out. When he awoke, he had a blue rubber band wrapped around his arm and an "injection needle" in his arm right below the elbow crease. There was "blood drawn". His shorts were on the ground and his underwear was pushed down below his knees. Mr. Kavanagh was lying next to him on the bed, fully clothed. He appeared to be sleeping. The complainant "ripped off the band, threw the needle on the ground" and left the room.

- [11] After this incident, the complainant continued to see Mr. Kavanagh. He was "highly addicted" and in his testimony, he described Mr. Kavanagh as someone who was "keeping [his] addiction going". Within a week of the alleged sexual incident, the complainant was arrested and held in custody until a date in August 2016. He was released to a youth program. While in custody, he disclosed the sexual activity.

Defence Position

- [12] Mr. Kavanagh's trial lawyer argued that the complainant was neither credible nor reliable. The defence accepted that Mr. Kavanagh was "exploiting, taking advantage [of] [and] feeding a troubled youth with drugs". However, the complainant could not be believed. He "lies when it's convenient" and says "what he wants, when he wants".
- [13] In support of this position, the defence pointed to the fact that although the complainant testified about sexual activity, he told a police officer in January 2017 that he had "no idea" whether Mr. Kavanagh "gave [him] a blowjob". He said he did not see Mr. Kavanagh engage in the act and he did not know why his shorts were off.
- [14] Defence counsel also argued that the complainant would claim to not remember things when it was "convenient" for him. He was often high on drugs when he spent time with Mr. Kavanagh, impacting the reliability of his evidence. The complainant admitted that on the day of the alleged incident, he was "passing in and out". Although there was video surveillance showing the complainant entering Mr. Kavanagh's boarding house the month prior to the incident, the Crown adduced no video evidence for the days immediately surrounding it. The defence said this gap raised a serious question about whether the complainant was even there.
- [15] Mr. Kavanagh submitted that the complainant's memory was spotty, there were inconsistencies between his testimony and statements he provided to others, including the police, and there were inconsistencies between his testimony and objective facts. It was argued that the complainant had a motive to lie. He was taken into custody in late July 2016, knew he would likely be there for some time and he made up a story about Mr. Kavanagh to "get sympathy as [a] victim" and to be released.

Judge's Findings

- [16] The judge understood that proof of the sexual offence rested on her assessment of the complainant's credibility (at para. 4).

- [17] She was alive to the defence submission that the complainant was an untruthful and unreliable witness, had a motive to lie and that it would be "dangerous to rely" on his testimony (at paras. 64-67).
- [18] However, she found the complainant to be a credible witness:
- [69] He was honest and straight forward. He was forthcoming about his own issues and failings. He admitted his drug use and addiction, his lack of regard for court orders, and his lying. He admitted lying to his father, his youth worker and his foster parents. He testified that he had let his [family] down by never being there for them. He admitted ripping the accused off by not paying him for the drugs fronted to him to sell. He admitted using the drugs the accused gave him and lying to the accused telling him that he had been robbed. He made no attempt to paint himself favourably nor did he minimise his behaviour.
- [70] He gave his evidence in a thoughtful manner and was forthright when he was unsure about an answer. He did not embellish his evidence.
- [71] When he testified about the sexual assault, WM was visibly uncomfortable. He said as little as possible and was clearly embarrassed and ashamed. He could hardly talk about it. When he did, he testified as if he was reliving the incident. The emotions he showed were real - he cried and looked down. He recalled details - the accused asking him to turn the music up so no one would hear, his shorts being off when he came to, the needle in his arm (the kind of needle used to inject drugs), the band around his arm (blue), the way the accused looked laying on the bed (like he was dead).
- [72] What he did not say in his evidence is striking as well. He did not testify that he said no. He did not testify that he tried to struggle. He did not say that he tried to stop the accused in any way.
- [19] The judge found that the complainant's evidence was "corroborated in many ways" (at para. 74). This included: (a) Facebook messages confirming the relationship with Mr. Kavanagh; (b) third party confirmation that Mr. Kavanagh falsely held himself out as the complainant's "outreach worker" (the complainant said he witnessed Mr. Kavanagh misrepresent their relationship); (c) video surveillance evidence from Mr. Kavanagh's boarding house showing the complainant covering his face when he entered the building, consistent with his description of how he got inside; (d) testimony from the boarding house manager that the complainant was in Mr. Kavanagh's room (shirtless); (e) a "fresh needle mark" on the complainant's arm after the alleged sexual incident; and (f) a "drastic" decline in the complainant's condition (at paras. 74-77).
- [20] The judge was satisfied that the complainant's inability to remember some details was "of no moment"--they were not things she would have expected him to remember (at para. 73). The fact that he continued to see Mr. Kavanagh after the sexual activity was understandable. He was addicted to drugs and Mr. Kavanagh supplied him with drugs (at paras. 76, 79-80). The judge rejected the submission that the complainant lied about the sexual activity to portray

himself as a victim, evoke sympathy and secure his release from custody. From her perspective, this suggestion carried no force in the context of a complainant who was frequently in and out of custody and did not seem to be affected by it (at para. 78). The judge considered the January 2017 statement to the police and accepted the complainant's explanation that he lied to the officer about having "no idea" whether Mr. Kavanagh performed oral sex because he did not feel comfortable describing the incident to that officer (at para. 82). He had not met her before and it "[was] natural that he, a teenage boy, would feel discomfort in talking about something that he found so difficult and embarrassing with her" (at para. 83).

[21] The judge found that "overall", the complainant's evidence "[made] sense". It was "corroborated in many material ways" and it fit with the other evidence. That evidence, based on the judge's interpretation of it, established that Mr. Kavanagh had been "grooming" the complainant (at paras. 84-87).

[22] The judge convicted Mr. Kavanagh of all counts on the Indictment.

Appellate Review

[23] To succeed in having his convictions overturned, Mr. Kavanagh must "demonstrate either error or the frustration of appellate review": *R. v. G.F.*, 2021 SCC 20 at para. 79, citing *R. v. Sheppard*, 2002 SCC 26 at para. 54. Neither burden will be met by "merely pointing to ambiguous aspects of the trial decision": *G.F.* at para. 79.

[24] In deciding whether the judge erred, this Court must bring a functional and contextual approach to its review of the reasons for conviction. The reasons must be read as a whole and in the context of the live issues at the trial, informed by the positions taken by the parties. The reasons must also be read "with sensitivity to the trial judge's role and advantage in making findings of fact and credibility": *G.F.* at para. 5. To the extent that Mr. Kavanagh invites us to interfere with findings of fact, the judge's assessment of credibility or the weighing of evidence, a deferential standard of review applies: *G.F.* at para. 81; *R. v. M.D.*, 2021 BCCA 339 at para. 54.

[25] As aptly explained in *M.D.*:

[55] Trial judges enjoy the distinct advantage of having seen and heard the witnesses testify firsthand and, therefore, are in the best position to assess the truthfulness of their accounts. Assessing credibility involves a complex process of watching and listening to the witnesses, distilling the impressions that emerge from their testimony and reconciling the various versions of events as recounted: *R. v. Gagnon*, 2006 SCC 17 at para. 20; *R. v. Wright*, 2019 BCCA 327 at paras. 23-25. Accordingly, appellate courts have been repeatedly cautioned against substituting their own assessment of credibility for that of the trial judge when there is a reasonable basis for the trial judge's conclusions on credibility: *Gagnon* at paras. 22-23; *R. v. R.E.M.*, 2008 SCC 51 at para. 48.

Discussion

[26] Mr. Kavanagh's appeal is squarely focused on the complainant's credibility and reliability. At the start of the hearing, his counsel fairly acknowledged the high threshold for appellate intervention in these circumstances.

[27] However, Mr. Kavanagh contends that the judge's approach to credibility and reliability was palpably flawed. Consequently, appellate intervention is warranted. He says the judge:

erroneously characterized evidence as corroborative and assigned it more weight than warranted; wrongly found that a deterioration in the complainant's condition in the days following the alleged sexual activity corroborated his testimony about oral sex; erroneously treated the evidence of a needle mark in the complainant's arm as corroborative without appreciating the frailties of that evidence, including the fact that the complainant admitted to taking drugs intravenously while addicted; wrongly relied on the absence of evidence of a proved motive to lie as a factor that bolstered the complainant's credibility; failed to give adequate consideration and weight to the inconsistency between the complainant's January 2017 police statement and his testimony; misapprehended a defence argument that in disclosing sexual activity, the complainant was simply telling people what he thought they wanted to hear based on their prior warnings about Mr. Kavanagh; failed to consider the possibility that the complainant mistakenly believed sexual activity occurred; and improperly engaged in cross-count reasoning by inferring from the evidence on the non-sexual counts that Mr. Kavanagh was "grooming" the complainant, there was an underlying sexual purpose to the relationship, and a sexual incident was therefore more likely to have occurred.

[28] In his factum, Mr. Kavanagh raises various sub-issues under each of these grounds of appeal. I have considered them, both individually and in their cumulative effect. For the purpose of these reasons, I consider it necessary to set out and address only the more substantial of the alleged errors.

The Judge Did Not Mischaracterize Evidence as Corroborative

[29] Mr. Kavanagh accepts it was open to the judge to find that the pieces of evidence referred to in para. 74 of her reasons were consistent with aspects of the complainant's testimony and capable of offering general support for a finding of testimonial veracity. However, he says the judge went too far in treating this evidence as corroborative and, by doing so, she assigned it undue significance in her credibility and reliability analysis.

[30] I disagree. The evidence referred to in para. 74 was independent of the complainant. It consisted of documentary and video evidence and testimony from other witnesses that independently confirmed parts of the complainant's narrative and, at law, properly could provide comfort to the trial judge that the complainant was telling the truth: *R. v. Khela*, 2009 SCC 4 at para. 39. The weight to be assigned to this evidence and the degree to which it was confirmatory was a matter for the trial judge in her consideration of the case as a whole: *R. v. Demedeiros*, 2018 ABCA 241 at para. 12, *aff'd* 2019 SCC 11.

[31] In my view, the evidence referred to in para. 74 is qualitatively different from the evidence found to have been erroneously treated as "corroborating" in *R. v. T.W.S.*, 2018 BCCA 119 at para. 33. Mr. Kavanagh relies on *T.W.S.* in support of his position. In that case, the Court ordered a new trial because the trial judge treated the child complainant's "ability to recall details surrounding" the alleged incidents of sexual conduct as corroboration (at paras. 33, 36). Although a trier of fact can "consider the level of detail a witness is able to provide as enhancing that witness's credibility [it is] not equivalent to treating that detail as corroborative or confirmatory" (at para. 39; emphasis added). Here, the evidence at issue in para. 74 was separate from the complainant's own recall of the events, distinct from his articulation of the specifics, and there is no risk of the complainant having been his "own corroborator": *T.W.S.* at para. 41.

There Was an Evidentiary Basis for a Finding of a Drastic Decline

[32] Mr. Kavanagh challenges the judge's treatment of evidence that the complainant's mental and physical condition "declined drastically" between July 16-22, 2016, as corroborative of his assertion of sexual activity. The judge stated (at para. 75):

While the sexual assault happened in private, there is evidence that corroborates it as well. After the incident [the complainant] declined drastically. He was clearly suffering. He went on a drug binge. It was almost like a death wish; a desperate attempt to escape. According to TP [with whom the complainant was residing at the time], a reformed drug addict himself and an experienced foster parent to high-risk youth many of who suffer with drug issues, if [the complainant] was not arrested in July [2016] he would have died.

[33] Mr. Kavanagh says the judge's interpretation of the evidence surrounding the complainant's condition (that it was "almost like a death wish") is not supported by the record. More importantly, even if there was some evidence from which a decline in the nature described by the judge could be inferred, there was no evidence that the deteriorating condition was in any way connected to the sexual activity with Mr. Kavanagh. The Crown did not ask the complainant about this. He did not testify that he was struggling in the days following the sexual incident because of its impact.

[34] Mr. Kavanagh accepts that evidence of a complainant's emotional state soon after an alleged sexual offence can properly inform a judge's credibility analysis: *R. v. Greif*, 2021 BCCA 187 at para. 70; *R. v. Murphy*, [1977] 2 S.C.R. 603 at 612-613. However, he argues that the evidence at issue in para. 75 of the judge's reasons was not of a distraught emotional condition. It was evidence of a mental and physical state that is consistent with and easily explained by the complainant's drug addiction and the fact that he was actively using at the material time. Moreover, there was evidence that the complainant had experienced declines on prior occasions, requiring intervention through apprehension, residential treatment or otherwise. Mr. Kavanagh says there was nothing out of the ordinary about the complainant's behaviour in July 2016.

- [35] I am satisfied there was evidence from which the judge could draw the inferences that she did. I accept that another judge, hearing this same evidence, may not have reached the same conclusion given the overarching context of drug addiction and the complainant's regular use. I also accept that in her reasons, the judge may have overstated the effect of this and other evidence. However, this does not mean that her reasoning process was fundamentally flawed. Nor, importantly, does it undercut the core conclusions reached by her.
- [36] TP, the foster parent with whom the complainant stayed for approximately one week in July 2016, described how within a matter of days, a "very young-looking normal kid" began to show "an amazing amount of deterioration". The complainant "went from looking like one of [his] neighbour's kids to somebody who was near death" (emphasis added). TP had "never seen anything quite like that." The complainant was "going down so quickly [m]entally, physically it was really, really disturbing to watch that". He "looked like he was dying" (emphasis added).
- [37] Brian Louie, a youth probation officer who had been supervising the complainant since May 2015, saw the complainant on July 21, 2016. He "wasn't able to hold a conversation which [was] not typical" for him. This was "much more different than [Mr. Louie] had seen him previous" (emphasis added). Mr. Louie was very concerned about the complainant's well-being--more concerned than he had been in the past.
- [38] Jennifer O'Buck, a detective with the Vancouver Police Department, dealt with the complainant multiple times. She completed a curfew check on July 20, 2016. She interacted with the complainant and he "couldn't form a sentence. He was mumbling and he was not himself". She had never seen him like that.
- [39] This was post-event evidence from which the judge could infer that the complainant's mental and physical condition in the days following the alleged sexual incident was marked and out of the ordinary, even with a history of drug addiction, intoxication and previous crises that required intervention by the people who monitored and cared for him.
- [40] I am also satisfied that applying logic, common sense and human experience, it was open to the judge to conclude that the observations made of the complainant were consistent with and corroborative of having recently experienced a traumatic event: *R. v. Rose*, 2021 ONCA 408 at para. 33. There did not have to be evidence from the complainant or an expert opinion witness that definitively linked the deterioration to a specific incident before that inference was available. Nor did Mr. Kavanagh's counsel refer us to any authority to that effect.
- [41] Although the complainant was not asked about the personal impact of the sexual activity, there was evidence before the judge that he was significantly affected by it. When asked why he told a police officer in January 2017 that he had "no idea" whether Mr. Kavanagh performed oral sex on him, the complainant said he was not comfortable describing the event to that officer. He "had never met them before. [He] didn't even know who they were". The judge accepted this evidence. The complainant was also noted by the judge to be "visibly

uncomfortable" and "clearly embarrassed and ashamed" when he testified about the incident at the trial in April 2018. He "could hardly talk about it" and "[w]hen he did, he testified as if he was reliving the incident" (at para. 71).

- [42] The stark and rapid deterioration in the complainant's condition, noted by people who were familiar with him and his behavioural history; its temporal connection to the date of the alleged sexual offence; the evidence that the complainant was uncomfortable speaking about the incident six months after the fact; and the observations made of his demeanour at the trial, considered cumulatively, provided the judge with an independent and supportive foundation for a finding of corroboration. As succinctly stated in *R. v. J.C.*, 2021 ONCA 131: "there is no bar on relying upon common-sense or human experience to identify inferences that arise from the evidence" (at para. 59).

The Evidence of a Needle Mark Was Logically Probative

- [43] Contrary to Mr. Kavanagh's suggestion, the evidence of a "fresh needle mark" in the complainant's arm was not of marginal probative value.
- [44] The complainant testified that while at TP's residence from July 16-22, 2016, the only time he took drugs intravenously was during the occasion on which Mr. Kavanagh performed oral sex. Richard De Beck, a youth probation officer, saw the complainant on July 19, 2016 at TP's residence. Mr. De Beck saw a "fresh hypodermic needle mark" on the complainant's arm. Sergeant Elvis Bellia of the Vancouver Police Department accompanied Mr. De Beck. He saw "something red, like a needle hole or pinprick in [the complainant's] left elbow pit". These observations were independent of the complainant and consistent with his testimony. They were also made in close temporal proximity to the actus reus of the sexual offence. The judge was entitled to treat this evidence as corroborative.

The Judge Did Not Err in Her Treatment of Motive

- [45] At para. 78 of her reasons, the judge stated that the complainant did not have a motive to lie about the sexual activity. Mr. Kavanagh says the judge wrongly used the absence of evidence of a proved motive to lie as a basis to conclude that the complainant was truthful. In making this argument, he relies principally on *R. v. Bartholomew*, 2019 ONCA 377. In that case, the Court held that the absence of evidence of a proved motive to lie is not capable of enhancing a complainant's credibility (at para. 26). At best, it is a "neutral factor" (at para. 26).
- [46] In my view, the judge did not err as contended or place a burden on Mr. Kavanagh to prove the absence of a reason to fabricate. I agree with the Crown that in para. 78 of her reasons, the judge was simply responding to (and rejecting) Mr. Kavanagh's submission that the complainant did have a motive to lie and, as a result, that his evidence should be disbelieved. Nowhere does the judge indicate that she relied on the absence of evidence of a proved motive to lie as a factor that enhanced the complainant's credibility.

The Judge Did Not Fail to Consider a Significant Inconsistency

[47] Mr. Kavanagh says the judge failed to adequately consider the inconsistency between the complainant's testimony about oral sex and his statement to the police in January 2017 that he had "no idea" of whether that actually took place. It is readily apparent from paras. 67 and 81-83 of the judge's reasons that she was alive to this evidence and to the significance attributed to it by the defence. She accepted the complainant's explanation for the inconsistency. She was entitled to do so as the trier of fact, in which she "enjoy[ed] the distinct advantage of having seen and heard [the complainant] testify firsthand": M.D. at para. 55.

The Misapprehension of a Defence Submission was Harmless

[48] I agree with Mr. Kavanagh's counsel that the judge's stated reason at para. 79 for rejecting the defence submission that in disclosing a sexual incident the complainant was simply saying what he thought people wanted to hear, is not responsive. The issue was not why the complainant would continue to see Mr. Kavanagh in the face of prior warnings to stay away from him. Rather, the defence submission was that the disclosure was inherently unreliable because it was tainted by information previously supplied to the complainant about Mr. Kavanagh, and the complainant likely perceived, based on that information, that disclosing an incident of sexual activity would resonate with his audience and garner sympathy.

[49] However, I am satisfied that any misunderstanding about this aspect of the defence position was harmless. The judge was aware of the evidence of prior warnings (at paras. 39, 43, 79). She understood the defence position that the complainant was lying about the sexual activity; that he "says whatever he wants whenever he wants"; and that it would be "dangerous to rely on [his] evidence" (at para. 64). The only real issue at the trial was the credibility and reliability of the complainant's testimony. The judge appropriately focused her analysis on that issue, in the context of the evidence as a whole. I cannot see how a correct understanding of defence counsel's point about tainting would have made a material difference. The defence advanced several bases for finding a reasonable doubt based on the complainant's credibility. The judge understood that a close examination of the complainant's testimony was necessary and she engaged in precisely that task.

The Judge Did Consider Whether the Complainant was Mistaken

[50] Mr. Kavanagh contends the judge failed to consider the possibility that the complainant mistakenly assumed that sexual activity occurred.

[51] It was suggested more than once by the defence in cross-examination of the complainant that he was "so doped up on drugs" that he did not remember what happened. The complainant was cross-examined on the January 2017 statement and the contrast between that statement and his testimony at the trial. In his closing submissions, defence counsel emphasized these issues, as well as the absence of independent evidence confirming the

complainant's physical presence at Mr. Kavanagh's boarding house in July 2016. Based on this evidence, and for other reasons, defence counsel submitted there was "simply no way [the judge could] be sure that [the] sexual act took place".

- [52] It is clear from paras. 66-67 of her reasons that the judge was alive to this aspect of the defence position, including the suggestion that the complainant made an assumption about oral sex having occurred because his shorts were down. The judge appreciated that in addition to challenging the complainant's credibility, Mr. Kavanagh was raising questions about the reliability of his evidence and whether he could, in fact, accurately remember what took place on the day in question. While the judge did not explicitly address the issue of a possible mistaken belief, the credibility and reliability of the complainant's evidence was squarely before her and her reasons reflect a considered assessment. Trial judges are not obliged to identify every piece of evidence considered by them, reconcile all evidentiary frailties or detail and explain each of their findings: *R. v. R.E.M.*, 2008 SCC 51 at paras. 15-20.

There Was No Improper Cross-count Reasoning

- [53] Finally, Mr. Kavanagh takes issue with the judge's conclusion at para. 87 that he was "grooming" the complainant. He says that to reach this conclusion, the judge wrongly used the evidence specific to the charges of trafficking and breach of a recognizance as a foundation from which to infer "grooming". She then reasoned, based on that foundation, that the sexual incident was more likely to have occurred because "grooming" carries an inherently sexual purpose. Mr. Kavanagh says this reasoning process is flawed. It reflects impermissible cross-count consideration and, importantly, resulted in a finding of corroboration for a sexual offence based on misconduct that, objectively, was not logically probative of an intention to facilitate sexual contact.
- [54] It is a well-established principle that in the absence of a similar fact ruling, or some other lawfully permissible basis for considering evidence across counts, the evidence on one count of an Indictment must not be put to probative use on the other counts: per Sopinka J. in *R. v. Rarru*, [1996] 2 S.C.R. 165 at para. 1; *R. v. Davis*, 2003 BCCA 679 at para. 32. This principle mitigates the risk that discreditable evidence adduced through multiple counts will lead to reasoning prejudice. It also avoids the possibility of moral prejudice: *R. v. Thomas*, 2019 BCCA 247 at para. 31.
- [55] I am satisfied that neither of those risks arose here. All four counts on the Indictment were properly before the judge. Mr. Kavanagh did not apply for severance or object to the judge considering the evidence of trafficking and breach of a recognizance in her assessment of the complainant's credibility and reliability. The evidence in support of each count formed an integral part of the context surrounding the complainant's interaction with Mr. Kavanagh between May 2015 and July 2016. It was relevant to appreciating the nature and scope of their relationship and provided important explanatory context for the complainant's actions.

- [56] The judge considered the whole of the relationship evidence, including the manner in which Mr. Kavanagh ingratiated himself into the complainant's life and its obviously exploitive aspects (acknowledged to exist by the defence). She found, as a fact, that Mr. Kavanagh "was grooming" the complainant (at para. 87). As with the other inferences drawn, this finding was open to her on the record.
- [57] In *Housen v. Nikolaisen*, 2002 SCC 33, the majority explains that when a trial judge makes a factual inference, they:
- [22] must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
- [58] It is not the role of an appellate court to second-guess the weight assigned to specific items of evidence: *Housen* at para. 23. It is only where the "inference-drawing process itself is palpably in error" that interference is warranted: *Housen* at para. 23 (emphasis in original). I do not see that here.

Disposition

- [59] Applying a functional and contextual approach to the reasons for conviction, in light of the record and the parties' submissions in the court below, Mr. Kavanagh has not persuaded me that the judge committed reversible error.
- [60] Accordingly, I would dismiss the appeal from conviction.
- [61] FITCH J.A.: I agree.
- [62] VOITH J.A.: I agree.
- [63] FITCH J.A.: The appeal from conviction is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

- [1] Criminal Code, R.S.C. 1985, c. C-46, ss. 151, 811, and Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(1).

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