

CANADA / JUDGMENT

R. v. Moazami

2021 BCCA 329

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 329 R. v. Moazami

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Moazami,

2021 BCCA 329

Date: 20210908

Docket: CA43857

Between:

Regina

Respondent

And

Reza Moazami

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 a complainant referred to in this judgment, and in particular, S.W., M.N., E.S., H.W. and Z.C. 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: An order of the Supreme Court of British Columbia, dated
February 11, 2016 (R. v. Moazami, 2016 BCSC 99, Vancouver Docket 26423).

The Appellant, appearing in person

in CA43857:

R. Moazami

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Place and Date of Hearing:

Vancouver, British Columbia

December 14-15, 2020

January 25-29, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 8, 2021

Written Reasons of the Court

Summary:

In a separate but related trial under appeal, the appellant was convicted of 30 counts of prostitution-related, sexual, and human trafficking offences against eleven complainants. Subsequently, the appellant was convicted of obstruction of justice and breach of a no-contact order. From the obstruction-related offences, the appellant raises three grounds of appeal. The first engages fresh evidence, alleging misconduct of the lead investigator, Detective James Fisher, in the case resulting in an abuse of process leading to a miscarriage of justice. The appellant relies on the fresh evidence raised in the companion appeal, CA43308. Second, the appellant argues that the trial judge erred by admitting and relying on hearsay evidence. Third, the appellant submits that the trial judge erred in his consideration of the co-conspirator's exception to the rule against hearsay. Held: Appeal dismissed; the application to admit fresh evidence is dismissed. There is no admissible evidence that the lead investigator did, or could have, interfered with the evidence, either in relation to the witnesses or relating to the impugned voice identification. Despite the repugnant behaviour of Mr. Fisher, there is no possibility that the fairness of the appellant's trial was affected. This Court relies on its reasoning and discussion in relation to the fresh evidence application as outlined in the reasons for judgment in CA43308. Furthermore, the judge did not err in admitting the evidence of one witness to the extent that it provided greater detail about the substantive offence. The evidence was not tendered for the truth of its contents, but as evidence of the offer to obstruct justice. The witnesses testified at trial and were available for cross-examination. There is nothing in the judge's analysis to suggest that he considered the impugned evidence in the second stage of the Carter analysis, where the relevant evidence is limited to evidence directly admissible against the accused. In respect of the co-conspirator's exception to the hearsay rule, the trial judge did not err in his consideration of the probable membership test. The record does not provide a basis for interfering with the judge's determination that the appellant was probably a member of the common criminal enterprise whose existence was conceded.

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Reasons for Judgment of the Court:

Introduction

- [1] On August 12, 2012, Mr. Moazami was charged with 36 counts of living on the avails of prostitution, sexual exploitation and sexual assault in relation to an alleged prostitution ring. He was arrested and held in custody from August 9, 2012, until October 12, 2012. During that time, a complainant referred to as S.W. in three of the counts was approached by a third party and offered money not to testify against Mr. Moazami. Mr. Moazami was subsequently charged with wilfully attempting to obstruct justice (the "Obstruct offence") and breach of a no-contact order in relation to S.W. He was tried on both counts before a judge alone (the "Obstruct trial"), convicted and sentenced to three years' imprisonment for the obstruct and six months concurrent for the breach. He appeals his conviction.
- [2] The Crown's case was that while in custody, Mr. Moazami had procured the assistance of his cellmate, Babak Nafaji Chaghabouri, to engage a friend of Mr. Chaghabouri to contact S.W. and offer her money not to testify against Mr. Moazami. At trial, Mr. Moazami accepted that an approach had been made to S.W., but claimed that he was not involved in this offer to her. The trial judge concluded that the evidence established that Mr. Moazami had participated in the effort to suborn the witness's testimony and entered a conviction.
- [3] On appeal, Mr. Moazami raises three grounds of appeal. The first ground relates to certain discreditable conduct engaged in by the lead detective investigating the prostitution related charges, Mr. Fisher. Mr. Moazami submits that this misconduct constituted an abuse of process in relation to his obstruction charge, leading to a miscarriage of justice. To support this submission, Mr. Moazami has applied to adduce fresh evidence that establishes the misconduct and explains, in Mr. Moazami's view, its impact.
- [4] The significance of Mr. Fisher's misconduct, which related to some of the individuals exploited by Mr. Moazami, has been addressed in the companion appeal CA43308 (the "Avails appeal"), released with this judgment, indexed as 2021 BCCA 328. In this appeal, we rely on those reasons, and similarly, we are not satisfied that the misconduct provides a basis for interfering with the obstruction conviction.
- [5] The second ground of appeal raised by Mr. Moazami is that the trial judge erred by admitting and relying upon hearsay evidence as to what was said to S.W. in an attempt to induce her to change her intended testimony. We are of the view that the judge made no error in his treatment of this evidence.
- [6] The final ground of appeal relates to the judge's reasoning in concluding that Mr. Moazami participated in the obstruction although the direct approach was made by a third party. Mr. Moazami asserts that the judge relied on inadmissible evidence for this conclusion, and specifically erred in his consideration of the co-conspirator's exception to the rule against hearsay. In our view, the judge was entitled to draw this conclusion on the evidence presented.

- [7] Accordingly, and for the reasons set out in this judgment, we are of the view that this appeal must be dismissed.

The Trial Judgment

- [8] The allegations against Mr. Moazami in the prostitution-related trial (the "Avails trial") are explained in the Avails appeal, but some reference to those offences is necessary to provide context for the obstruction conviction that is at issue in this appeal. The Crown's theory at the Avails trial was that Mr. Moazami had been living on the avails of prostitution in relation to several named (though anonymized) individuals, some of whom were underage. The Crown further alleged Mr. Moazami had committed other offences, including sexual assault and sexual exploitation, against some of these named individuals.
- [9] One of these individuals was identified by the anonymized initials S.W. The charges in relation to S.W. were these:

Count 10

from the 1st day of April, 2009 to the 29th day of September, 2010, inclusive, at or near Vancouver and North Vancouver, in the Province of British Columbia, did unlawfully live wholly or in part on the avails of prostitution of S. W., a person under the age of eighteen years, and for the purposes of profit, did aid, abet, counsel or compel S.W. to engage in or carry on prostitution with any person or generally, and did use, threaten to use or attempt to use violence, intimidation or coercion in relation to S.W., contrary to Section 212(2.1) of the Criminal Code.

Count 11

from the 1st day of April, 2009 to the 29th day of September, 2010, inclusive, at or near Vancouver and North Vancouver, in the Province of British Columbia, being a person in a relationship with a young person, S.W., that was exploitative of that young person, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of S.W., contrary to Section 153(1)(a) of the Criminal Code.

Count 12

from the 1st day of April, 2009 to the 29th day of September, 2010, inclusive, at or near Vancouver and North Vancouver, in the Province of British Columbia, did sexually assault S.W., contrary to Section 271(1)(a) of the Criminal Code.

- [10] From August 9 to October 12, 2012, Mr. Moazami was in custody at North Fraser Pretrial Centre awaiting trial in the Avails trial. S.W. was scheduled to be a witness for the Crown in the Avails trial.

- [11] During that time, in the fall of 2012, a third party and a friend of Mr. Chaghabouri, Azita Nazemi, approached S.W. in an attempt to dissuade her from giving evidence against Mr. Moazami. Both Ms. Nazemi and S.W. testified at the Obstruct trial.
- [12] Ms. Nazemi testified on April 1 and July 6, 2015. Ms. Nazemi gave evidence that Mr. Chaghabouri asked her to talk to S.W. to help Mr. Moazami. She testified that Mr. Moazami's mother gave her a certain piece of paper with some lettering on it when they visited North Fraser Pretrial Centre together, and she testified about first being told to direct S.W. to Mr. Moazami's mother and then to his lawyer. Ms. Nazemi said that Mr. Chaghabouri had asked her to convince S.W. to talk to the witnesses in the Avails trial.
- [13] Ms. Nazemi testified that she relayed to S.W. the offer that Mr. Moazami would pay \$5,000 if S.W. went to Mr. Moazami's lawyer and gave a statement resiling from her original police statement implicating Mr. Moazami, a further \$5,000 if she failed to testify against him, and more money for each additional witness she approached on Mr. Moazami's behalf.
- [14] S.W. testified at the Obstruct trial on July 7 and 8, 2015. S.W. testified that Ms. Nazemi had approached her with the offer to recant her statement in exchange for money, and additional money for not testifying at the Avails trial. S.W. testified that the offer included more money if she convinced other witnesses in the Avails trial to do the same. S.W. testified that Ms. Nazemi had told her that the offer had come from Mr. Moazami. S.W. also testified that Ms. Nazemi had shown her a piece of paper with what appeared to be handwritten code on it. S.W. declined the offer and went to the police.
- [15] By the conclusion of the trial, Mr. Moazami did not contest that the approach from Ms. Nazemi had occurred or that it constituted obstruction of justice. Mr. Moazami's position was that he had not been involved in the attempted bribe.
- [16] In addition to the direct evidence of Ms. Nazemi and S.W., the Crown's case was based primarily on transcripts from intercepted phone calls from the North Fraser Pretrial Centre. Five of the intercepted calls were from Mr. Moazami to his mother. The other twenty-five intercepted calls tendered at trial were from Mr. Chaghabouri to Ms. Nazemi. The calls between Mr. Chaghabouri and Ms. Nazemi substantiated the Crown's claim that Mr. Chaghabouri had asked Ms. Nazemi to approach S.W. with the offer of a bribe; Mr. Chaghabouri was also charged with and convicted of obstruction of justice.
- [17] There was no evidence that Mr. Moazami had ever spoken directly to Ms. Nazemi or to S.W. in relation to the attempted bribe. Thus, one of the central questions at trial was whether there was evidence that Mr. Moazami was a party to this obstruction.
- [18] The position of the Crown was that in four of the incriminating calls between Mr. Chaghabouri and Ms. Nazemi, Mr. Moazami could be heard speaking to Mr. Chaghabouri, making inculpatory comments that linked him to the offence. The individual heard on these four calls did not identify himself and the conversations were primarily in Farsi. The evidence identifying Mr. Moazami by his voice was supplied by Mr. Fisher, the lead detective

involved in the investigation leading to the Avails trial, by Ms. Nazemi in respect of one of the calls, and by one of the interpreters.

- [19] The trial judge summarized the evidence of Mr. Fisher and Ms. Nazemi concerning the identification of Mr. Moazami's voice in this way:
- [12] Detective Fisher said that he recognized Mr. Moazami's voice in the recordings from his prior experience with Mr. Moazami and the knowledge he gained of the sound of his voice, the familiarity of his speech patterns and his plaintive style of speaking that Detective Fisher considered to be unique. He said that Mr. Moazami also had a habit of talking over persons he was talking with and would begin talking before the other person had finished. He also testified that some of his calls were made with the calling card assigned to him at North Fraser. He also considered the content of his calls. A number of calls he made were with his mother, Azar Tafazoli, who called him "Reza" and whom he called "Mom".
- [13] Later, during his trial in 2014, Detective Fisher heard Mr. Moazami speak at different times over a period of six days. This confirmed to him that the person he had heard in the recordings was Mr. Moazami.
- [14] Detective Fisher's recognition of Mr. Moazami's voice is corroborated by the evidence of Azita Nazemi. In the transcript at Tab 7 of Exhibit 11 the comment, "Six, oh, four, right?" is attributed to Reza Moazami. Ms. Nazemi testified that the person making that comment was Reza Moazami.
- [20] In addition, the Farsi translator who had listened to and translated more than 200 of these calls over a period of three months also identified Mr. Moazami's voice in some of the calls.
- [21] The trial judge accepted the accuracy of the transcripts that had been prepared of the thirty calls relied on at trial, and concluded as follows with respect to Mr. Moazami:
- [28] I am also satisfied and find that the comments attributable to Reza Moazami in the transcripts in evidence were spoken by Reza Moazami. I make this finding based on the evidence of Detective Fisher, the translators referred to and Ms. Nazemi's evidence of when she heard him speak.
- [29] The evidence also establishes and I find that Mr. Najafi Chaghabori and his cell mate, Mr. Reza Moazami, had a close personal relationship.
- [30] I infer from the evidence that during a number of the transcribed conversations between Mr. Najafi Chaghabori and Ms. Nazemi, Mr. Moazami was standing near to Mr. Najafi Chaghabori while he was talking to Ms. Nazemi.
- [22] In addition to the evidence from the four calls in which the trial judge concluded that Mr. Moazami had participated, the Crown sought to rely on evidence from the calls between Mr. Chaghabori and Ms. Nazemi in which there was no evidence that Mr. Moazami was present, relying on the co-conspirators exception to the hearsay rule. The trial judge held that it was open to the Crown to do so, applying the test in *R. v. Carter*, [1982] 1 S.C.R. 938.

The judge held that the existence of a common design to commit obstruction had been proven beyond a reasonable doubt, that Mr. Moazami was probably a member of the conspiracy, and that relying on all the evidence of the participants, Mr. Moazami's guilt was established beyond a reasonable doubt.

[23] Mr. Moazami was accordingly convicted on both counts.

[24] Subsequent to the trial, it was determined that Mr. Fisher had engaged in serious misconduct of a sexual nature with respect to several of the individuals named as complainants or witnesses in the Avails trial. Mr. Moazami relies on this misconduct in both his appeals from conviction at the Avails trial and the Obstruct trial.

Mr. Moazami's Grounds of Appeal

[25] Mr. Moazami raises three grounds of appeal:

1. There was a miscarriage of justice or an abuse of process because Mr. Fisher engaged in serious misconduct with complainants and witnesses prior to and during the trial, and at Mr. Moazami's trial regarding prostitution, which affected the integrity of the evidence at the trial;
2. The trial judge erred in finding that the evidence from S.W. of what Ms. Nazemi told her was admissible as proof of the truth; and
3. The trial judge erred in law in finding that Mr. Moazami was a probable member of the conspiracy.

Analysis

a) Miscarriage of Justice and Abuse of Process

[26] In this appeal (the "Obstruct appeal"), Mr. Moazami relies on the misconduct of the lead detective, Mr. Fisher, in arguing that sustaining the obstruction conviction would amount to an abuse of process. Mr. Moazami submits that Mr. Fisher's conduct in relation to Ms. Nazemi and S.W., and generally, with the complainants and witnesses as outlined in the Avails appeal, gives rise to a miscarriage of justice and an abuse of process, and should result in a new trial.

[27] The legal framework in relation to this ground of appeal is set out in the Avails appeal, as is the test for fresh evidence on appeal.

i) The Fresh Evidence

[28] Mr. Moazami relies on all of the evidence filed for and summarized in the Avails appeal, and in particular in relation to S.W.

- [29] The fresh evidence on the Avails appeal in relation to S.W. and Mr. Fisher is that L.M. (H.W.'s victim worker) told the police that H.W. told her that S.W. told H.W. that Mr. Fisher had "asked to fuck her". H.W. told the police that Mr. Fisher kissed S.W. and had tried to sleep with her a few times. Mr. Fisher gave S.W. travel money, which was documented as proper Crown travel. S.W., when interviewed, denied that Mr. Fisher did anything to her. However, S.W. is one of two complainants who filed a civil suit against Mr. Fisher alleging sexual offences. Nevertheless, no affidavit was obtained from S.W. (or H.W.).
- [30] In the Avails appeal, we concluded that there is no admissible evidence that Mr. Fisher engaged in misconduct with S.W. Nor is there any indication that her evidence was affected or could have been affected by Mr. Fisher's conduct at the Avails trial.
- [31] In addition, in relation to this appeal, Mr. Moazami submits that between April 1 and April 2, 2015, S.W. and Mr. Fisher texted about: i) Mr. Fisher picking S.W. up to drive to court; ii) a discussion about an apparent car accident they were involved in on April 1, 2015; and iii) S.W. and Mr. Fisher coordinated dropping her son off on the way to court on April 2, 2015.
- [32] Furthermore, between July 6 and July 8, 2015, S.W. and Mr. Fisher texted about coordinating Mr. Fisher picking S.W. up to drive her to the Crown office and court.
- [33] With respect to Ms. Nazemi, Mr. Moazami points to the following fresh evidence to establish misconduct by Mr. Fisher.
- [34] On March 19, 2015, Ms. Nazemi texted Mr. Fisher stating that she wanted to stay with her original statement and not provide a new one. Mr. Fisher advised her to talk to Sandra Cunningham (the Crown prosecutor). Mr. Fisher also offered to drive Ms. Nazemi to court and to contact him for "any other help", as he would be at the trial each day.
- [35] On April 2, 2015, Ms. Nazemi texted Mr. Fisher and asked him to provide her a letter stating that her criminal charges have been dropped. Mr. Fisher responded stating that she can get a records check and he can provide a letter.
- [36] On June 19, 2015, Ms. Nazemi texted Mr. Fisher for advice on an emergency mental health situation and he advised her about who she could contact.
- [37] On October 17, 2015, Ms. Nazemi and Mr. Fisher exchanged text messages about Ms. Nazemi getting in contact with S.W., and Ms. Nazemi stated that she has already messaged S.W. over Facebook.

ii) Position of the Parties

Mr. Moazami

- [38] Mr. Moazami relies on his argument advanced in the Avails appeal concerning Mr. Fisher's misconduct. Mr. Moazami frames the question in the following manner: is there a reasonable possibility that Mr. Fisher's misconduct impacted the fairness of his trial?

- [39] Mr. Moazami submits that the actions of Mr. Fisher materially impacted three of the Crown's five evidentiary pillars: the identification of his voice by Mr. Fisher in background calls between Ms. Nazemi and Mr. Chaghabouri; the evidence of Ms. Nazemi; and the evidence of S.W. Mr. Moazami's position is that Mr. Fisher's misconduct resurrects the defence's argument at trial that Mr. Fisher's zeal to see Mr. Moazami convicted tainted his evidence.
- [40] On the identification issue, Mr. Moazami submits that, "[b]ecause the manner in which [Mr.] Fisher told the translators that the voice belonged to [Mr. Moazami], the Court should not be confident in the integrity of the identification of [Mr. Moazami]'s voice in the context of evaluating [Mr.] Fisher's credibility." Mr. Moazami submits that it is "quite possible" that the judge could have disbelieved Mr. Fisher's evidence, had his misconduct been known.
- [41] With respect to Ms. Nazemi's evidence, Mr. Moazami argues that the text messages between Mr. Fisher and Ms. Nazemi during the course of the trial were "unusual" at this phase of the trial. He submits that, in light of the breadth of misconduct at issue, this Court "should not be confident" about the integrity of Mr. Fisher's contact with Ms. Nazemi at "critical times", and, he alleges, the resulting effect on her evidence. Mr. Moazami argues that the "communication confirms an unusual relationship between the two and depicts a comfort level that went beyond professional parameters". Mr. Moazami submits that, while Ms. Nazemi's evidence was "underway in court", she and Mr. Fisher were allegedly communicating about Ms. Nazemi receiving a benefit from Mr. Fisher. Mr. Moazami states that, at the time of trial, defence counsel was unable to explore this with Ms. Nazemi, but had the communications been known, defence counsel would have examined this, and "opened doors to Ms. Nazemi's credibility and the integrity of her evidence." Mr. Moazami points specifically to the fact that the trial judge, in reasons for judgment, noted that Ms. Nazemi told the court that she was not offered anything by Crown or police in exchange for her testimony.
- [42] With respect to S.W.'s evidence, Mr. Moazami relies in part on the evidence of Mr. Fisher's misconduct in relation to S.W. in the Avails appeal. In this appeal, Moazami argues that Mr. Fisher and S.W. "appear to have had an unusually comfortable and unprofessional relationship" and that "the spectre of their relationship calls into question the integrity of S.W.'s evidence".
- [43] Mr. Moazami also relies on the misconduct of Mr. Fisher generally, as outlined in the Avails appeal, to support the argument that a miscarriage of justice has occurred.

Crown

- [44] On the identification issue, the Crown disputes Mr. Moazami's characterization of the voice identification by Mr. Fisher as a "critical component" of the evidence, pointing to the fact that the trial judge found that Mr. Moazami's background comments during the calls where Mr. Fisher identified his voice played a "lesser" role in establishing his guilt than other evidence. The Crown notes that, at trial, the Crown relied on Mr. Fisher's evidence, as well

as others', to establish that it was Mr. Moazami's voice on the calls in question. The Crown further points out that the judge himself listened to the calls and concluded that the voices "sounded the same each time that the particular individual spoke".

- [45] The Crown's primary position on the identification issue is that Mr. Fisher's misconduct did not affect the fairness of Mr. Moazami's trial. In any event, they submit that "even if Mr. Fisher is factored out of the equation, the evidence and inescapable inferences amply established that it was Mr. Moazami's voice on the disputed calls".
- [46] With respect to the evidence of Ms. Nazemi, the Crown states that the evidence does not bear out that Mr. Fisher and Ms. Nazemi discussed the "evidence Ms. Nazemi was to give at trial", that he negotiated a benefit with her in exchange for her testimony, or that he engaged in any other misconduct involving her. Indeed, she told investigators he did not engage in misconduct involving her.
- [47] With respect to the evidence of S.W., the Crown submits that communication between Mr. Fisher and S.W. in the nature of offering rides to court on trial dates does not raise "any such spectre" alleged by Mr. Moazami. The Crown argues that Mr. Moazami has proffered no admissible evidence of misconduct involving S.W. Furthermore, S.W. denied to investigators that any such misconduct ever took place.
- [48] The Crown states that it relies on S.W.'s prior consistent statement in relation to the Obstruct offence, made September 26, 2012, in support of this. The Crown says that statement took place before any alleged misconduct by Mr. Fisher involving her, and that "her statement contains all of the essentials of the evidence she later gave at trial and eliminates any suggestion that misconduct by Mr. Fisher influenced her evidence".

iii) Discussion

- [49] Mr. Moazami submits that there has been a miscarriage of justice and an abuse of process as a result of Mr. Fisher's conduct, resulting in an unfair trial. Mr. Moazami does not rely on the residual category of abuse of process in this appeal, which focusses not on an individual's rights, but considers whether the integrity of the justice system has been impugned.
- [50] It is necessary to take a close look at the proffered evidence in order to assess the claims made by Mr. Moazami. As in the Avails appeal, the evidence was tendered via a third-party affidavit. No first person affidavit was tendered.

Mr. Fisher and Ms. Nazemi

- [51] Ms. Nazemi gave a statement to the police on December 19, 2012, following her arrest. This was the first time Ms. Nazemi met Mr. Fisher.

- [52] In her statement from December 19, 2012, Ms. Nazemi at first denied putting the offer to S.W., stating that she would not have risked her friendship with S.W. Eventually, however, in that same statement, she admitted that she did put the offer to S.W., knowing that if she did not do so, Mr. Moazami would get another person to approach S.W.
- [53] At the time of giving her statement, Mr. Fisher indicated to Ms. Nazemi that she would be charged with obstruction of justice.
- [54] In our view, the text messages relied on by Mr. Moazami do not support an inference that Mr. Fisher was discussing the details of Ms. Nazemi's evidence with her in an effort to influence her. Mr. Fisher encouraged Ms. Nazemi to talk to the Crown prosecutor, Sandra Cunningham, before testifying, and offered her a ride to court on trial dates. The text messages do not evince that Mr. Fisher, in any manner, interfered with Ms. Nazemi's evidence or engaged in any improper conduct in relation to Ms. Nazemi. Other text exchanges that Mr. Moazami argues impugn Ms. Nazemi's evidence (by virtue of Mr. Fisher's conduct) are also not indicative of any inappropriate behaviour or misconduct. The text messages do not, in our view, demonstrate an "unusual relationship" that "went beyond professional parameters", but rather display a typical pattern of support between witness and police officer that raises, in our opinion, no suggestion of an abuse of process.
- [55] In respect of Mr. Moazami's allegations that Ms. Nazemi's charges were dropped in exchange for her testimony, defence counsel knew at trial that a stay of proceedings had been entered on the charges against Ms. Nazemi, and cross-examined her on that. Ms. Nazemi testified, under cross-examination, that the Crown did not stay her charges in exchange for testimony. In fact, she stated that she did not know why the charges were stayed, and subsequently was served with a subpoena to testify.
- [56] Furthermore, Ms. Nazemi told investigators she never met Mr. Fisher alone, that he never did anything unprofessional, and that Mr. Fisher never gave her advice about how to testify.
- [57] Ms. Nazemi's statement was given prior to any allegations or documentation of misconduct by Mr. Fisher in relation to Ms. Nazemi. Her statement is substantially mirrored by the evidence she gave at the Obstruct trial.
- [58] In our view, there is therefore no evidence of improper conduct by Mr. Fisher towards Ms. Nazemi that could or would have affected the reliability of Ms. Nazemi's evidence and the fairness of Mr. Moazami's trial. Indeed, the evidence Mr. Moazami relies on with respect to Ms. Nazemi does not disclose any misconduct at all.

Mr. Fisher and S.W.

- [59] Mr. Moazami relies on what he says is Mr. Fisher's unusual conduct with S.W. In addition, he relies on his argument in the Avails appeal that Mr. Fisher sexually abused S.W. As noted in the Avails appeal, and repeated here, there is no admissible evidence that Mr. Fisher engaged in any misconduct with S.W.

- [60] S.W. was a complainant and testified on the Avails trial on November 12 to November 15, 2013, and the Obstruct trial on July 7 and 8, 2015. The evidence in relation to allegations of Mr. Fisher's misconduct as it relates to S.W. is summarized above, and in the Avails appeal.
- [61] S.W.'s statement in relation to the Obstruct trial was given prior to any alleged, or documentation of, misconduct by Mr. Fisher in respect of S.W. That statement is consistent with the evidence she gave at the Obstruct trial.
- [62] As in the Avails appeal, and for the reasons expressed in the reasons for judgment in that appeal, in our view, there is no admissible evidence that Mr. Fisher engaged in misconduct with S.W. Nor is there any evidence that her evidence was affected or could have been affected by Mr. Fisher.
- [63] Thus, the fresh evidence in relation to S.W. and Ms. Nazemi does not show that there was a reasonable possibility that Mr. Fisher's conduct rendered Mr. Moazami's trial unfair, in that either of their evidence was affected in any way.

Identification of Mr. Moazami's Voice

- [64] Mr. Fisher testified for five days at the Obstruct trial between March 25 and March 31, 2015. Notably, he gave evidence in relation to the identification of Mr. Moazami's voice on some of the calls that were admitted into evidence. It is the evidence in relation to the voice identification that requires scrutiny in order to assess whether there has been a miscarriage of justice.
- [65] Mr. Moazami relies on Mr. Fisher's misconduct with other complainants, some of which occurred before the Obstruct trial. Of significance are the sexual assaults of M.N. and E.S. (outlined in the Avails appeal), which clearly occurred before the Obstruct trial. Of less significance in this context are the sexual assaults by Mr. Fisher against Z.C., between August 22 and December 7, 2015, and H.W., which occurred in December 2015, all of which occurred after Mr. Fisher testified in the Obstruct trial. Mr. Moazami submits that had he been aware of Mr. Fisher's actions, it would have provided fruitful avenues for cross-examination of Mr. Fisher that were unavailable to him at trial. This point has more substance, and, as stated above, needs to be examined closely to ascertain if there was a miscarriage of justice. Mr. Fisher's credibility would have been sorely tested in cross-examination had Mr. Moazami been aware of Mr. Fisher's misconduct in relation to, at least, M.N. and E.S.
- [66] At trial, Mr. Moazami admitted that five recorded calls were between he and his mother, Azar Tafazoli. This admission was proper based on the context of the calls. It was obvious from the transcript of the calls that Mr. Moazami and his mother were speaking. It was disputed, however, whether a male voice heard in the background on four calls between Mr. Chaghabouri and Ms. Nazemi was Mr. Moazami's:

- a phone call on August 22, 2012, in which Mr. Chaghabouri told Ms. Nazemi that he was calling "using Reza's card"; the male voice later asked "is that mine?" and Mr. Chaghabouri said, "No my card Reza wants his card"; Mr. Chaghabouri then asked "are you going to call your mother?" and the voice said "yeah";
- a phone call on September 5, 2012, in which Mr. Chaghabouri is heard telling Ms. Nazemi he is going to give her number to "Reza's mother" and then the background voice is heard to say "six, oh, four, right?" and then "her name is Azar";
- a phone call on September 29, 2012, in which Mr. Chaghabouri asks "do you know her [sic] mom's last name", Ms. Nazemi replies "I just know Azar", Mr. Chaghabouri says "he's going to write it down for me, he will be back Okay it - it's Azar Tafazoli T-A-F-A-Z-O-L-I", and then the background voice says "I called her and she didn't picked up her phone"; and
- a phone call on October 12, 2012, in which Mr. Chaghabouri asks Ms. Nazemi "are you going to see that girl today? That girl? [S.W.]?" and then the background voice says "How about that girl?".

- [67] The evidence relied on to establish that it was Mr. Moazami's voice was: the identification by Mr. Fisher; the evidence of Rouzbeh Sanjabi, who translated three of the calls; and inferences from the content and context of the recordings. The defence acknowledged in closing submissions at trial "a couple of instances" where one could conclude from the circumstances that the voice was Mr. Moazami's.
- [68] Ms. Nazemi also testified that she recognized Mr. Moazami's voice on one of the calls, where he is giving her his mother's telephone number via Mr. Chaghabouri.
- [69] Mr. Moazami's submission at trial was that Mr. Fisher's unusual zeal to see Mr. Moazami convicted led him to conclude that, "he was hearing Mr. Moazami's voice when it wasn't necessarily Mr. Moazami". On appeal, Mr. Moazami raises this issue again. In our view, there is no evidence supporting a submission that Mr. Fisher's "zeal" to convict Mr. Moazami resulted in either mistaken or perjured evidence. This issue was fully canvassed at trial, and no specific error is alleged. The argument is simply repeated.
- [70] Mr. Moazami submits that "[Mr.] Fisher told the translators that the voice belonged to [Mr. Moazami]", so that their evidence was tainted. Three calls were translated by Mr. Sanjabi. He testified that he listened to all the recorded calls (more than 200) over a period of three months. He became familiar with individual voices and manners of speech and was able to recognize which voices belonged to the same person. He recognized "the same deep, nasal male voice" from calls admittedly between Mr. Moazami and his mother, in the background of the calls on September 5 and October 12, 2012, between Mr. Chaghabouri and Ms. Nazemi. He was not asked about the call on September 29, 2012. Mr. Sanjabi denied that Mr. Fisher had told him it was Mr. Moazami's voice.
- [71] The judge, after himself listening to the recordings, agreed with Mr. Fisher's identification of Mr. Moazami's voice, and noted that:

- [23] Based on listening to the recordings of the individuals identified by Detective Fisher during this period, I can say that the voices identified by him sounded the same each time that the particular individual spoke.
- [72] He concluded:
- [80] Mr. Moazami's participation in the plan is based on direct and circumstantial evidence. The bulk of that evidence is found in the recorded telephone calls made from North Fraser by Mr. Najafi Chaghabouri to Ms. Nazemi and, to a lesser extent, Mr. Moazami's comments, while standing in the vicinity of Mr. Najafi Chaghabouri, during those conversations. The direct evidence of both S.W. and Ms. Nazemi also shows that Mr. Moazami was a participant in the common enterprise.
- [81] Mr. Moazami's counsel has admitted that the male voice heard on the calls transcribed in Tabs 3, 6, 9, 11 and 15 of Exhibit 11 was Mr. Moazami's and the female voice was that of his mother however, those calls do not by themselves establish that he participated in the common enterprise.
- [82] Defence counsel argues however that the male voice in the background of conversations between Mr. Najafi Chaghabouri and Ms. Nazemi, transcribed in Tabs 2, 7, 27 and 30 of Exhibit 11, is not that of Mr. Moazami. He submits that the Crown has not proven beyond a reasonable doubt that that male voice is the voice of Mr. Moazami.
- [83] In my view the identification of Mr. Moazami's voice in the transcripts in Exhibit 11, including his voice when he was in the background of conversations between Mr. Najafi Chaghabouri and Ms. Nazemi, has been established beyond a reasonable doubt not only by the evidence of Detective Fisher and Rouzbeh Sanjabi, which I accept, but also by inferences I have drawn from the context of the conversations where it is said to be Mr. Moazami speaking.
- [84] In Tab 2 of Exhibit 11 during a call made by Mr. Najafi Chaghabouri to Ms. Nazemi, Najafi Chaghabouri told Ms. Nazemi that he was using Moazami's phone card. At line 392, a male voice says, "is that mine or?" I infer from those comments that they are made by Mr. Moazami asking if Mr. Najafi Chaghabouri was using his phone card. When Mr. Najafi Chaghabouri says, "are you going to call your mother?" a male voice answered, "Yeah". The only reasonable inference that can be drawn from the comments in lines 392 to 420 is that the second male voice is that of Mr. Moazami.
- [73] The judge's finding with respect to the voice identification was based on the evidence of Mr. Fisher, but also the evidence of Mr. Sanjabi and inferences drawn from the context of the conversations. Once Mr. Moazami's voice was identified from the calls with his mother, the evidence of Mr. Fisher was not only corroborated, but the need to rely on the evidence of Mr. Fisher as the voice identification witness was negated. Both Ms. Nazemi and Mr. Sanjabi were able to identify Mr. Moazami's voice independent of Mr. Fisher.

- [74] Mr. Moazami has failed to demonstrate that Mr. Fisher's evidence at the Obstruct trial, identifying Mr. Moazami's voice, is unreliable, inaccurate, or falsely motivated. Rather, it is corroborated by other evidence at trial, and even by the judge himself.
- [75] Even if Mr. Fisher's evidence is factored out of the equation, the evidence and inescapable inferences amply established that it was Mr. Moazami's voice on the disputed calls.
- [76] Therefore, in our view, despite the repugnant behaviour of Mr. Fisher, his conduct, specifically with M.N., E.S., H.W. and Z.C., does not result in a miscarriage of justice or an abuse of process that would render Mr. Moazami's trial unfair on the Obstruct charge.
- [77] We would not give effect to this ground of appeal. We would not admit the fresh evidence tendered by Mr. Moazami.
- b) The Co-Conspirator Exception to Hearsay
- [78] The second and third grounds of appeal both relate to the admissibility and use by the trial judge of evidence tendered to establish Mr. Moazami's participation in the attempt to bribe S.W. We begin with the issue of the use of statements made by alleged co-conspirators outside the presence of Mr. Moazami.
- [79] Mr. Moazami's submission is that, accepting that Mr. Chaghabouri and Ms. Nazemi were engaged in a common enterprise to obstruct justice, the trial judge erred in finding that Mr. Moazami was a party to that common enterprise. The framework for analysis of this issue is what has been referred to as the co-conspirator's exception to the hearsay rule.
- [80] The Crown's theory was that Mr. Moazami and Mr. Chaghabouri were both parties to the obstruction, and that they solicited the assistance of Ms. Nazemi to carry it out. The Crown's case against Mr. Moazami was based on evidence of the phone calls between Mr. Chaghabouri and Ms. Nazemi planning the offer to S.W.; the contested evidence that Mr. Moazami participated in some of those calls; the evidence of Ms. Nazemi and S.W. concerning the offer to S.W.; certain circumstantial evidence that information provided to S.W. could only have come from Mr. Moazami; and the fact that the obstruction benefitted only Mr. Moazami.
- [81] As part of its case, the Crown sought to rely on some of the acts and declarations of Mr. Chaghabouri and Ms. Nazemi against Mr. Moazami during telephone conversations in which Mr. Moazami was not present. These acts and declarations were admissible against Mr. Chaghabouri, but were arguably hearsay in respect of Mr. Moazami. Accordingly, the Crown relied on the co-conspirator's exception to the hearsay rule to enable the trial judge to rely on this evidence in the case against Mr. Moazami.
- [82] The co-conspirator's exception to the hearsay rule was explained in Carter. In order to be able to rely on hearsay evidence of a witness alleged to be a participant in a common unlawful enterprise with the accused, the Crown must first establish beyond a reasonable doubt that a conspiracy or unlawful enterprise has been proven and must establish on a

balance of probabilities that the accused was a party to that conspiracy or unlawful enterprise. If both requirements are met, the judge may rely on the evidence of any co-conspirator against the accused.

[83] The test must was summarized by Frankel J.A. in *R. v. Tran*, 2014 BCCA 343, in these terms:

[78] In *Carter*, Mr. Justice McIntyre held that to reach a verdict in a case in which the Crown relies on the co-conspirator exception to the hearsay rule a trier of fact must proceed in three steps. He reiterated those steps in *R. v. Barrow*, [1987] 2 S.C.R. 694 at 740. They are:

- (1) The trier of fact must consider all of the evidence to determine whether the alleged conspiracy has been proven beyond a reasonable doubt.
- (2) If the alleged conspiracy is found to exist, then the trier of fact is to consider the evidence directly admissible against each accused and unindicted conspirators to decide, on a balance of probabilities, whether that person is a member of the conspiracy.
- (3) If the trier of fact is satisfied that an accused is probably a member of the conspiracy, then it must go on to decide whether that accused's membership has been established beyond a reasonable doubt. At this step, the trier of fact must consider all of the evidence, including hearsay acts and declarations made in furtherance of the conspiracy by those who have been found to be probable members of the conspiracy.

See also: *R. v. Wang*, 2013 BCCA 311 at para. 48, 299 C.C.C. (3d) 431, leave to appeal ref'd, [2013] 3 S.C.R. xi.

[84] Although the evidentiary rule is generally referred to as the co-conspirator's exception, it is not limited to conspiracy charges. The rule applies equally to "substantive offences in which evidence is introduced that acts were done or words spoken in furtherance of a common design to commit the offence": *R. v. Lord*, [1995] 1 S.C.R. 747 at 747. In *Tran*, Frankel J.A. characterized the term co-conspirator's exception as "somewhat of a misnomer", as "the exception applies not only to conspiracy but to all crimes when it is alleged the accused engaged in a 'common design' or 'joint criminal enterprise'": at para. 88.

[85] On this appeal, Mr. Moazami concedes that the first requirement that a conspiracy or common unlawful enterprise be established has been met. He says, however, that the trial judge erred in his conclusion that the second requirement, that the Crown prove that he was probably a member of that joint enterprise, had been established. Mr. Moazami submits that the judge wrongly relied on the hearsay evidence of Mr. Chaghabouri and Ms. Nazemi (hearsay as against Mr. Moazami) as context in assessing the weight of the direct evidence against Mr. Moazami.

[86] The trial judge assessed the second branch of the *Carter* test in this way:

- [70] In considering the acts and declarations of Moazami I do so in their context. (See R. v. Wang, 2013 BCCA 311) The context includes him wanting his mother to meet Azita Nazemi and also not wanting anything said over the phone about "that girl", who, I infer, is S.W.
- [71] The fact that Azar Tafazoli is Moazami's mother also provides context for the conversation between Najafi Chaghabouri and Azita Nazemi when he tells Azita Nazemi to call "his mom" and "talk to her, say like is she going to call you " It is during that conversation that Najafi Chaghabouri and Nazemi discuss the payment of \$5,000 to S.W. to talk to a lawyer and another \$5,000 for "not to showing up there, right?". Najafi Chaghabouri also said to Nazemi that he told Moazami that he had said that but Moazami told him, " why would you say ten thousand dollars. I said ten thousand dollars for all the witnesses."
- [72] Then, a few minutes later on the same day, in a call by Najafi Chaghabouri transcribed at Tab 21 of Exhibit 11, he directs Azita Nazemi to tell "that girl", who is clearly S.W., to call Moazami's lawyer, Danny Markovitz, rather than calling Moazami's mother, to get the money. The clear inference is that Moazami was involved in the plan to bribe S.W. Danny Markovitz was his lawyer and it would make no sense for Najafi Chaghabouri to tell Nazemi to have S.W. call Danny Marovitz if Moazami had not told him to give those directions to her.
- [73] I am satisfied that based on the evidence that is directly admissible against Reza Moazami, including inferences drawn from that evidence as well as the circumstantial evidence, that the Crown has proven on a balance of probabilities that Moazami was a probable member in the common enterprise along with Najafi Chaghabouri and Azita Nazemi.
- [87] The position of Mr. Moazami is that it is impermissible to draw an inference from evidence that is presumptively inadmissible in order to determine membership in the conspiracy. Mr. Moazami accepts that context can be used to explain evidence directly admissible against an accused, but submits that context alone does not permit the trier of fact to draw and rely upon inferences drawn from evidence that was not directly admissible against Mr. Moazami. Mr. Moazami further submits that the circumstantial evidence that the trial judge referenced was also not evidence that was directly admissible against Mr. Moazami.
- [88] A similar issue arose in R. v. Wang, 2013 BCCA 311. The Crown was relying on 106 intercepted communications between various of the alleged participants in a conspiracy to import cocaine. Mr. Wang was heard on seven of the intercepted calls. On a separate count concerning an alleged conspiracy to export methamphetamine to Australia, there were more than 85 intercepted communications. Mr. Wang was overheard on 16 intercepted calls. At trial, Mr. Wang did not contest the existence of the conspiracy, but argued that the trial judge erred in his analysis of stage two of Carter, taking into account at that stage evidence of the acts of the other alleged co-conspirators during calls in which Mr. Wang was not present.

- [89] In Wang, this Court did not give effect to this ground of appeal. The Court explained that a trier of fact is entitled to consider the context of the direct evidence against the accused, in order to give that evidence proper weight:
- [53] If one simply read the transcript of the intercepted calls involving Mr. Wang, the reader would have no idea what he was talking about, other than something was too wet and Mr. Ye was agitated with Mr. Wang because what he gave him was problematic. A trier of fact, however, is not limited to the bare conversation without context.
- [90] Wang also made reference to an earlier decision of this Court, *R. v. Fimognairi*, [1983] B.C.J. No. 576 (C.A.). In *Fimognairi*, it had been contended that the trial judge could not consider the statements of co-conspirators to determine whether there was any evidence of the participation of a particular accused in the conspiracy. On a "no evidence" motion, the trial judge had given effect to that objection, but this Court rejected such a limitation, holding that "the learned trial judge was entitled to consider the acts and declarations of the individual accused in their context, that is, against the picture provided by the acts and declarations of the alleged co-conspirators": *Fimognairi* at para. 83. This Court held that "the conclusion equally applies to determining whether an accused is a probable member of a conspiracy": Wang at para. 63, citing *Fimognairi*.
- [91] This Court in *Tran* expressly endorsed the analysis in Wang, summarizing the principle in this way:
- [116] A probable-membership determination requires a contextual assessment of the "direct evidence" against the person whose participation is being considered. To do otherwise would place a trier of fact in the position of having to evaluate an accused's or unindicted co-conspirator's own acts and declarations in isolation, detached from the surrounding events. Whether it is more likely than not that someone participated in joint criminal activity can only be properly determined by considering what that person said and did against the backdrop of what the other alleged participants were doing at the relevant times
- [92] As set out above, the trial judge made a finding of fact, supported by the evidence, that Mr. Moazami participated in four of the 25 calls intercepted between Mr. Chaghabouri and Ms. Nazemi. On August 22, 2012, Mr. Chaghabouri called Ms. Nazemi and told her that he was calling "using Reza's card"; a male voice later asked "is that mine?" and Mr. Chaghabouri said, "No my card Reza wants his card"; Mr. Chaghabouri then asked "are you going to call your mother?" and the voice said "yeah". On September 5, 2012, Mr. Chaghabouri called Ms. Nazemi and told her he is going to give her number to "Reza's mother" and then the background voice is heard to say "six, oh, four, right?" and then "her name is Azar". On September 29, 2012, Mr. Chaghabouri called Ms. Nazemi and asked her "do you know her [sic] mom's last name"; Ms. Nazemi replies "I just know Azar"; Mr. Chaghabouri says "he's going to write it down for me, he will be back Okay it - it's Azar Tafazoli T-A-F-A-Z-O-L-I", and then the background voice says "I called her and she didn't picked up her phone". Finally, and significantly, on phone call on October 12, 2012, Mr. Chaghabouri asks Ms. Nazemi "are

you going to see that girl today? ... That girl? [S.W.]" and then the background voice says "How about that girl?"

- [93] In each case, the trial judge accepted the evidence that the background voice was that of Mr. Moazami. The significance of these comments would be difficult to assess in isolation, detached from the surrounding events. As explained in *Tran*, at para. 116, a probable-membership determination can only be evaluated by considering what that person said and did against the backdrop of what the other alleged participants were doing at the relevant times, which in this case requires a consideration of the other intercepted communications that provide context for the plan to have Ms. Nazemi speak to Mr. Moazami's mother and to S.W.
- [94] In our opinion, the trial judge did not err in his consideration of the probable membership test from *Carter*. The record in this case does not provide a basis for interfering with the judge's determination that Mr. Moazami was probably a member of the common criminal enterprise whose existence was conceded, which in turn permitted the judge to assess all of the evidence to determine that Mr. Moazami had been proven guilty beyond a reasonable doubt of the obstruction charge and by extension the breach of the no-contact order.

c) Admissibility of S.W.'s Evidence

- [95] Both Ms. Nazemi and S.W. testified as to what Ms. Nazemi had told S.W. about the proposed bribe. Their testimony was largely consistent, but Mr. Moazami submits that S.W. broadened the scope and elevated the level of specificity of Ms. Nazemi's evidence. This additional evidence, Mr. Moazami submits, is inadmissible hearsay against Mr. Moazami and should not have been relied on by the trial judge.
- [96] The trial judge summarized Ms. Nazemi's evidence in this way:
- [32] Ms. Nazemi said that Najafi Chaghabori spoke to her more than once about talking to S.W. about an upcoming court case to help out his friend, Mr. Moazami. Ms. Nazemi said she did not want to do that but, sometime around September she spoke to S.W. about what Najafi Chaghabori had asked her to say. She thought that she was doing that for Reza Moazami.
- [33] Ms. Nazemi referred to lines 73 to 79 on page 3 of the transcript at Tab 20 of Exhibit 11 where money is discussed by her and Najafi Chaghabori. She said that conversation referred to \$5,000 to be paid to S.W. and another \$5,000 to be paid to her not to show up in court. She testified further that the first \$5,000 would be paid to S.W. if she went to Moazami's lawyer and gave a statement that her first statement to the police was untrue.
- [34] She also referred to lines 27 to 33 on page 2 of the transcript at Tab 21 and said that conversation related to Moazami's lawyer having the money to be paid to S.W.
- [35] She said that the comments by Najafi Chaghabori in line 57 on the same page refer to S.W. and if S.W. approached other girls, who were witnesses in the case against Moazami, Moazami would pay her for each girl she approached.

- [36] At line 304 on page 9 of Tab 26 of Exhibit 11 Ms. Nazemi said that she was asking Najafi Chaghabouri for Moazami's lawyer's phone number so she could give it to S.W.
- [97] The judge summarized S.W.'s evidence in this way:
- [39] The complainant, S.W., said that she had met Reza Moazami when she was sixteen years old and started working for him as a prostitute. At the time of this trial, she was 22 years of age. In 2011 she gave a statement to the VPD regarding her involvement with Mr. Moazami and he was charged with a criminal offence. She was scheduled to be a witness in those proceedings.
- [40] S.W. also testified that she had become more than an acquaintance of Azita Nazemi in 2012 and that she had a few conversations with her in the fall of 2012. She testified that Azita told her that Reza Moazami did not want her to testify and that she should write a letter to his lawyer saying that she was not a prostitute and Moazami did not take money from her or hit her. If she did Azita told her that she would be paid \$5,000 and an additional \$5,000 if she did not show up in court. She said that Azita also told her that Reza Moazami would pay her more money if she told the other girls involved to write a letter and not appear in court. She said that she was told by Azita that it would be Reza's lawyer who would pay her.
- [41] S.W. also testified that Azita Nazemi had told her that Reza Moazami had been speaking to Tony and Tony was relaying this information to Azita. She did not know Mr. Najafi Chaghabouri but learned from Azita that she visited him in jail and that he was Moazami's cell mate. She understood that "Tony" referred to Mr. Najafi Chaghabouri.
- [98] Mr. Moazami objects to the judge's reference to S.W.'s evidence where Ms. Nazemi told her that "she should write a letter to [his] lawyer [saying] that she was not a prostitute and that [Moazami] did not take money from her nor hit her", on the basis that this evidence went beyond the testimony of the co-conspirator, Ms. Nazemi. The position of Mr. Moazami is that the trial judge broadened the scope and elevated the level of specificity of Ms. Nazemi's evidence through S.W., contrary to the principle set out in *R. v. Khelawon*, 2006 SCC 57, and that this error as to admissibility was material and was relied upon in the trial judge's further reasoning.
- [99] In *Khelawon*, the only evidence against the accused facing an aggravated assault charge was the unsworn evidence of the alleged victim S., who had died of unrelated causes prior to the trial. The issue was whether the evidence was sufficiently reliable to be admitted as hearsay evidence. The Supreme Court held that it was not, pointing to a number of serious issues, including whether S. was mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault. In these circumstances, the inability of the accused to cross-examine S. impaired the fairness of the trial.

- [100] In our view, the requirement for reliability explained in *Khelawon* does not result in the inadmissibility of that part of S.W.'s evidence that provides additional detail of the offer to obstruct justice. While the statements made by Ms. Nazemi to S.W. were out-of-court statements and presumptively inadmissible for the truth of their contents, the general proscription against hearsay use of these statements did not require that the admissible evidence of the offer be limited to the specific testimony of Ms. Nazemi. Both Ms. Nazemi and S.W. testified at trial and were available for cross-examination. As the Supreme Court pointed out in *Khelawon*,
- [34] it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule.
- [101] As we have explained in discussing the first step of the judge's Carter analysis, the trial judge was entitled to take into account all of the evidence to determine whether an unlawful criminal enterprise had occurred. This includes not only the evidence of Ms. Nazemi, who was a co-conspirator in the enterprise, but also the evidence of S.W., the target of the intended obstruction. While the evidence of S.W. as to the offer would not itself be admissible against Mr. Moazami to determine probable membership in the conspiracy, there is nothing in the judge's analysis to suggest that he took the additional comments of S.W. into account in the second stage of the Carter analysis, where the relevant evidence is limited to evidence directly admissible against the accused. Once the probable membership of Mr. Moazami in the conspiracy was established, the judge was entitled to take into account all the evidence in determining whether Mr. Moazami's guilt had been established beyond a reasonable doubt.
- [102] Finally, the hearsay analysis has little if any application to the evidence of the statements made by Ms. Nazemi to S.W. The evidence of these statements was not tendered for the truth of the contents--that S.W. would in fact be paid \$10,000 to recant her testimony--but rather as direct evidence of the substantive offence, an offer to make a payment to obstruct justice. In *Khelawon*, Charron J. explained that:
- [35] The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.
- [103] Neither of these conditions apply in this case.
- [104] The issue raised by S.W.'s testimony is not whether it was inadmissible hearsay, but rather whether it was direct evidence against Mr. Moazami that could be considered in the second stage of the Carter analysis. As there is no indication that the trial judge did consider this evidence at that stage of the analysis, no question of erroneous reasoning arises in this case.
- [105] For these reasons, we conclude that the trial judge did not err in admitting the evidence of S.W. to the extent that it provided greater detail of the offer to obstruct justice.

Conclusion

[106] For the foregoing reasons, the appeal and the application to adduce fresh evidence are dismissed.

"The Honourable Madam Justice Saunders"

"The Honourable Madam Justice Bennett"

"The Honourable Mr. Justice Hunter"

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