

CANADA / JUDGMENT

R. v. Mann

2020 BCCA 353

COURT

British Columbia Court of Appeal

DECIDED

10 December 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 353 R. v. Mann

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mann,

2020 BCCA 353

Date: 20201210

Docket: CA45705

Between:

Regina

Respondent

And

Steven Singh Mann

Appellant

Restriction on publication: A publication ban has been mandatorily 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 and witness referred to in this judgment by the initials BM and FT. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated July 20, 2018 (R. v. Mann, 2018 BCSC 1845, Chilliwack Docket 66321).

Counsel for the Appellant, appearing via videoconference:

R. Mansoori-Dara

J. Narwal

Counsel for the Respondent, appearing via videoconference:

S. Elliott

S. Gilliespie

Place and Date of Hearing:

Vancouver, British Columbia

October 23, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 10, 2020

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Voith

Summary:

The appellant appeals his conviction of sexual assault. In addition, the appellant applies for leave to adduce fresh evidence. The appellant argues that the trial judge erred by: (a) declining to order further Stinchcombe disclosure mid-trial; (b) engaging in impermissible stereotypical reasoning; (c) misapprehending evidence; (d) in his treatment of prior consistent statements; and (e) in misapplying the rule in *Browne v Dunn*. Held: the appeal and the application to adduce fresh evidence are dismissed. The trial judge's refusal to order further disclosure was appropriate in the circumstances. His conclusions were grounded in the evidence before him and did not result in impermissible stereotypical reasoning. On each of the six aspects of the judge's reasons where the appellant argues there was a misapprehension of evidence, the judge's reasoning displayed no reversible error. It is not the role of an appellate court to re-weigh evidence. Furthermore, nothing in the judge's reasons suggest that he placed any reliance on the complainant's prior

consistent statements to bolster credibility except in finding that her attempt to disclose complete evidence was an indication of her reliability as a witness. The judge correctly applied the rule in *Browne v Dunn* in finding that aspects of the defence evidence that were central to the issues at trial were not put to the complainant or the witness; the issue of how to remedy the breach is a matter for the discretion of the trial judge. Finally, the fresh evidence application failed to meet the Palmer criteria and it would not be in the interests of justice to admit the fresh evidence on appeal.

Table of Contents

Paragraph Range

1.0 INTRODUCTION

[1] - [7]

2.0 THE PROCEEDINGS AT TRIAL

[8] - [42]

2.1 The Crown's case

[9] - [25]

2.2 The case for the defence

[26] - [42]

3.0 DISCUSSION

[43] - [141]

3.1 Did the trial judge err in failing to order further Stinchcombe disclosure?

[43] - [54]

3.2 Did the trial judge err in assessing credibility?

[55] - [141]

3.2.1 Did the trial judge engage in impermissible stereotypical reasoning?

[62] - [76]

3.2.2 Did the trial judge misapprehend evidence?

[77] - [107]

3.2.3 Did the trial judge make improper use of prior consistent statements?

[108] - [114]

3.2.4 Did the trial judge misapply the rule in *Browne v Dunn*?

[115] - [133]

3.2.5 The new evidence application

[134] - [141]

4.0 DISPOSITION

[142] - [142]

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1.0 INTRODUCTION

- [1] On July 20, 2018, Mr. Justice Brown convicted the appellant of the sexual assault of BM. At that time, the appellant was 22, and BM was 18. The appellant did not deny sexual interaction with BM. The critical issue at trial was whether the Crown proved the absence of consent, and/or a lack of capacity to consent. BM had ingested a toxically high dose of MDMA ("Ecstasy"), and whether she had done so voluntarily or unwittingly also became an issue. Credibility was front and centre.
- [2] The trial judge concluded that BM had not consented, and in any event lacked the capacity to consent. He accepted the evidence of BM, who had no recollection of what happened after being administered the drug, and rejected the evidence of the appellant.
- [3] The appellant appeals his conviction. He raises two grounds of appeal, the second of which yields a number of issues.
- [4] First, he alleges that the Crown failed to provide, and the judge erred in failing to order, further Stinchcombe disclosure mid-trial.
- [5] Second, he asserts that the trial judge erred in his assessment of credibility. Specifically, the appellant says that the judge (a) engaged in impermissible stereotypical reasoning and thereby considered irrelevant factors, (b) misapprehended evidence, (c) erred in his treatment of prior consistent statements, and (d) misapplied the rule in *Browne v Dunn*.
- [6] In addition, the appellant applies for leave to adduce fresh evidence, which he submits will undermine the judge's credibility findings if admitted.
- [7] For the reasons that follow, I conclude that both the appeal and the application to adduce fresh evidence must be dismissed.

2.0 THE PROCEEDINGS AT TRIAL

- [8] For contextual purposes, I summarize the evidence at trial as follows. Where specific detail becomes important, I will review it below in my discussion of the various issues.

2.1 The Crown's case

- [9] The Crown called the complainant and her friend, FT, and four police officers. Three of the officers were involved on the night in question. The fourth, Constable Parks, was the lead detective in the investigation. He was called to be cross-examined at the request of defence counsel, and it is in relation to his investigation that the disclosure issue arises.
- [10] The Crown also called Erin Loewen, a registered nurse with specialized training in sexual assault nursing, and relied on a statement of facts admitted pursuant to section 655 of the Criminal Code. These admissions related principally to expert evidence.
- [11] The facts admitted included the expert qualifications of Ms. Loewen, William Price, a forensic scientist expert in the interpretation of DNA profiles, and Verna Mendes, a forensic toxicologist. Their reports were agreed to be admissible. Also admitted were the continuity of exhibits including swab samples taken by Ms. Loewen from the body of BM and forwarded for forensic examination.
- [12] It was admitted that the appellant's DNA was found in samples from a rectal swab Ms. Loewen took from BM.
- [13] With respect to the evening in question, BM and her friend FT had travelled from their home in Saskatchewan to Abbotsford, BC, on vacation. On the evening of July 4, 2014, they drank some wine at home and then took a cab to a local pub, the Townhall. As the pub was closing, BM and FT met up with three males, who invited them to come to a party. One of these males was the appellant. Another was Rajin Gill, who testified as a witness for the defence.
- [14] The women agreed to go, and were driven to a house that belonged to the parents of one of the males. The parents were away. The party that the women expected did not manifest itself. The women decided they would stay for one drink. BM accompanied one of the males in a car trip during which the male picked up some drugs. When they returned, she had a drink. She recalls nothing more until a voice asked her about what had happened there that night. Her first visual recollection was in hospital.
- [15] BM testified that she never consented to having sex with the appellant, and would not have consented to do so. She said she would never have consented to anal intercourse, and never let the appellant touch her. With respect to Ecstasy, she said she had heard of it, but had never taken it. She said she had no interest in taking it, and did not intend to take it.
- [16] FT recalled being in the house with BM and the three men, sitting on the couch and listening to music. She began to feel very dizzy, and unable to speak or hear. She felt unwell, and ran downstairs. She fled the house barefoot and called 9-1-1. Her next recollection is being in hospital.
- [17] It was FT's flight from the house and her 9-1-1 call that led to the involvement of officers of the Abbotsford police force.

- [18] Constable Stevens responded to the 9-1-1 call. He drove to the area where the call came from and found FT, whom he described as a distraught female who was confused to a marked degree, unstable and intoxicated. FT said she had been with a friend, but did not know where her friend was.
- [19] A police dog tracked to the door of the house where the women had been. Constable Stevens and Constable Gayger knocked on the door. The appellant answered. The police officers asked if there was a female in the residence. The appellant's first response was that one had been there earlier, but then said that no women were ever there. He said that a woman had been dropped off in front of the house, but did not come in, and he did not know who she was. He denied there were any women in the house. As they were talking, Constable Stevens heard a female voice call out from upstairs.
- [20] Constable Stevens went upstairs and found a young woman in the front bedroom. She was naked, holding up a blanket, and, he said, clearly confused and disoriented. She did not understand anything Constable Stevens said. He requested the attendance of a female officer, who arrived in about a minute.
- [21] Sgt. Byrd was on patrol when she was advised of a panicked call about a friend being still in a residence, the panicked woman having gotten out. She was asked to go there with Constable Boonstra. On arrival, they went upstairs. The woman in question seemed to be impaired and was not making any sense. Sgt. Byrd was not thinking in terms of a sexual assault at that time, but arranged for BM to be taken to Abbotsford Hospital. BM could not answer questions or make any sense about where she had been.
- [22] Constable Boonstra arrived at the residence at about 2:50 a.m. on July 5, 2014. Sgt. Byrd asked him to go to the bedroom and collect evidence. He recalled BM sitting on the bed with her knees at her chest, her pants around her ankle. She seemed very impaired and kept repeating herself. She knew the day, but not the month. Her eyes were dilated. She did not know where she was and was confused about how she got there. She did know that at one point she had been with a friend.
- [23] Ms. Loewen examined BM at Abbotsford Hospital at about 1:00 p.m. on July 5, 2014. She did a full sexual assault nurse examination ("SANE"). She noted bruising, and signs in the vaginal area indicative of forceful vaginal entry. She took swabs from both the vaginal area and the rectal area. Ms. Loewen collected blood and urine specimens for toxicological analysis.
- [24] On cross-examination, Ms. Loewen agreed that the vaginal signs may or may not indicate sexual assault. They were not conclusive either way. She also conceded that the rectal sample that proved to contain the appellant's DNA could have come from the inside or the outside of the rectum.

[25] The thrust of the evidence of the toxicologist, Ms. Mendes, was as follows. At moderate doses, MDMA has empathogenic effects resulting in feelings of empathy, closeness and increased response to intimate touch. At high dosages, toxicity can occur resulting in hallucinations, confusion, agitation, seizures, coma and possible death. The level found in the blood sample taken from BM by Ms. Loewen on the afternoon of July 5, 2014, was 381 ng/ml, which Ms. Mendes said was considered to be in the toxic range for the drug. Assuming none was consumed after the incident at the house approximately 12 hours before the sample was taken, the concentration at the time of the incident would have been significantly higher. The specific concentration at that earlier time could not be determined.

2.2 The case for the defence

- [26] The appellant's friend, Rajin Gill, testified first. Mr. Gill was involved in the events of the evening. He was 18 years old at the time, and it was his family home where the group from the pub ended up, and where the alleged assault occurred. His parents were away.
- [27] Mr. Gill and the appellant, together with another person who was a cousin of Mr. Gill, spent the evening at the Townhall. Mr. Gill had eight or nine drinks, and a few rounds of shots. He was not overly drunk, but he and the appellant were intoxicated. They were there to have a good time, rather than to get drunk, and he had a good recollection of the evening.
- [28] He recalled that at closing time, they met up with a couple of young women. He asked them if they would like to come back with them, and they agreed. They drove to Mr. Gill's family home in Mr. Gill's parents' car. The appellant drove, as Mr. Gill was too impaired to drive.
- [29] Back at the house, they all went upstairs to the family room, where they sat and talked. "One of the girls" mentioned wanting to use Ecstasy. By chance, Mr. Gill had tried it one prior time and had the phone number of the person who had given it to him, so he called up that person to arrange to get some. He drove to pick it up, and "the one lady was with me". They drove a short distance, picked up the drug, and returned to the house. There, Mr. Gill mixed the MDMA powder into a vodka drink, following instructions from "one of the females" who was telling him how much to put in. In none of his references to one of the two women did Mr. Gill specify which one.
- [30] This evidence led to one of the objections concerning the application of *Browne v Dunn*, as it had not been suggested to either BM or FT in cross-examination that the MDMA had been acquired at the request of one of them, or that one of them had given instructions about how to mix it.
- [31] Mr. Gill, the two women, and the cousin all ingested some of this drink. Mr. Gill could not recall whether the appellant did as well. They sat around, and at some point between 2:30 and 2:45 a.m., according to Mr. Gill, one of the girls began to get cuddly, and talking more. The other got up and walked down the stairs, saying she wanted to phone her mom. Mr. Gill told her to use the rec room, where it would be quieter. But instead, she left the house, barefoot. None of them made very much of this. Mr. Gill did not see her again that night.

- [32] Back in the upstairs family room, the remaining woman was talking to the appellant, and they began to get intimate, sitting very close together on the couch. They then got up and went down the hall to the master bedroom. This was definitely after 3:00 a.m. Mr. Gill assumed they were going to "hook up". He recalled the appellant coming out of the bedroom 10 to 15 minutes later, and within a few minutes of that, the police were at the front door. This caused Mr. Gill considerable anxiety.
- [33] This evidence caused the Crown some anxiety as, in the Crown's submission, the wholly consensual nature of the relationship between BM and the appellant as described by Mr. Gill had never been put to BM (who, of course, had no recollection of anything after taking the drink laced with MDMA). Again, the Crown raised the applicability of *Browne v Dunn*.
- [34] The appellant described going to the Townhall pub with Mr. Gill and Mr. Gill's cousin. He consumed no alcohol before going there, and maybe two drinks while he was there. They decided to leave, and as his friends were finishing off their drinks, the appellant went outside to get the car and meet them at the front door. When his friends came to the car, they had two girls with them. They all drove to Mr. Gill's family's house.
- [35] Under cross-examination, the appellant agreed that, in fact, he had been kicked out of the bar by the bouncers, but said that it had nothing to do with harassing a woman. He said he was simply told "it's time for you to go". He denied harassing any females, as "[t]hat's not how you pick up girls". This is of relevance to the appellant's application to adduce fresh evidence, which evidence includes police statements taken from the bouncers in which they indicate that they confronted the appellant as a result of complaints of harassment from two women, and required him to leave the premises.
- [36] Back at the house, the group went upstairs to the family room, and just sat and talked for a bit. The others talked about drinking, and possibly getting MDMA, but were more into just drinking. The appellant then left the room to roll a joint, and returned to ask if Mr. Gill and BM wanted to join him in smoking. The other woman had gone downstairs, saying she was going to make a phone call. The appellant went out on a balcony at the back of the house and smoked by himself. He did not do any MDMA. He understood that the others did.
- [37] After returning to the family room, Mr. Gill and his cousin were having a conversation, and the appellant sat with BM. They had a couple of drinks. They were getting pretty close to each other, and BM was basically leaning on him. As they were talking, he did not see any signs of MDMA use. He had tried it himself two or three years before, and has been around others who had done it.
- [38] Then, as they continued to sit close together on the sofa, BM started to feel his penis area. He asked her if she wanted to go into a room, and she said that she did. They got up, and BM was "kind of almost trying to lead the way, but she didn't know where to go". They walked to the master bedroom and got on the bed. They were kissing, and she tried to take his jeans off. He had to help by unbuttoning them, and then he removed her top. She then removed her bra, and continued to kiss. She then started to give him a hand job. He was sitting on the

edge of the bed, and she was standing in front of him. After he ejaculated, she grabbed the bedsheet and tried to clean him with it. He went to the bathroom to get some toilet paper, and when he returned she was just sitting there. He could tell she wanted to have sex, but he wasn't up to it. She began playing with herself. He told her he would get her a drink, and left the room.

- [39] When he got back to the family room, the appellant realized the others had ordered pizza, so he went back to the bedroom door to tell BM. She said she would get dressed and come right out. He returned to the family room to eat pizza with the other two men, and after a few minutes passed, there was a ring at the front door. It was the police. They panicked.
- [40] At first they waited. As the appellant did not think they had done anything wrong, his initial feeling was not even to open the door. Mr. Gill wanted him to go to the door because he was nervous about the reaction of his parents and their neighbours. The appellant opened the door. He was asked a number of questions, and two of the three police officers entered the house. He was not arrested.
- [41] Under cross-examination, the appellant conceded that he lied to the police when they asked him about the presence of females in the house. He said that he didn't feel like he was lying, he just wasn't telling them the truth. He then agreed he told the police a "bald-faced lie".
- [42] The appellant denied giving BM the MDMA without her knowledge, maintaining that she had done it herself.

3.0 DISCUSSION

3.1 Did the trial judge err in failing to order further Stinchcombe disclosure?

- [43] During the trial, the appellant applied for an order requiring Constable Parks to search for, and produce if they existed, emails and/or text messages between Constable Parks and BM during the course of the investigation relating to matters other than witness management. Counsel for the appellant (who was not counsel on the appeal) was concerned about the possibility of suggestions being made to BM that might have influenced her evidence, given her complete lack of recall concerning events after she blacked out.
- [44] Constable Parks was produced for cross examination. He could not recall whether he had any email communications with BM during the relevant time period, or whether he had any text communications at all. He did acknowledge one text message updating her on a court date, which had been disclosed. He did not believe that he had any communication with her outside of witness management. His usual practice would have been to forward any relevant communications to the Crown; he would not have forwarded clearly irrelevant materials such as updates on court dates, responding to questions about the court process, and so on. He did make a reference to BM's mother looking into things.

- [45] It is, of course, the duty of the Crown to disclose all material, whether inculpatory or exculpatory, that is not beyond its control, clearly irrelevant, or privileged; material is relevant if it could reasonably be used by the defence in meeting the case for the Crown: *R v Stinchcombe*, [1991] 3 SCR 326; *R v Chaplin*, [1995] 1 SCR 727 at para 21; *R v Dixon*, [1998] 1 SCR 244 at para 20.
- [46] The police have a corresponding duty to disclose to the Crown the "fruits of the investigation" along with materials that are "obviously relevant to the accused's case": *R v Gubbins*, 2018 SCC 44 at para 21. Where the Crown is aware of undisclosed materials in the hands of the police or other connected entities, it has a duty to make reasonable inquiries: *Gubbins* at para 21.
- [47] The defence bears the onus of establishing a basis that would allow the trial judge to conclude that there exists further material that is potentially relevant. This burden "serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests": *Chaplin* at para 32.
- [48] In *R v Anderson*, 2013 SKCA 92, Justice Ottenbreit for the Saskatchewan Court of Appeal said this:
- [64] As a practical matter, during a review of the Crown's disclosure obligations prior to trial or during trial, a trial judge must look at a myriad of relevant factors touching on whether the Crown has fulfilled its obligation in good faith and in a timely manner. Without providing an exhaustive list, this could include looking at the essential elements of the offence, the complexity of the investigation, the volume and type of disclosure already provided, what the Crown refuses or is unable to provide, a preliminary assessment of how the further disclosure sought is relevant in the sense of assisting the accused, whether it is part of the case to meet, the interaction between the Crown and defence, the behaviour of the Crown and defence, the timing of disclosure and the nature of the defence requests for disclosure. The interplay of these factors is case specific.

[Emphasis added.]

- [49] In this case, the judge denied the application. He noted that whether the type of material of which the appellant sought disclosure in fact existed was a matter of speculation, and, indeed, appellant's counsel conceded he was on something of a "fishing expedition". He observed that no questions had been put to the complainant about any of this, and that nothing had been raised at or following the preliminary inquiry. Moreover, the judge noted, the proceedings had already been lengthy, and any such documentation would be of little help in resolving the issues, particularly given the question of capacity to consent.
- [50] The appellant nevertheless contends that this ruling deprived him of access to information that could have led to reasonable avenues of investigation about vital issues at trial, including consent and incapacity, and allowed Constable Parks to become the arbiter of relevance.

- [51] I see no error in the judge's ruling. It was one that was open to him in the circumstances. Nothing raised by the appellant, speculative as his argument was, established that undisclosed information or communications in fact existed, or that, to the extent they existed, their nondisclosure resulted in a breach of the appellant's right to make full answer and defence. Moreover, the judge was entitled to take into account the timing and scope of the request at trial, and the appellant's failure to pursue disclosure diligently before then, given that all necessary information was at hand by the time of the preliminary inquiry. This included not only the role of Constable Parks, but also the considerable disclosure the Crown had made by then, including, for instance, the text from Constable Parks about court dates.
- [52] Evidence relied on by the appellant to support alleged prejudice does not, in fact, provide the necessary support. While BM did refer in her victim impact statement to "[piecing] things together", this was an obvious reference to trying to make sense of what had happened to her during her blackout, not to "refreshing" her own memory of the evening. She was very candid about what she did and did not recall when she testified, and did not claim to recall events around the sexual contact at all.
- [53] Unexpectedly, an adjournment was subsequently necessitated for other reasons. It was then open to the appellant to bring a formal section 7 Charter application to compel disclosure, but he did not do so.
- [54] In these circumstances, I would not accede to this ground of appeal.

3.2 Did the trial judge err in assessing credibility?

- [55] As discussed above, this ground of appeal comprises four separate issues, some of which raise several subsidiary issues. In general, it must be noted that a trial judge's assessment of credibility attracts a high degree of deference: *R v Vuradin*, 2013 SCC 38 at para 11. As the Supreme Court of Canada observed in *R v Gagnon*, 2006 SCC 17 at para 20, "[a]ssessing credibility is not a science", and in the absence of a palpable and overriding error, the trial judge's perceptions should be respected.
- [56] In this case, the trial judge made the following assessments of credibility.
- [57] With respect to Mr. Gill, the judge said this:
- [157] I did not find Mr. Gill a trustworthy or reliable witness. He was evasive and inconsistent; and his testimony lacked an air of reality. It is more than coincidental that he knew where to pick up MDMA nearby and at such a late time; what drug it was he wanted to pick up and from where. It was never explained why the drugs needed to be obtained or used by anyone present in the first place. I do not find credible the assertion that either of the women expressed an interest in obtaining any drugs. Where could they expect to obtain them at such an hour, and why would they want to do so in their circumstances among strangers?

- [158] He showed a notable lack of concern for Ms. F.T.'s well-being, having headed out at a late hour with no shoes on, for her whereabouts, etc. He reluctantly acknowledged Steven Mann was intoxicated after first minimizing his consumption of alcohol. On the one hand, Mr. Gill suggested he was not a friend of Steven Mann and had not known him well at all. He indicated he rarely socialized with Mr. Mann before, very little. He had thought nothing of letting Steven Mann drive his parents' Jetta, allow someone he did not consider a friend and a total stranger whose name he did not even know use his parents' master bedroom to "hook up" without Steven Mann's having asked for permission to use that room. It was no concern to him that Mr. Mann and Ms. B.M. had gone off to hook up in his parents' bedroom, despite attesting to his being concerned about his parents' property and his brother's reputation, and him finding out. Nor, on the other hand, did he express concern that Ms. F.T., having consumed MDMA, had exited the house in bare feet, as he instead turns his attention to where his friends and Ms. B.M. were.
- [159] Mr. Gill reacted to the police being outside with the barefoot woman by not answering the door and telling Steven Mann to do it. His implicit creating of social space between himself and Mr. Mann makes it easier for him to attempt an impression he was not a biased friend, leading a narrative to help him while cloaking his own activities of purchasing and distributing a serious controlled substance when he was not fully aware of all of its side effects.
- [58] With respect to the complainant, the judge said the following. The appellant objects particularly to comments in para 268 as displaying stereotypical reasoning.
- [265] While generally speaking, a witness' demeanour on the stand is not a dominant consideration when assessing the witness' credibility, it may still influence the assessment and, depending on the nature of the case, sometimes becomes a significant factor. Despite the obvious emotional stress Ms. B.M. had to manage at a young age, she answered questions courteously and in a straightforward way. She was not shaken on cross-examination, particularly with respect her primary assertions.
- [266] Her memory of events leading up to her ingestion of MDMA was related in a clear and unembellished way. She acknowledged riding briefly with Rajin Gill when he went to purchase some drugs.
- [267] I believe Ms. B.M. when she testified that she never consented and never would have consented to having any sexual activity with Steven Mann or any other male present at the Wagner residence. Her position is tenable and plausible for multiple reasons. She was only 18 years of age, she did not know any of the males, she did not intend to stay for more than one drink, and had in mind preparations for returning home, whether it was the next day or next coming day.
- [268] Mr. Mann depicted her as a seducer, which, considering the circumstances: Mr. Mann being a complete stranger; considerably older than Ms. B.M.; and, at least based on his demeanour as a witness, not a warm or alluring person; having two other males sitting in

close proximity on the couch, purportedly seeing her rubbing Mr. Mann's penis through his clothes, making him feel uncomfortable according to his testimony; let alone Ms. B.M., in that circumstance, then leading him down the hall to a room without a word, or any invitation from Rajin Gill, a room she did not know of before, had never been in before, but purportedly leading Mr. Mann to it, Ms. F.T. having already left, this all while being alone among three strange males she did not know, and not feeling safe because there obviously was not going to be what she thought would be a party with at least five more people. Such a narrative, which reflects Mr. Mann's story, does not have about it an air of reality and gives good reason for Ms. B.M.'s testimony with respect to whether or not she would have consented or did consent to sexual contact with Mr. Mann or any of the males that were there.

No consent conclusion

- [269] In short, I believe Ms. B.M. when she says she neither consented to nor would she have consented to sexual activity of any kind with the accused. The circumstances of which she was aware, as mentioned, give sufficient tenable and plausible reasons for her testimony that she never would have done so. If a complainant lacks the capacity to give consent, there can be no question as to their internal state of mind in any case.
- [59] With respect to the credibility of the appellant, the judge commented at various places, but summed up in this way:
- [283] I am going to briefly assess Mr. Mann's testimony at this juncture. I have already discussed Mr. Mann's testimony. Here, I will focus on certain aspects of it.
- [284] When considering Mr. Mann's demeanour as a witness, I keep in mind that witnesses often feel anxious and find it hard at times to express themselves. Mr. Mann elected to testify and be subjected to cross-examination, although he was not bound to do so. His answers were quite often evasive and argumentative, rushing to a quick answer before the question was completed as if following a script. He was sometimes glib and dismissive in his attitude and answer given. Much of his testimony lacked an air of reality. He showed no empathy towards the claimant.
- [285] I found the following points instructive:
- a. Mr. Mann testified after Mr. Gill, accepting his evidence as true. I assessed Mr. Gill's testimony and his credibility earlier in these reasons, concluding for the greater part that he was not a credible or trustworthy witness in this case. His implicit creating of social space between him and Mr. Mann, making it easier for him to create the impression he was not a biased friend leading a narrative to help him while veiling his own activities of purchasing and distributing a serious controlled substance when he was not aware of all of its side effects. He was not a neutral witness.

- b. The manner in which Mr. Gill conducted himself when the police arrived consisted with the conduct of a guilty mind, not that of an innocent person who knew he had engaged in criminal activity.
- c. Mr. Mann claimed he had not consumed alcohol, minimizing his consumption, although Mr. Gill had consumed heavily. Mr. Mann said he had been kicked out of the pub, but then blurted out when testifying about when walking to the bedroom, "We were all intoxicated." I note Mr. Gill testified Mr. Mann was intoxicated.
- d. The theory that Ms. B.M. and Ms. F.T. encouraged use of MDMA was never put to them when they testified, and I find this assertion was not truthful. I find convincing Ms. B.M.'s testimony she had no interest in drugs that day.
- e. Despite Mr. Mann having his own vehicle, he drove the Jetta belonging to Mr. Gill's parents.
- f. Mr. Mann said he saw a woman go outside to make a phone call, then saw her outside. He did not explain how he was able to see her outside making a call, given his location. The evidence indicated that it was 1:15 a.m. before the dog could track to the door of the house.
- g. Mr. Mann had never been to the residence before, but was aware of and able to just pick a bedroom. He made no effort to seek permission to use the master bedroom of Mr. Gill's parents.

That is not plausible.

- h. Mr. Mann testified that Ms. B.M. looked fine and sober before she allegedly consented to sexual intercourse. This is in stark contrast to the testimony of several police officers who attended shortly after the sexual contact occurred. I find he was not truthful about Ms. B.M.'s state at the time he had sexual contact with her.

[286] As noted, Mr. Mann had not realized his DNA had been found in Ms. B.M.'s rectum. After counsel pointed this out to him, he quickly responded that, after he ejaculated, ejaculate must have found its way into Ms. B.M.'s rectum when she allegedly masturbated. In fact, Mr. Mann had engaged in anal intercourse or attempted to do so. His response was quick, and I find untrue, as were some of his other answers.

Lie to police - Post-offence conduct

[287] I discussed earlier Mr. Mann's post-offence conduct with the police at the door and his having lied to them about females being in the house, and will not recast those facts here.

[288] After being pressed on cross-examination with quite a few questions on this subject, he admitted he had lied to the police, seeking to justify that in saying he had previous bad encounters with the police; a reason not in harmony with his also having said he had done nothing wrong and had nothing to conceal from the police, when in fact he had just had sexual contact with a semi-nude virtual stranger lying on a bed in the master bedroom of the residence, and who had consumed alcohol, and, I accept, unknowingly ingested toxic

levels of MDMA surreptitiously added to her drink. I do not say it was Mr. Mann, but it was surreptitiously added to her drink by one of the males present.

[289] Mr. Mann's post-offence conduct consists with a guilty mind.

[290] Mr. Mann testified he did not use drugs, apart from occasional marihuana but, when he was arrested, the arresting officer found drugs in the jacket he was wearing. Mr. Mann testified he had picked up the wrong jacket, but did not explain to whom the jacket belonged or how that came about.

[291] Mr. Mann testified he saw no need to ask Ms. B.M. how she was feeling, or whether she "really wanted to go ahead with this". In fact, there is no evidence of any inquiries of any kind being made, or of any steps reasonable in the circumstances known to him, including her ingestion of MDMA, to ensure she was unequivocally consenting to sexual intercourse.

[292] I do not believe Mr. Mann's testimony on what occurred; neither does it raise a reasonable doubt. Considering the evidence in its totality, I find the Crown has proven Count 1 beyond a reasonable doubt, accordingly; and that on or about July 5, 2014, Steven Singh Mann did sexually assault B.M., contrary to s. 271 of the Criminal Code.

[60] I set out these excerpts at some length, because in assessing the alleged errors in the judge's assessment of credibility, context is of great importance.

[61] I turn to review the specific issues raised by the appellant.

3.2.1 Did the trial judge engage in impermissible stereotypical reasoning?

[62] In the appellant's submission, the judge used impermissible stereotypical reasoning in relation to the appellant, which he then used in weighing the evidence of BM about whether or not she would have consented to sexual contact with the appellant. He points in particular to the judge's reference in para 268 to the appellant being "considerably older than Ms. B.M.; and, at least based on his demeanour as a witness, not a warm or alluring person "

[63] The appellant points out that, at the time, BM was 18, and he was 22, hardly an extraordinary age gap. As against this, I note only that Ms. BM testified that she thought the appellant and the others were "like five years older than us", and that her perception is what, if anything, would be relevant.

[64] Findings of credibility must, of course, be based on evidence. Stereotypical reasoning must not be used as a substitute for evidence. On the other hand, it is not an error to assess evidence against common sense and human experience. These principles were discussed by the Court of Appeal of Yukon in *R v Kodwat*, 2017 YKCA 11. Both parties rely on that decision.

[65] Kodwat was also a case of alleged sexual assault. The only element of the offence that was at issue was consent. The complainant's evidence with respect to the offence, however, was very limited. She was 17 years old at the time. She ended up at the home of the accused and his mother, but had little recollection of what occurred there. She woke up in the accused's room, beside him. She maintained that she had never met him before, and remembered nothing about any sexual contact. She said nothing at all about consent.

[66] The accused, who was 28 years her senior, testified that she consented, first, to kissing, and then to sexual intercourse.

[67] In convicting the accused, the trial judge disbelieved his evidence as to consent, saying (quoted at para 27 of the appeal decision):

It is inconceivable that an attractive 17-year-old girl would consent to kiss for 20 to 25 minutes and then have unprotected sexual intercourse with the accused who meant nothing to her and whom she did not remember -- and furthermore, who was 28 years her senior. She had passed out from being drunk and overly tired. It is preposterous to think that she woke up when the movie was over and voluntarily kissed the accused for 20 to 25 minutes and then had unprotected sex with him. It defies any reasonable expectation of being believed.

[68] In giving the reasons of the court setting aside the conviction and ordering a new trial, Mr. Justice Willcock said this:

[36] As this case illustrates, judges called upon to draw inferences with respect to human behaviour must wrestle with two competing imperatives: on one hand we are not to leave our common sense at the door, on the other, as we are reminded in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 68, myths and stereotypes pervade public perceptions of sexual assault. Some favour the accused, others the Crown.

[37] In *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, a case referred to by both the appellant and the respondent, the Supreme Court was divided in their views on the allegation that the trial decision was undermined by an apprehension of bias. While the decision turned on that question, all judges of the court expressed, to some degree, the view that unsupported assumptions and stereotypes should not affect the trial judge's assessment of the evidence.

[38] Mr. Justice Major, writing for the minority wrote:

13 The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

[Emphasis added.]

[39] Madam Justice L'Heureux-Dubé and Madam Justice McLachlin wrote:

35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:

... the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

[Emphasis added.]

[40] Mr. Justice Cory (with whom Justice Iacobucci agreed) in a concurring judgment wrote:

120 Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.

[Emphasis added.]

[41] While it may have been open to the trial judge to draw the inference that the complainant did not consent to sexual intercourse from all of the surrounding circumstances established by the evidence, the conclusion that it was "inconceivable" that any 17-year-old woman in these circumstances would have engaged in consensual sex with an unfamiliar man of the appellant's age was a stereotypical assumption or generalization lacking in an evidentiary foundation. In my view, there is a danger that assumption resulted in a conviction that was not founded upon the evidence.

[Emphasis original.]

[69] The appellant argues that in this case, too, the judge made a stereotypical assumption lacking any evidentiary foundation, by commenting on the appellant being "considerably older" than BM, and lacking in allure. The appellant also relies on this comment as support for his submission that the judge misapprehended evidence. I will deal with it further under that heading. For present purposes, the appellant contends that it is akin to what the trial judge concluded in *Kodwat*: a finding that no attractive 18-year-old woman would consent to sex with a man who was several years her senior and as unprepossessing as the judge perceived the appellant to be. This, he submits, is impermissible reasoning.

- [70] While that proposition has merit so far as it goes, in my view it is not applicable to what occurred in this case. Viewed in context, this is not a situation where the judge used stereotypical reasoning to overcome a lack of evidence, as was the case in *Kodwat*. On the contrary, the judge paid careful attention to the evidence as a whole, and his reasoning must be taken as a whole: see *R v Delmas*, 2020 ABCA 152, aff'd 2020 SCC 39. His comments in para 268 form part of his assessment of the appellant's evidence, beginning with the proposition that, according to the appellant, it was BM who seduced him. Those comments must be compared with what the judge stated in para 267 about the reasons why he believed BM when she testified that she never consented and never would have consented to having sexual activity with the appellant.
- [71] The judge then evaluated the appellant's depiction of BM as seducer in the context not only of BM's evidence as to her lack of interest in any sexual contact with the appellant, whom she perceived to be five years her senior, and whom she had just met, but also in the context of the other features of the appellant's evidence. These other features included the immediate proximity of two other males, his professed discomfort at BM's sexual advances in the presence of the other males, his description of her wanting to lead him to a room in a house she had never seen before, and her evidence that she did not feel safe after arriving and seeing that there was no party.
- [72] The judge's comments were thus grounded in the evidence, and were not a substitute for it. Viewed properly, his conclusion was not that no young woman would willingly have sex with someone like the appellant, thereby avoiding an assessment of the evidence or a lack of evidence. Rather, his conclusion was that taking into account all of the evidence, the appellant's testimony that this particular young woman seduced him lacked credibility. There is nothing impermissible about that reasoning.
- [73] As I see it, this is not a case like *R v Roth*, 2020 BCCA 240, where the judge made what this court found to be unwarranted conclusions about, for instance, the likelihood of the appellant falling asleep when he said he did, based upon the fact that the appellant was a 24-year-old power lifter. As this court noted at para 70, there was no evidence about how likely 24-year-old powerlifters are to suffer from fatigue compared to the general population. In the case before us, however, the judge has a considerable amount of evidence from BM about her lack of interest in having sex with the appellant, as well as evidence from the surrounding circumstances, that made her an unlikely seducer.
- [74] The distinction is illustrated by the judgment of the Alberta Court of Appeal in *R v Quartey*, 2018 ABCA 12, where the majority concluded that the trial judge had not relied on generalizations or stereotypes about sexual behaviour when assessing the conduct of the parties. The majority stated at para 21:

When the trial reasons are reviewed in their entirety, it is apparent that the trial judge was not suggesting that it was "unbelievable" that a man would be less interested in engaging in sex than a woman but rather that he found it unbelievable in view of all of the evidence that the appellant was not interested in engaging in sex with the complainant.

[Emphasis original.]

[75] As the Supreme Court of Canada accepted in *R v Davis*, [1999] 3 SCR 759 at para 103, citing the words of Green JA in the Court of Appeal for Newfoundland,

It is not sufficient to "cherry pick" certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages

[76] I conclude that when the impugned comments here are reviewed in the context of the judge's overall credibility assessments, no reversible error has been demonstrated. His conclusions were firmly founded on evidence.

3.2.2 Did the trial judge misapprehend evidence?

[77] The appellant points to six aspects of the trial judge's findings, and submits that those findings demonstrate a misapprehension of the evidence.

[78] I have already referred to the deference due to the trial judge's findings of credibility. For a misapprehension of evidence to warrant appellate intervention, the appellant must establish two things. These are, first, that the misapprehension goes to the substance rather than to the detail, and so is material rather than peripheral to the reasoning of the trial judge; and second, that the errors thus identified play an essential part not just in the narrative of the judgment, but in the reasoning process resulting in a conviction: *R v Lohrer*, [2004] 3 SCR 732 at para 2, and *R v Swales*, 2014 BCCA 350 at paras 48-49. As this Court stated in *Swales*:

[49] It is not enough for the appellant to merely suggest a different interpretation of the evidence, or merely point to some evidence which arguably weighs against the trial judge's finding. Mere differences in interpretation on factual matters are not misapprehensions but simple disagreement with the judge's differing view of the evidence.

[79] As will become apparent, it is my view that this passage covers many of the concerns raised by the appellant. It is not our role to re-weigh the evidence, and this must be borne in mind as I review the alleged errors.

[80] First, the appellant contends that the judge misapprehended the evidence about age when he described the appellant, from the perspective of the complainant, as a "complete stranger; considerably older than Ms. B.M." (emphasis added; see para 268 of the trial reasons, quoted above). The appellant points out that the age difference was in fact only a little less than four years, though BM thought it was probably five years.

- [81] In my view, this is a classic example of "cherry-picking" as discussed above, and cannot properly be described as a misapprehension. The modifier "considerably" is imprecise and elastic. In relation to an 18-year-old, a four or five-year age difference may indeed reasonably be described as considerable. It is the difference, for instance, between someone who recently graduated from high school, and someone who has graduated from university and entered the workforce (or, in this case, who has spent six years in the work force). Nothing in the reasons suggests that the judge was under the misapprehension that the age gap was any greater than that.
- [82] Second, the appellant objects to the judge's reference to BM feeling unsafe when she realized that there was no party at the residence. This reference, too, was in the context of evaluating the appellant's depiction of BM as seducer. In my view, it did not constitute a misapprehension of BM's evidence. BM made it clear that she understood from what the males told her that there would be a party at the residence to which they invited her, and on that basis, she and FT agreed to go. When they saw that there was no party, she testified that, [W]e were like, "what is going on?" We were expecting to go to a party, where there was nobody, so we were -- we, in fact, decided, "Well, this is strange. Let's get out of here." We were staying for one drink, and we were going to leave.
- [83] I conclude that the impugned statement was supported by the evidence. No misapprehension arises.
- [84] Third, the appellant submits in his factum that the judge's comment in para 285(f) of his reasons that "the evidence indicated that it was 1:15 a.m. before the dog could track to the door of the house" had no support in the evidence, and no obvious relevance (emphasis added). It indeed appears that the time stated by the judge was incorrect, but I cannot see that anything even remotely material turns on it. It was a matter of detail, not substance, and was not material to the trial judge's reasoning.
- [85] Fourth, the appellant argues that the judge misapprehended the DNA expert evidence as admitted, and the evidence of Ms. Loewen, in concluding that there had been sexual intercourse between the appellant and BM, including anal intercourse. The appellant refers to para 286 of the trial reasons for judgment, where the judge said this:

As noted, Mr. Mann had not realized his DNA had been found in Ms. B.M.'s rectum. After counsel pointed this out to him, he quickly responded that, after he ejaculated, ejaculate must have found its way into Ms. B.M.'s rectum when she allegedly masturbated. In fact, Mr. Mann had engaged in anal intercourse or attempted to do so. His response was quick, and I find untrue, as were some of his other answers.

- [86] The appellant points out the wording of the relevant admission, admitting that "the samples referred to herein as Exhibit A5 (rectal swab from BM's body) was [sic] found to contain DNA" (admitted to be the appellant's), and to the evidence of Ms. Loewen that she could not be sure whether that rectal swab was taken from inside or from the outside of BM's rectum.

Accordingly, the appellant submits, it was a misapprehension for the judge to leap to the conclusion that there had been anal sex. There was no expert evidence discussing the likelihood of the transfer of DNA to the outside of the rectum during the course of the events described by the appellant (BM touching herself).

- [87] I see no merit in this submission. It is clear that the judge understood the import of Ms. Loewen's evidence, as indicated in para 93 of his reasons for judgment. In any event, what type of sexual act occurred was not relevant to the actus reus of the offence. The appellant admitted sexual contact. For the purpose of convicting him, it did not matter whether this comprised vaginal intercourse, anal intercourse, or manual stimulation. BM was quite clear, and the judge accepted, that she did not consent, and would not have consented, to any sexual contact with the appellant. The reference to anal intercourse was, accordingly, not part of the reasoning process that led to conviction.
- [88] Insofar as the judge relied on his findings in assessing the appellant's credibility, there was evidence to support his approach. Whether the specimen was found inside or on the outside of BM's rectum was not important given what the judge characterized as a hasty and unconvincing explanation from the appellant as to how the DNA came to be found in the rectal area at all--an explanation that included BM's apparent normalcy at a time when it was admitted she would have had a highly toxic level of MDMA in her blood. Moreover, when asked about the physical effects of the evening, BM testified: "it felt like my--my butt just--it felt torn and I didn't know why." And that is where the appellant's DNA was found.
- [89] The trial judge was there; he saw, heard and assessed the witnesses. His approach to credibility is entitled to deference and, in my view, no error has been demonstrated in that approach.
- [90] Fifth, the appellant submits that the judge's conclusion that BM did not have the capacity to consent to sexual activity due to the ingestion of MDMA was tainted by misapprehensions of the evidence in three instances.
- [91] The first instance of alleged misapprehension is in relation to the expert evidence of Ms. Mendes. The appellant says that the judge erroneously concluded that the involuntary ingestion of MDMA would exacerbate the severity of the side effects, and that the levels would have been significantly higher at the time of the alleged sexual assault than the 381 ng/ml found in the sample taken at, according to the judge, 14:10 on the afternoon of July 5. The appellant maintains that the sample was in fact taken at 13:00 that afternoon.
- [92] I see no merit to this submission. The trial judge clearly understood the evidence of Ms. Mendes, and set it out correctly. As he stated at para 272: "If the user had no experience with the drug and so not anticipating its adverse effects, their reaction may be worse. That would be Ms. B.M.'s situation" (emphasis added).

- [93] As to the timing, the appellant has failed to establish that the judge got it wrong. The hospital records include a nursing note timed at 13:00 on July 5 that records the visit of Ms. Loewen to conduct a SANE, and a number of other activities, including "labs in to draw blood". This is not determinative, as the time records the start of Ms. Loewen's visit, not the time that the labs were in to draw the blood. The laboratory reports indicate 14:10 as the time of the taking of the specimen, which is the time of the trial judge used.
- [94] But even if the sample was taken at 13:00, it does not affect the import of Ms. Mendes' evidence that the concentration at the assumed time of the incident would have been significantly higher than what she measured. As a result, even if there were a misapprehension, and it appears there was not, it was not material.
- [95] The second instance of alleged misapprehension in relation to capacity relates to the manner in which the judge dealt with the police evidence concerning BM's state at the time that they entered the house.
- [96] At para 250 of his reasons, the judge said this:

As for Ms. B.M., Constable Stevens described her as being confused, unstable, intoxicated, confused to a marked degree, more than just intoxicated, clearly confused and disoriented, and he confirmed that on cross-examination, all of that consistent with the testimony of Ms. Mendes.

- [97] The appellant points out, correctly, that Constable Stevens gave the evidence there quoted in describing FT, not BM. Transposing the evidence as he did was indeed a misapprehension by the trial judge. But Constable Stevens' description of BM was consistent with the evidence quoted by the judge, which is hardly surprising as both women had ingested the same MDMA-laced drink. What Constable Stevens said about BM was this:

She was clearly confused and disoriented as well and appeared -- well, she didn't understand first of all when I opened the door and asked her a question. I don't remember what I asked her, but in our conversation she didn't seem to understand what was happening or who I was or what was going on. She was quite disoriented and confused .

- [98] The judge clearly accepted Constable Stevens as a credible witness. In these circumstances, taking into account all of the evidence, I am satisfied that this misapprehension was not material to the judge's assessment of BM's incapacity.
- [99] The third instance of alleged misapprehension is in relation to the timing of the sexual contact. The appellant submits that the judge's chain of reasoning went this way: the police arrived "a few minutes" after the sexual contact; at the time of the arrival of the police, BM was incapable of consent; therefore BM was incapable of consent at the time of the sexual contact. In the appellant's submission, the judge speculated about the time of the assault in relation to the arrival of the police, and made no finding of the precise time of consumption of MDMA. Accordingly, his chain of reasoning was flawed.

- [100] I am unable to agree. First, the precise time of consumption of MDMA was not particularly material. What was material was its effect as observed by the police on their arrival. Was that arrival "within minutes" of the sexual episode in the bedroom? According to the evidence, it was. This was not speculation on the part of the judge. There was no evidence to the contrary.
- [101] Under cross-examination, it was put to the appellant that the police encountered BM "virtually minutes after you had a sexual encounter with her. You know that. And they found her to be in a highly confused and an intoxicated condition." The appellant agreed, although he suggested that BM's state of confusion may have had more to do with being startled by the sudden appearance of the police.
- [102] Moreover, the evidence in chief of both Mr. Gill and the appellant was also consistent with the police arriving only minutes after the appellant left the bedroom. All of this matched the timing of the chain of events started by FT, some time before BM and the appellant found their way to the bedroom, when she left the house and called 9-1-1 to summon the police for help. That summons led to the appearance of the police at the doorstep of Mr. Gill's house soon afterwards.
- [103] While it is true that the judge found both Mr. Gill and the appellant to be wanting in credibility, he was entitled to rely on their evidence as to timing, particularly as it was concordant, and consistent with the evidence of what happened with FT. See, for instance, *R v Wright*, 2019 BCCA 284 at para 58.
- [104] I conclude that no reversible error has been demonstrated in relation to the judge's finding that BM lacked the capacity to consent to sexual contact with the appellant. He gave appropriate consideration to all of the evidence concerning this issue, notwithstanding his specific finding at para 269 that BM "neither consented to nor would she have consented to sexual activity of any kind with the accused".
- [105] Sixth, the appellant maintains that the judge misapprehended the evidence concerning whether the appellant was intoxicated. Part of the application to adduce fresh evidence relates to this issue. But I see no material misapprehension. There was certainly ample evidence to support the conclusion that the appellant had been intoxicated. Mr. Gill said as much. The appellant denied that he was intoxicated, but when it was put to him that BM was intoxicated when they went to the bedroom, he "blurted out" (as the judge described it), "Everyone was intoxicated there" (a statement misquoted by the judge as "We were all intoxicated", but to the same effect).

[106] Referring to para 285(c) of the reasons for judgment (quoted after para 59 above), the appellant maintains that the judge wrongly concluded that the appellant had been ejected from the Townhall pub because of intoxication, but the judge did not make that finding. He simply observed that the appellant said he had been ejected. Earlier in his reasons, at para 164, he noted that the appellant denied it was for harassing women. The judge did not find it was for anything else.

[107] I see no reversible error in the judge's references to the appellant's state of intoxication.

3.2.3 Did the trial judge make improper use of prior consistent statements?

[108] The appellant asserts that the judge relied on BM's prior consistent statements without any voir dire, and without indicating either what particular parts of her statements he relied on, or what he relied on them for. Given the centrality of credibility, the appellant submits that the judge's conclusions are unsafe.

[109] The appellant refers to the following two paragraphs from the trial reasons for judgment:

[259] Also relevant to this case and others like it is our Court of Appeal decision in *R. v. Untinen*, 2017 BCCA 320. In that case, the court gives guidance to a trier of fact assessing credibility when a witness' evidence is tested against a prior statement. The court explained inconsistency is not to be treated as a core aberration but can be considered against claims of inconsistency, to assess the overall credibility and reliability of a witness. At para. 80, Justice Fitch stated:

[80] In summary, consistencies between a complainant's out-of-court video statement and ... [their] in-court testimony may provide important context that informs the trier of fact's evaluation of a defence challenge to ... [their] credibility or reliability. Consistency of account could dispel, or at least blunt, a defence claim that inconsistencies undermine the witness's credibility or reliability. Again, this is not using internal consistency to corroborate the witness's evidence.

[260] Justice Fitch referred in that same para. to the analysis of David M. Paciocco, now a member of the Court of Appeal in Ontario, where he stated in part that:

... [C]onsistencies are relevant solely to enable the decision-maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness. In effect, the consistent features of the prior statement do not add affirmative weight to the party's case. They are used simply to knock the "inconsistency" challenge off of the opposing party's scales, or to reduce the weight of those inconsistencies that may remain.

[110] Relying on *R v Rockey*, [1996] 3 SCR 829, *R v DK*, 2020 ONCA 79, and *R v Langan*, 2019 BCCA 467 (reversed since the argument of this appeal: 2020 SCC 33), the appellant argues that it cannot be discerned here to what extent the judge used BM's prior consistent statements impermissibly to bolster her credibility: see *Langan* at paras 46 and 49.

- [111] The difficulty is that nothing in the judge's reasons suggest that he placed any reliance on BM's prior statements, consistent or inconsistent, in assessing her credibility, except in one tangential respect.
- [112] In the transcript, the judge's discussion with counsel, in which he referred them to this court's decision in *Untinen* as mentioned in the excerpt quoted above, arose in the context of the disclosure application, and the suggestion by the appellant's trial counsel that there was some evidence of statements proffered by the complainant that were not revealed initially. This related to the fact that BM had called Constable Park to say that she remembered going on a drive to get drugs that night. But in fact she had mentioned that initially. Then, in reviewing Constable Park's evidence, the judge said this in his reasons for judgment:
- [85] Constable Parks did have a note of a comment while taking Ms. B.M. to the hospital, her memory still hazy from substances. He had noted that Ms. B.M. had taken a ride with one of the males who was going out to buy drugs. Constable Parks said he did have a much later telephone conversation about going out to buy pizza, but he had interpreted that as involving buying drugs, his interpretation of what Ms. B.M. had said; but he was not sure, given the passage of time.
- [86] From Ms. B.M.'s cross-examination it had come up that Ms. B.M. had made a trip with Rajin Gill, that she had some telephone discussions with police.
- [87] I agree with Crown it was not an omission, as it had been disclosed from the outset, i.e. the trip to get some drugs. In fact, Ms. B.M. had mistakenly thought that she had not disclosed that detail, when in fact she had done so. In other words, she had thought she found herself wanting to acknowledge something she felt she should have mentioned, effectively a conscientious desire to be truthful, which reflects well on Ms. B.M.'s honesty and reliability as a witness. It is noteworthy Constable Parks was being asked to recall two-year-old conversations that he indicated were dealing mostly with process matters, and some hearsay that I would not admit. In essence, that is a piecemeal matter in the narrative of the facts.
- [88] In short, Ms. B.M. had revealed, had made mention of the trip for the drugs and thought she had not done so, and was concerned to ensure that that was clarified.
- [113] From this, it is apparent that the trial judge did not rely impermissibly on a prior consistent statement to bolster credibility. Rather, his later reference in paras 259-260 makes it clear that, at most, he dealt with an alleged omission or inconsistency by weighing it against the reality, which was that BM had not sought to change inconsistent evidence (which, it turned out, was consistent), but rather had made an effort to ensure her evidence was complete and correct.
- [114] It was, accordingly, not the consistency of the original statement that impressed the judge, so the risk did not arise referred to in *Langan* at para 52: "A misperception repeated remains a misperception; an incorrect memory repeated remains an incorrect memory; a

fabrication repeated remains a fabrication." Rather, it was BM's action in wishing to correct a perceived omission that the judge described as reflecting well on her reliability. Such impressions can often arise during the course of a witness's cross examination from the manner in which they respond to challenging questions. I see no reversible error in this.

3.2.4 Did the trial judge misapply the rule in *Browne v Dunn*?

- [115] Whether the rule in *Browne v Dunn* (1893), 6 R 67 (UKHL), applies is a question of law, reviewable on a standard of correctness: *Nagy v BCAA Insurance Corporation*, 2020 BCAA 270 at para 23; *R v Drydgen*, 2013 BCCA 253 at para 22. But "deference is owed to the factual findings underpinning the trial judge's conclusion on whether or not the rule is engaged": *Hamman v Insurance Corporation of British Columbia*, 2020 BCCA 170 at para 77; *R v Lyttle*, 2004 SCC 5 at para 65.
- [116] As we have seen, two instances arose that led the Crown to invoke the rule in *Browne v Dunn*. The first was the evidence of Mr. Gill that it was one of the two women who had suggested getting some MDMA, and who, after he was able to obtain some, instructed him on how to mix it in a drink. None of that had been put to either BM or FT.
- [117] The second was the evidence of Mr. Gill and the appellant describing developments that led to sexual contact between BM and the appellant in a way that indicated that BM fully consented to what occurred, and indeed led the way. Although BM had testified that she did not and would not have consented to any kind of sexual contact with the appellant, she was not cross-examined about cuddling on the couch with the appellant, kissing him, fondling him, and otherwise consenting to sexual contact.
- [118] The appellant submits, first, that the judge erred in concluding that the rule was engaged, and so should not have applied it. In the alternative, the appellant asserts that if the rule was engaged, the judge erred by engaging in "double dipping" when it came to remedying the perceived prejudice. The first dip was to permit the Crown to recall BM to answer a list of set questions that have been pre-agreed between the Crown and defence counsel. The second, the appellant maintains, was to rely on the rule in assessing credibility, in essence giving the Crown two remedies for one breach.
- [119] As to whether the rule was engaged at all, the appellant submits that it was always apparent that the defence theory was that BM and FT were interested in MDMA. Accordingly, it was not necessary to put to them the evidence that would be forthcoming from Mr. Gill. I disagree.
- [120] Whether the rule is engaged does indeed depend on the particular circumstances of the case: see e.g. *Lyttle* at para 65. The rule does not require counsel to ask contradicting questions about straightforward matters of fact on which of the witness has already given evidence that is unlikely to change: *R v Khuc*, 2000 BCCA 20 at para 44; *R v Podolski*, 2018 BCCA 96 at para 145. But that is not the situation we have here.

- [121] It is true that BM was cross-examined about a potential interest in drugs, but the questioning was not in any way inconsistent with the proposition that it was the men who brought up the idea. It was never put to her that it was either she or FT who came up with the idea of getting MDMA, and either she or FT who instructed Mr. Gill about how to mix it in a drink and administer it. This evidence went to an essential aspect of the case, intertwined as it was with the issues of consent and capacity.
- [122] As to the question of BM's role in the sexual contact, it is obviously true that consent was always in issue. But casting BM as the seducer went considerably further than anything that had been suggested to BM in relation to so central an issue.
- [123] It follows, in my view, that the judge was correct in concluding that the rule was engaged.
- [124] I turn to consider the alleged error in relation to the matter of remedy.
- [125] In discussions during the trial, the Crown suggested the possibility of recalling BM and FT, or alternatively, that an adverse inference could be drawn in relation to the appellant's credibility. Defence counsel initially opposed recalling BM, and sought an adjournment to consider his position. At that point, it was unclear whether either BM or FT would be willing or able to re-attend, and the judge did not grant the adjournment. The point of law was straightforward.
- [126] The trial was subsequently adjourned for unrelated reasons, and by the time it resumed, the Crown and defence counsel had agreed that BM should be recalled to answer a list of questions.
- [127] In his reasons for judgment, the judge said this about the situation:
- [38] After Mr. Gill and Mr. Mann had testified, Crown counsel objected that Mr. Mann had been asked questions about matters that had not been put to Ms. B.M., contrary to the principles laid out in *Browne v. Dunn*, (1893), 6 R. 67 (U.K.H.L.), a widely-cited common law case.
- [39] This was quite clear. After considering authorities and the options available to the Court to address the issue and the procedural dilemma it created, I granted the Crown leave to re-open its case and recall Ms. B.M., so she would have an opportunity to address pertinent portions of Mr. Mann's testimony that were not put to her; and likewise, with respect to Mr. Gill.
- [40] The protocol I approved was that Crown counsel provide defence counsel with a list of questions to put to Ms. B.M., as written. Defence counsel agreed to do so. Counsel's phrasing of the question occasionally strayed off the written text. Whether he could cross-examine on the answers and to what extent was in my discretion.
- [41] Given Ms. B.M.'s distress when she last testified and how far away she lived, it could not be presumed she would be willing to return and testify. She did, however, agree to do so; and as I mentioned, I will address her added testimony later in these reasons.

- [128] When recalled, BM denied expressing any interest in MDMA, denied showing anyone how to consume MDMA, and denied giving instructions about how to add MDMA to a drink. She also denied initiating any physical contact with any of the males.
- [129] The appellant accepts that, if the rule was engaged (as I find it was), then this process was open to the judge to remedy the breach of the rule. How to remedy the breach is indeed a matter for the discretion of the trial judge. But, the appellant maintains, the judge went further than is permissible, and used the rule again to weigh against the appellant in assessing his credibility.
- [130] The appellant was unable to direct us to any authority for the proposition that a judge may not apply more than one remedy in the face of the unfairness resulting from a breach of the rule in *Browne v Dunn*. As noted in *David M Paciocco and Lee Stuesser, The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 472, cited with approval by this court in *R v Poole*, 2015 BCCA 464 at para 42:

A party who intends to impeach an opponent's witness must direct the witness's attention to that fact by appropriate questions during cross-examination. This is a matter of fairness to the witness. If the cross-examiner fails to do so, there is no fixed consequence; the effect depends upon the circumstances of each case. The court should first see if the witness can be recalled. If that is not possible or appropriate, the weight of the contradictory evidence or submission may be lessened .

[Emphasis added.]

- [131] Assuming, however, without deciding, that, as a matter of law, it is open to the judge to select only one item from the remedial menu, I see no indication in the reasons for judgment that the judge in fact drew a *Browne v Dunn* adverse inference against the appellant in weighing his credibility.
- [132] The appellant points to the repeated references in the reasons for judgment to the defence's failure to cross-examine BM and FT on the relevant points. But these were oral reasons for judgment, which can be repetitive. Nothing in them suggests that an adverse inference was in fact drawn as a result of that failure. On the contrary, the judge reviewed the evidence of both BM and the appellant at some length, and gave detailed reasons for preferring the evidence of one over the other. None of those reasons included the distribution of weight as a remedy flowing from the rule in *Browne v Dunn*.

[133] I would not accede to this ground of appeal.

3.2.5 The new evidence application

- [134] The test for the admission of fresh evidence on appeal is well-established. As this court put it in *R v Aulakh*, 2012 BCCA 340:

[56] Section 683(1) of the Criminal Code authorizes the Court to received [sic] fresh evidence on appeal where it considers that it is "in the interests of justice" to do so. An application to adduce fresh evidence is typically made where an appeal involves an allegation of a miscarriage of justice in regard to a substantive factual or legal issue raised at trial. The application is supported by an affidavit that sets out why, if the fresh evidence had been adduced at trial, there is a reasonable probability that the result would have been different.

[57] The test for the admission of fresh evidence is governed by *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (confirmed in *R. v. Warsing*, [1998] 3 S.C.R. 579). The proposed evidence must be admissible in accordance with the rules of evidence (e.g., not hearsay, speculation, opinion, or argument) and must meet the following criteria: (i) in spite of due diligence the evidence could not be adduced at trial; (ii) the evidence is relevant; (iii) the evidence is credible; and (iv) the evidence could be expected to have affected the result. In criminal cases the due diligence criterion is often relaxed as it "must yield where its rigid application might lead to a miscarriage of justice"

[135] In this case, the appellant seeks the admission of:

- statements given to the police by two bouncers at the Townhall pub who interacted with the appellant in the early morning hours of July 5, 2014;
- BM's first police statement; and
- BM's hospital records.

[136] The appellant seeks to rely on the statements from the two bouncers to establish that the appellant was not ejected from the pub for intoxication. The reason given by the bouncer most directly involved is that two women had complained about the appellant harassing them.

[137] As statements given to the police, neither statement is admissible; both are hearsay. But even if it were direct evidence, both bouncers were available to give that evidence at the time of trial. The fact that they were not called was presumably a matter of strategy on the part of the defence. It will be recalled that the appellant testified under oath that he had not been ejected for harassing women, so the evidence of the bouncers would likely have done further damage to the appellant's credibility. Moreover, harassing behaviour, the reason for ejection given by the bouncers, is not inconsistent with a state of intoxication.

[138] This evidence meets none of the *Palmer* criteria, and it cannot be said that excluding it would lead to a miscarriage of justice.

[139] The complainant's police statement was available at trial. It is also hearsay, although it was open to the appellant to use it in cross-examination. Here, the appellant argues that it belies the finding of incapacity, since BM was able to give a coherent statement at a time when she remained significantly under the influence of MDMA. In this regard, the appellant states in his Notice of Application that the statement was taken at 4:48 a.m. But in fact it was taken at

4:48 p.m. As the Crown points out, that BM may have been coherent and able to communicate at that point is of no relevance to her capacity to consent at the time of the offence, some 14 hours before. Once again, this evidence does not meet the Palmer criteria, and it cannot be said that it would be in the interests of justice to admit it.

[140] The hospital records were available at the trial, and were entered into evidence for a limited purpose. They were used in the cross-examination of Ms. Loewen. They were not used, though they could have been, in the cross-examination of BM. The judge referred to the records in this way:

[95] On cross-examination, [Ms. Loewen] testified she would review hospital admission records to have some idea of the reasons for the patient's admission to Emergency. She could not recall if she did so, but confirmed those records did not form part of her documentation. In this regard, I note in passing that the times for most of the Emergency Health Services Admission Records for July 5 are in the range of 4:00 a.m. to 4:30 a.m.

[96] Some of the notes are difficult to read; and in some parts, require explanation. A note at 7:45 a.m. stated the complainant remained slightly disorganized in speech; at times unable to recall events preceding hospitalization, and was not then in the state to give consent to a SANE examination, etc.

[97] Defence counsel referred to a triage note at 3:52 a.m.: "denies being sexually assaulted; denies being hurt." Under "Chief Complainant" was noted in part " given a drink, does not recall what happened after, called Emergency Health Services complaining of feeling drugged." Another entry states at 4:30 a.m., "He kept putting his fingers in my mouth." I place no store in this, but mention it to illustrate the need for such documents to be properly and fully introduced, explained, and questioned.

[98] The entries were not put to Ms. B.M. They did not form part of the SANE document submitted by Crown, and they cannot be relied on in a piecemeal way.

[Emphasis added.]

[141] The frailties noted by the judge remain. Clearly, the records could not reasonably be expected to have affected the result. Their admission at this stage, given their availability at trial, cannot be justified.

4.0 DISPOSITION

[142] For these reasons, I would dismiss the application to admit fresh evidence, and I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Voith"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/03/2020BCCA0353.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-mann-2020>

Prepared on 29 October 2026 · Esheria