

CANADA / JUDGMENT

R. v. Moazami

2020 BCCA 357

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 357 R. v. Moazami COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Moazami, 2020 BCCA 357 Date: 20201207 Docket: CA43308 Between: Regina Respondent And Reza Moazami Appellant Corrected Judgment: The text of the judgment was corrected on the cover page on December 15, 2020. 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 a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered. FILE SEALED IN PART Before: The Honourable Madam Justice Saunders The Honourable Madam Justice Bennett The Honourable Mr. Justice Hunter On appeal from: Orders of the Supreme Court of British Columbia, dated September 15, 2014 and February 11, 2016 (R. v. Moazami, 2014 BCSC 1727, Vancouver Docket 26108 and R. v. Moazami, 2016 BCSC 99, Vancouver Docket 26423). Oral Reasons for Directions Counsel for the Appellant: T.M. Arbogast A. Grewal K.A. Kirkpatrick Counsel for the Respondent: T.A. Shaw M.G. Scott Counsel for Trial Counsel (D. Markovitz and K.A. Bastow): A.N. MacKay Place and Date of Hearing: Vancouver, British Columbia December 2, 2020 Place and Date of Judgment: Vancouver, British Columbia December 7, 2020 Summary: The Crown brings an application seeking directions as to whether the appellant is in compliance with this Court's Practice Directive relating to ineffective assistance of trial counsel. The Crown argues that the appellant's factum raises new factual allegations of ineffective assistance that were not in the original affidavits and that trial counsel were not given the opportunity to respond to such allegations. The Crown seeks a direction that the appellant may not cross-examine counsel on, or use in argument, the alleged new factual allegations. The appellant argues that his factum simply summarizes the trial judge's findings and that, in any event, the appellant's factum is included under the words "other material" in the Practice Directive. Held: Trial counsel may be questioned on the matters raised by the appellant from the outset, and in the general manner in which they were raised. Particular aspects of questioning could have been raised in the affidavits and were not, and may not be raised. The phrase "other material", as it appears in the Practice Directive, does not include the factum on appeal.

- [1] BENNETT J.A.: Reza Moazami is appealing convictions for 30 counts relating to a variety of offences including: human trafficking; living on the avails of prostitution; and sexual offences. There were 11 complainants. One of his grounds of appeal is ineffective assistance of trial counsel with respect to two defence counsel, invoking this Court's Practice Directive (Criminal), issued November 12, 2013.
- [2] The Crown brings an application seeking directions on whether Mr. Moazami is in compliance with the Practice Directive, and, if not, whether a remedy should flow from his non-compliance. The Practice Directive is appended to the reasons.
- [3] Mr. Moazami filed an affidavit on June 9, 2016, which, amongst other things, generally challenged defence counsels' failure to take his instructions regarding cross-examination. He filed a second affidavit on November 29, 2016, outlining his complaints regarding lack of cross-examination, referencing a number of paragraphs in the reasons for judgment of the trial judge (indexed at 2014 BCSC 1727). The difficulty with the affidavit is that it refers to the paragraph numbers, and to witnesses generally within those paragraph numbers, without specifically identifying the witnesses. This necessitates constant reference to the reasons for judgment in order to understand the contents of the affidavit.
- [4] Defence counsel, Danny Markovitz, responded with two affidavits. Defence counsel, Karen Bastow, was questioned under oath before Justice Frankel sitting as a special commissioner pursuant to s. 683(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46.
- [5] The Crown, joined by Ms. MacKay, counsel for the two defence counsel, submits that Mr. Moazami, in his factum filed June 30, 2020 (and not provided to Ms. MacKay until September 23 due to publication ban issues), raises "new and materially distinct instances of alleged ineffective assistance", to which neither defence counsel have responded. Both counsel and Mr. Moazami are scheduled to testify at the commencement of the appeal during the week of December 14, 2020. The Crown cites the Practice Directive "Stage Two: Advancing an Appeal Alleging that trial counsel was ineffective":
4. The appellant shall prepare and provide to trial counsel his or her affidavit setting out the factual basis for the allegations bearing on trial counsel's professional conduct and a signed waiver in which the appellant expressly waives solicitor-client privilege to the extent necessary to allow trial counsel to respond to the allegations against him or her. The appellant shall also deliver a copy of the affidavit and signed waiver to the Crown/respondent.
- [6] The Practice Directive requires that the appellant file an affidavit setting out the "factual basis" for the allegations bearing on trial counsel's conduct, which is to be completed before the appellant's factum is filed.

- [7] The Crown takes issue with para. 127 of the appellant's factum: Madame Justice Bruce had concerns regarding the appellant's evidence that was not put to witnesses (i.e. Browne and Dunn). Following is a summary of some of those concerns voiced during court and in the Reasons for Judgment:
- a. RM [Reza Moazami] evidence that JC had one dose of GHB not put to JC - para 565
 - b. RM evidence that JC invited him to have sex not put to JC - para 565
 - c. RM evidence that JC consented to sex in the living room not put to JC - para 565
 - d. RM evidence that JC and him talked fully about sex not put to JC - para 565
 - e. RM evidence SW preferred anal sex & engaged in it every time they had sex not put to SW - para 570 During testimony:
 - a. That EB's mom was not asked about a conversation between her and RM about EB leaving Calgary, Bastow moves on - T1981 L7 42
 - b. That evidence by RM relating to the complainants ages, drug use, sexual relations with RM, work history, text message conversations, etc. was never put to the complainants and raises the Browne and Dunn rule issue and that this is not a situation where it would be appropriate to call back the complainants to give rebuttal evidence - T2039 L15 - 2041 L14
 - c. That none of information regarding the text messages and that the complainants were able to keep all of the money they made when RM was not present (which RM is talking to) was put to the complainants - T2133 - T2134 L32, T2140 L17
- [8] The Crown submits that all of the above are new facts to which defence counsel have not had an opportunity to respond, and the appellant is shielded from cross-examination on these points as they do not appear in his affidavit. The Crown says that the new facts raised do not comply with the Practice Directive.
- [9] The Crown seeks a direction that Mr. Moazami may not cross-examine counsel on the "new factual allegations" and may not raise them in argument.
- [10] Mr. Moazami makes several arguments in response. He says that these are not newly raised facts. He says at para. 127 he was summarizing the judge's findings, not setting out new facts he wished to raise.
- [11] He says that the Practice Directive refers to "other material" and a factum is included in the "other material" and, therefore, provides sufficient notice to the Crown and defence counsel.
- [12] He submits that the only matters he wishes to raise that the Crown takes issue with is the lack of cross-examination of S.W. and J.C. in relation to the sexual assault allegations. The Crown concedes that Mr. Moazami has always raised the lack of cross-examination of J.C. Mr. Moazami submits that the proper place to look is in his factum at paras. 165-169:

165. Trial counsel's ineffective assistance in this case is separated into two categories. The first category, relating to both performance and prejudice, concerns specific assistance relating to defending against the charges of sexual assault relating to JC and SW. This case was a difficult one for defence counsel, as each complainant and each count could have proceeded as a separate trial. Defence counsel had a complex task of having to discretely address the evidence as it related to each count. That said, when counsel take on a trial of this magnitude and complexity, it is incumbent on trial counsel to embrace the challenge of providing an accused with adequate representation relating to each count.
166. With respect to the evidence of JC, she specifically testified that she ingested GHB and then awoke to having sex with the appellant. On its face, this was evidence of sexual assault. In cross examination, JC was not challenged about the sex assault at all, other than being asked to confirm that she had sex with the appellant on the living room floor, to which she replied "yes". (T126 L43) Defence counsel asked her about issues related to prostitution and making money. The sex assault charge was serious and required a considered approach, especially in light of the appellant's evidence about it, which was that JC consented. (T2019 L36) JC was not cross-examined about the manner of the ingesting of GHB and what and who she did that with. If the appellant were facing a trial just for the sexual assault of JC, the cross examination can only be seen as wholly inadequate and below acceptable standards.
167. The same issues relate to the evidence of sexual assault from SW. SW stated that the appellant sexually assaulted her by engaging in anal sex without her consent. (supra, para 59) The appellant simply stated that there were no times where he and SW had sex without consent. (supra, para 92(3)(c)) Defence counsel did not ask any specific questions about the details of the incident. Like with JC, this was simply below acceptable standards.
168. With respect to the second category of ineffective assistance, the trial judge stated: [AB3144, para 326] Much of his evidence was not put to the complainants in cross-examination and, as a consequence, can be accorded little weight.
169. The breadth of the trial judge's comments during the trial and in the reasons for judgment concerning the Browne and Dunn issue are troubling. It leads to an almost inescapable inference that there was either a breakdown in communication between counsel and the appellant, or simply a lack of preparation in terms of how the defence was proceeding. There is little question that the appellant intended to testify from the outset. The approach taken by the two defence counsel was to split the examinations of the complainants, with Mr. Markovitz taking JC, HW, SW and SH, with Ms. Bastow taking the remaining seven. The appellant takes no issue with this approach per se as this was a complex and unwieldy matter. The split questioning approach highlights that there both had to be a cohesive approach to dealing with how the appellant's evidence had to be approached vis-à-vis each complainant, but also shows that each defence counsel had time to address this issue. Justice Bruce's comments reflect that there was simply no preparation in regards to linking the appellant's anticipated evidence to questions put to some of the complainants. The specific examples of JC and SW above support this proposition.

- [13] In his affidavit #2 at para. 39, Mr. Moazami refers to paras. 175-197 of the reasons, which engage the issues in relation to S.W.:
39. The Learned Trial Judge found that my testimony was not credible. A significant aspect of that finding was that my testimony was not put to the Crown witnesses. I provide the following instances where my instructions were not followed by my counsel. In listing these instances, I make specific reference to the following paragraphs in the Reasons for Judgement. Paras. 175-197 This witness was not challenged on her evidence about my knowledge about her age. My counsel never pursued my request to contact the witness's mother to contradict some of the claims made by the witness. The witness was not challenged about her allegation that I controlled her movements and did not allow her to have keys and it was never put to the witness that I was often away working or in school. The witness was not questioned about statements saying that I assaulted her. The witness was not challenged on her claim that I controlled her prostitution including location, price and frequency. The witness was not questioned about being coached to give her evidence. She was not challenged on her drug use and her attributing that usage to me. The witness was not challenged about colluding with other witnesses and Facebook captures were not used to demonstrate the collusion.
- [14] In that summary is included, "The witness was not questioned about statements saying that I assaulted her".
- [15] Mr. Moazami contends that there was no cross-examination on the allegation of sexual assault. He says that the reference to his evidence that S.W. preferred anal intercourse is not something he will pursue with defence counsel.
- [16] In my view, the lack of questioning regarding anal intercourse was not specifically raised in the affidavit, and easily could have been. Such questions at trial likely would have had to be accompanied by an application to adduce evidence of prior sexual conduct, pursuant to s. 276 of the Criminal Code. Indeed, as the law now stands, it is unlikely Mr. Moazami could have given the evidence he did in that regard without a hearing on its admissibility.
- [17] I do not consider that the Practice Directive intended to include the filing of the factum as "other material". The Practice Directive is clear that the affidavit and other material will be filed before the appellant's factum is filed. No one questions that other issues that are not covered by initial affidavits may arise. However, if they do, then the Practice Directive has to be reengaged, and new affidavits and responses filed. This case was heavily case managed, and new issues could and should have been brought before the case management judge in a timely way.
- [18] In summary, in my view:
- a. Defence counsel may be questioned regarding the sexual assault allegation by J.C., including the use of GHB on that occasion (not generally), as it was an integral aspect of the assault. This lack of cross-examination had been raised by Mr. Moazami from the outset; and

- b. Defence counsel may be asked generally about why they did not cross-examine S.W. in relation to the sexual assault allegations. However, they may not be cross-examined on why they did not ask about anal sex with the appellant on prior occasions or on the suggestion that S.W. preferred anal sex. The affidavit filed refers to the failure to question S.W. on the assault, and raises the issue, but only in a general way. Nor can Mr. Moazami rely on the failure to raise those specific questions in relation to anal sex as part of his ineffective assistance argument.

[19] Mr. Moazami says he does not intend to ask questions with respect to the other matters raised in his factum at para. 127 noted above.

[20] SAUNDERS J.A.: I agree.

[21] HUNTER J.A.: I agree.

[22] SAUNDERS J.A.: The motion for directions is answered in the terms described by Justice Bennett. "The Honourable Madam Justice Bennett" APPENDIX A

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