

CANADA / JUDGMENT

R. v. Moazami

2021 BCCA 328

COURT

British Columbia Court of Appeal

DECIDED

8 September 2021

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

2021 BCCA 328 R. v. Moazami

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Moazami,

2021 BCCA 328

Date: 20210908

Docket: CA43308

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, M.N., E.B., S.W., S.H., C.B., I.T., J.C., H.W., T.H., S.K., and J.C.H.; and the witnesses identified as E.S., L.D., E.V., L.G., L.M., and M.R., and the individuals known as Z.C., CH2, and N.V. 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
September 15, 2014 (R. v. Moazami, 2014 BCSC 1727, Vancouver Docket 26108).

Counsel for the Appellant in CA43308:

T.M. Arbogast

A. Grewal

K.A. Kirkpatrick

E. Wyllie

The Appellant, appearing in person

in CA43857:

R. Moazami

Counsel for the Respondent:

T.A. Shaw

M.G. Scott

S. Harvey, Articled Student

A. Greig, Articled Student

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:

The appellant was convicted of 30 counts of prostitution-related, sexual, and human-trafficking offences against eleven complainants between the ages of 14 and 19. This appeal 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 also alleges ineffective assistance of trial counsel, which engages further fresh evidence. Held: Appeal dismissed; the applications to admit fresh evidence are dismissed. The proposed fresh evidence does not meet the test in *Dixon and Taillefer*. There is no admissible evidence capable of demonstrating that Mr. Fisher did, or could have, interfered with the evidence of the complainants or witnesses in the appellant's trial. Despite the repugnant behaviour of Mr. Fisher, there is no reasonable possibility that the fairness of the appellant's trial was affected. The appellant's complaints of ineffective assistance of counsel, individually and together, do not meet the legal criteria to establish a miscarriage of justice. The appellant failed to demonstrate that trial counsel's representation fell below the standard of reasonable professional judgment expected from a lawyer.

Table of Contents**Paragraph Range****Introduction**

[1] - [29]

a) The Charges and Convictions

[6] - [12]

b) The Trial

[13] - [19]

c) The New Issues on Appeal

[20] - [29]

Miscarriage of Justice and Abuse of Process

[30] - [198]

a) Legal Framework

[33] - [70]

i) Miscarriage of Justice

[33] - [40]

ii) Abuse of Process

[41] - [53]

iii) Fresh Evidence

[54] - [70]

Hearsay

[68] - [70]

b) Position of the Parties

[71] - [76]

c) Scope of Misconduct

[77] - [190]

Analysis

[175] - [190]

d) Disclosure of the Facebook Accounts

[191] - [198]

Ineffective Assistance of Trial Counsel

[199] - [237]

a) Legal Framework

[200] - [206]

b) The Allegations of Ineffective Assistance of Counsel

[207] - [234]

i) The Complaint Concerning J.C.

[211] - [228]

ii) The Complaint Concerning S.W.

[229] - [234]

c) The Fresh Evidence Application

[235] - [237]

Conclusion

[238]

Reasons for Judgment of the Court:

Introduction

- [1] By notice of appeal filed December 9, 2015, Reza Moazami appeals from convictions by Madam Justice Bruce on September 15, 2014, on a 36-count indictment, of 30 prostitution-related, sexual, and human trafficking offences against eleven female complainants between the ages of 14 and 19, committed between February 2009 and October 7, 2011 (the "Avails trial"). Nine of the complainants were under the age of 18 years at the time of the offences.
- [2] The appeal is dismissed for the following reasons.
- [3] This appeal has reduced to two areas of dispute unrelated to the reasons for judgment. Both engage fresh evidence, the admissibility of which we address in our discussion of the issues on appeal. The two new areas of dispute are:
1. the effect of misconduct of the lead investigator in the case against Mr. Moazami on trial fairness and the administration of justice; and
 2. an allegation by Mr. Moazami of ineffective assistance of trial counsel.
- [4] In a separate appeal, CA43857, answered in separate reasons for judgment released today and indexed as 2021 BCCA 329, Mr. Moazami also appeals from convictions on February 11, 2016, of attempting to obstruct justice and breach of a no-contact order (the "Obstruct trial"). These reasons for judgment are independent of the reasons in CA43857, but the converse is not true; in CA43857, Mr. Moazami relies upon submissions made here in respect of the issue of police misconduct.
- [5] A brief description of the offences and the trial will set these issues in context. We refer to the complainants, as did the judge, by initials. For the reader's convenience, we attach as Appendix a a chart setting out the counts and the trial results on each. The complainants are known in these reasons as M.N., E.B., S.W., S.H., C.B., I.T., J.C., H.W., T.H., S.K., and J.C.H.
- a) The Charges and Convictions
- [6] The convictions engage eight provisions of the Criminal Code in effect at the time:
- s. 151(a) - sexual interference of a person under the age of 16 years (three convictions);
 - s. 153(1)(a) - sexual exploitation of a young person (16 or 17 years old) (four convictions);
 - s. 212(1)(d) - procuring a person to become a prostitute (four convictions);
 - s. 212(1)(j) - living on the avails of prostitution (five convictions);
 - s. 212(2) - living on the avails of prostitution of a person under the age of 18 years (five convictions);

- s. 212(2.1) - living on the avails of prostitution of a person under the age of 18 years with coercion (three convictions);
- s. 271(1)(a) - sexual assault (five convictions); and
- s. 279.01(1)(b) - controlling the movements of a person for the purpose of exploiting her (human trafficking) (one conviction).

- [7] The five convictions under s. 212(2)--living on the avails of prostitution of a person under the age of 18 years--are included offences of charges under s. 212(2.1)--living on the avails of prostitution of a person under the age of 18 years with coercion. These five convictions of the lesser included offence were entered on the judge's reasonable doubt that Mr. Moazami used, threatened to use, or attempted to use violence, intimidation or coercion before those complainants turned 18. Mr. Moazami was convicted of three offences of the greater s. 212(2.1) offence and was acquitted of one count under s. 212(2.1) on the judge's reasonable doubt that the complainant worked for him as a prostitute before she turned 18.
- [8] In all, Mr. Moazami was convicted of 13 offences of some form of living on the avails of prostitution, relating to all eleven complainants; he was convicted twice in relation to two of the complainants (S.H. and T.H.) as they turned 18 during the relevant period.
- [9] Of seven counts of procuring a person to become a prostitute contrary to s. 212(1)(d), Mr. Moazami was acquitted on three, on the judge's reasonable doubt that the complainants had worked or had intended to work as a prostitute before meeting Mr. Moazami.
- [10] In respect of human trafficking contrary to s. 279.01(1)(b), Mr. Moazami was convicted of trafficking the complainant J.C. by transporting her to Calgary and Edmonton, Alberta, from British Columbia for the purpose of exploiting her. The judge found Mr. Moazami's violence, intimidation, and exploitation of this complainant created a relationship of fear and dependence such that J.C. felt unable to decline to work as a prostitute for him. Mr. Moazami was acquitted of trafficking H.W., a person under the age of 18, contrary to s. 279.01(1)(b) on the judge's reasonable doubt that H.W. feared for her safety or the safety of another if she declined to work as a prostitute for him.
- [11] On the three counts of sexual interference with a person under the age of 16 years (s. 151(a)), the judge found that Mr. Moazami either knew that each complainant was underage or failed to take reasonable steps to ascertain the complainant's age and likewise in respect of the four counts of sexual exploitation of a young person aged 16 or 17 (s. 153(1)(a)). Furthermore, the judge found for the purposes of s. 153(1)(a) that each relationship was exploitative.
- [12] Mr. Moazami also was convicted of five of the six counts of sexual assault (s. 271(1)(a)). The sole acquittal on this offence was on a count concerning H.W. wherein the Crown conceded, after testimony, that the evidence did not prove the offence beyond a reasonable doubt. Three of the five convictions under s. 271(1)(a) related to sexual intercourse with a complainant under the age of 16 years. In respect of a fourth conviction, the judge found

that the complainant J.C. ingested the drug gamma hydroxybutyrate ("GHB") and awoke to find Mr. Moazami having sexual intercourse with her. In respect of the fifth conviction, the judge found that Mr. Moazami had persisted in a form of sexual intercourse with S.W. against her expressed wishes.

b) The Trial

[13] The key issues at trial were the exploitative character of Mr. Moazami's behaviours to the complainants and his knowledge or steps taken by him to determine the ages of the complainants.

[14] The trial itself was lengthy, taking place over 61 days. It started on September 25, 2013, with Mr. Moazami represented by two counsel, Mr. Markovitz and Ms. Bastow. It ended on June 23, 2014, with Mr. Moazami represented only by Ms. Bastow. Mr. Moazami made extensive admissions including these noted by the judge:

- the ages of the complainants on the relevant dates;
- addresses of residential apartments in Vancouver and Richmond, British Columbia where the complainants worked as prostitutes;
- travel he undertook with certain of the complainants outside of the Lower Mainland, including to Calgary and Edmonton, Alberta;
- that several of the complainants worked as prostitutes out of hotels located in Vancouver, North Vancouver, Richmond, and Nanaimo, British Columbia; Calgary and Edmonton, Alberta; and Montreal, Quebec, with registered guest names including himself, C.B., I.T. and T.H.;
- a laptop computer and seven smart phones were seized from him or from addresses associated with him;
- the analysis of the electronic devices performed by Detective Yingling;
- the authenticity of a volume of prostitution advertisements found on searching internet sites;
- credit card records and photographs; and
- certain Facebook records and accounts, but not Facebook messages that purported to be conversations between himself and individual complainants.

[15] In addition to the admissions, the Crown called each complainant, seven lay persons, and certain police officers as witnesses.

[16] The defence elected to call evidence. Three lay persons testified, led in chief by Mr. Markovitz. The fourth witness for the defence was Mr. Moazami. Mr. Markovitz withdrew as counsel before Mr. Moazami commenced his evidence. Ms. Bastow then assumed sole conduct of the defence for the balance of the trial.

- [17] In his testimony, Mr. Moazami presented himself as providing protection and security to the complainants. He denied elements of the offences, denied engaging in parasitic relationships, said that complainants had consented to sexual activity with him, and said he reasonably thought the underage complainants were not underage.
- [18] The judge found Mr. Moazami was not credible and, in general, that the other witnesses were credible. She said:
- [4] As described in detail below, I concluded that Mr. Moazami was not a credible witness and, apart from his admissions against interest and where corroborated by other independent testimony, I do not believe his evidence and it does not raise a reasonable doubt. In contrast, I found the complainants, as well as the other Crown witnesses and the witnesses called by the defence to be generally credible witnesses. Their evidence, for the most part, was internally and externally consistent. There are a few exceptions and these are addressed in detail below. The main exception is the evidence of H.W., who I found was not a credible witness generally.
- [19] In comprehensive reasons for judgment, the judge found, and it is not disputed, that Mr. Moazami: took provocative pictures of complainants and posted them on web-based advertising sites; supplied some of the complainants with unlawful drugs, usually without charge; travelled with certain complainants outside of British Columbia to hotels for the purpose of their prostitution; obtained locations, including apartments, where prostitution of the complainants took place; fixed rates of the complainants for sexual services; and retained some or all of the income earned in these transactions, he said for providing food, lodging, and clothing. The judge found Mr. Moazami's actions to some of the complainants were cruel and coercive, and met the predatory standards demanded by the offences on which she convicted, as we have earlier described.
- c) The New Issues on Appeal
- [20] The issues on appeal arose after trial, and the resulting disclosure required heavy case management. The first issue concerns the effect of misconduct of the lead investigator in the Moazami investigation, former Detective James Fisher, through his actions and relationships with certain of the complainants and witnesses at Mr. Moazami's trial.
- [21] The Moazami investigation was handled by the Special Investigation Section - Counter Exploitation Unit ("CEU") of the Vancouver Police Department ("VPD"). The mandate of the CEU prioritizes intervention in situations involving violence, exploitation, youth, and human trafficking, and states that "[t]he safety of sex workers is of paramount importance." The role of the police officers in the CEU is to befriend, and "build a bond" with, the women and girls in the sex trade, creating and maintaining trust and confidence, in the effort to assist them in exiting the trade.

- [22] From December 2011 through the trial, Mr. Fisher was the lead investigator. He also acted in a support role for certain of the complainants during the investigation and at trial. The extent of that role is in issue. What is not contested is that in March 2016, the VPD opened an investigation into the conduct of Mr. Fisher in response to a complaint by Z.C., a witness in another prostitution-related investigation unrelated to the charges against Mr. Moazami. Mr. Fisher was arrested on December 28, 2016, on charges arising from that investigation, and was suspended from his employment. He retired as a police officer in January 2017.
- [23] The charges against Mr. Fisher evolved. They first included a charge of attempting to obstruct justice by providing false or misleading information relating to a stabbing incident involving the complainant H.W. in 2015. That charge did not proceed. Over time, Mr. Fisher was also charged with engaging in sexual misconduct with H.W., with the complainant M.N., with a witness at Mr. Moazami's trial referred to as E.S., and with Z.C.
- [24] Mr. Fisher pleaded guilty to one count of breach of trust by kissing H.W. between December 3 and December 6, 2015, one count of sexual exploitation against Z.C., and one count of breach of trust involving Z.C. Although Mr. Fisher has not admitted to misconduct that was the subject of the charges naming M.N. and E.S. as complainants and those charges have been stayed, the Crown does not dispute the substance of those charges for purposes of this ground of appeal.
- [25] In August 2017, a special prosecutor, Mr. Doyle, Q.C., was appointed to assist an investigation into the conduct of three VPD officers who had been involved in the Fisher investigation. In May 2020, it was determined that the charge approval standard was not met; no charges have been laid in respect of that investigation.
- [26] The complaints against Mr. Fisher have resulted in voluminous disclosure concerning his actions and role with the complainants in the Moazami investigation and trial. Much of this is presented to us on a fresh evidence application addressed below.
- [27] The second issue raised on appeal is Mr. Moazami's allegation of ineffective assistance of trial counsel which, he says, created an unfair trial and miscarriage of justice that must be remedied by a new trial.
- [28] This issue engaged this Court's Practice Directive (Criminal) issued November 12, 2013, designed to ensure presentation of a complete picture to the court and protection of counsel's professional (solicitor-client) obligations in appeals engaging complaints against trial counsel. As required, Mr. Moazami waived solicitor-client privilege for the purposes of determining this ground of appeal. Both counsel then were asked to respond to his allegations. Mr. Markovitz filed affidavits addressing Mr. Moazami's affidavits; Ms. Bastow was questioned under oath on the allegations before Mr. Justice Frankel, sitting as a special commissioner. On December 7, 2020, for reasons indexed as 2020 BCCA 357, on the Crown's motion for directions on the scope of issues raised in the ineffective assistance of counsel complaint, the issues of ineffective assistance of counsel were identified as a lack of cross-examination of J.C. and S.W. on certain aspects of their evidence on the two counts of

sexual assault relating to them.

[29] With that overview, we turn to the substantive issues before us.

Miscarriage of Justice and Abuse of Process

[30] Disgraced Vancouver City Police Detective, James Fisher, is the centre of this ground of appeal. As noted, Mr. Moazami was convicted of multiple counts relating to prostitution and related sexual offences that had been investigated by Mr. Fisher.

[31] Several years after Mr. Moazami's conviction, it came to light that Mr. Fisher had sexually assaulted some of the women who were complainants, and a witness at Mr. Moazami's trial. Mr. Moazami argues that the conduct of Mr. Fisher resulted in a miscarriage of justice and an abuse of process vis-à-vis his trial rights, and generally as a result of impugning the integrity of the justice system.

[32] Mr. Moazami seeks to adduce fresh evidence to demonstrate the extent and impact of Mr. Fisher's conduct on his trial.

a) Legal Framework

i) Miscarriage of Justice

[33] The power of the Court of Appeal to interfere with a conviction on the basis of a miscarriage of justice is found in s. 686(1)(a)(iii) of the Criminal Code:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(iii) on any ground there was a miscarriage of justice;

[34] In *R. v. Fanjoy*, [1985] 2 S.C.R. 233 at 240, the Court, in considering the provisions of s. 613(1)(a)(iii) [now s. 686(1)(a)(iii)] said:

A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact. However, I am not able to say that an error which, in the words of Brooke J.A., "could only unfairly prejudice", would not by itself cause a miscarriage of justice. It would be wholly inconsistent with a finding of unfair prejudice in a trial to find, nonetheless, that no miscarriage of justice occurred. In my opinion, the Court of Appeal, having found as it did, ought to have allowed the appeal under s. 613(1)(a) (iii) of the Criminal Code

[35] In *R. v. Guyatt* (1997), 119 C.C.C. (3d) 304 (B.C.C.A.), leave to appeal ref'd [1997] S.C.C.A. No. 601, this Court said, at para. 70, that the focus under s. 686(1)(a)(iii) is not the verdict itself, but the process by which the verdict was reached. Section 686(1)(a)(iii) is concerned with the impact of an error on the trial proceedings that results in an unfair trial: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.).

[36] In *Morrissey*, Doherty J.A. wrote the following, at 539-541:

While s. 686(1)(a) provides three distinct bases upon which this court may quash a conviction, each shares the same underlying rationale. A conviction which is the product of a miscarriage of justice cannot stand. Section 686(1)(a)(i) is concerned with the most obvious example of a miscarriage of justice, a conviction which no reasonable trier of fact properly instructed could have returned on the evidence adduced at trial. Section 686(1)(a)(ii) read along with s. 686(1)(b)(iii) presumes that an error in law produces a miscarriage of justice unless the Crown can demonstrate the contrary with the requisite degree of certainty. Section 686(1)(a)(iii) addresses all other miscarriages of justice not caught by the two preceding subsections. In so far as the operation of s. 686(1)(a) is concerned, the distinction between errors of law and all other types of error has only one significance. Where the error is one of law the Crown bears the burden of demonstrating that the error did not result in a miscarriage of justice. Where the error is not one of law alone the appellant bears that burden.

I turn next to s. 686(1)(a)(iii). This subsection is not concerned with the characterization of an error as one of law, fact, mixed fact and law or something else, but rather with the impact of the error on the trial proceedings. It reaches all errors resulting in a miscarriage of justice and vindicates the wide jurisdiction vested in this court by s. 675(1). The long reach of s. 686(1)(a)(iii) was described by McIntyre J., for a unanimous court, in *Fanjoy v. R.*, [1985] 2 S.C.R. 233 at p. 240, 21 C.C.C. (3d) 312 at pp. 317-18:

A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.

[37] What is meant by a miscarriage of justice was discussed in *R. v. Davey*, 2012 SCC 75:

[50] In his concurring opinion in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, LeBel J. considered the scope of the miscarriages of justice contemplated by s. 686(1)(a)(iii). He concluded, at para. 69, that when considering whether an irregularity that occurred during a trial rises to the level of a miscarriage of justice, "[t]he essential question in that regard is whether the irregularity was severe enough to render the trial unfair or to create the appearance of unfairness."

[51] In *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89, Cromwell J.A. provided a helpful summary of the two types of unfairness contemplated within the meaning of miscarriage of justice under s. 686(1)(a)(iii):

. . . the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice [Citations omitted.]

[38] In *R. v. Masuda* (1953), 106 C.C.C. 122 (B.C.C.A), a case where three police witnesses had dinner with the jury during the trial, this Court said, at 124:

Moreover, if Crown witnesses are permitted to join the jury in an atmosphere of sociability during the adjournment of a murder trial, the confidence of the public in our present system of trial by jury would be shaken. The Courts are the custodians of that confidence and it must be upheld and not weakened. Thus it appears to us that the opportunity for communication, while a factor for consideration, is not the whole test to be applied in the circumstances. The test, in our opinion, is that enunciated by Lord Hewart C.J. in *R. v. Sussex Justices, Ex p. McCarthy* (1923), 93 L.J.K.B. 129 at p. 131, wherein he said: "Nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice", and "it is ... of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly be [sic] seen to be done".

[39] In *R. v. Cameron* (1991), 2 O.R. (3d) 633 (C.A.), a case where a number of sheriffs and police officers ate dinner with the jury, the Court in reconciling cases in relation to whether actual prejudice to the accused was required said this, at 638-639:

The reconciliation of these apparently conflicting approaches lies in identifying the concern raised by the offending circumstance. If, as in *Gilson and Labelle*, the offensive conduct is not such as to taint the administration of justice, then the concern is properly directed to whether actual prejudice was occasioned to the accused. Where the events in question are so serious as to affect the administration of justice, as they were in *Hertrich*, then the focus turns upon the justice system and the miscarriage of justice occurs whenever the confidence of the public in the system is shaken; that confidence is equally shaken by the appearance as by the fact of an unfair trial.

The inquiry established that no actual prejudice had been demonstrated, but it did little, if anything, with respect to the appearance of unfairness which in my view, is incontrovertible. The conviction cannot be allowed to stand.

[40] In brief, in the circumstances of police misconduct on the issue of whether there was a miscarriage of justice requiring a new trial, the question before us is whether the conduct of Mr. Fisher rendered the trial unfair, or whether his conduct shook the confidence of the public in the administration of justice.

ii) Abuse of Process

- [41] The common law doctrine of abuse of process and the concomitant remedy were merged into the Charter in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 69-71. Justice L'Heureux-Dubé discussed the various Charter sections in which an abuse of process might arise; for example, where there is trial unfairness, s. 11(d) would be engaged, or a lengthy delay, invoking s. 11(b). She also discussed the residual category of conduct that falls within s. 7 of the Charter. That category addresses "the panoply of diverse and sometimes unforeseeable circumstances" that may occur in the context of the prosecution that are so vexatious or unfair that fundamental notions of justice are contravened and the integrity of the judicial process is undermined: at para. 73.
- [42] The remedy for a violation is found in s. 24(1) of the Charter, which allows for "such remedy as the court considers appropriate and just in the circumstances". Adopting criteria recommended by Professor Paciocco (as he then was), Justice L'Heureux-Dubé concluded, at para. 75, that a stay of proceedings, involving both prejudice to the accused and to the integrity of the judicial system, was only appropriate when:
- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
 - (2) no other remedy is reasonably capable of removing that prejudice.
- [43] Other remedies are available under s. 24(1), and a stay of proceedings is considered the last resort when all other options for protecting an accused's rights are extinguished. It is imposed only in the "clearest of cases": *O'Connor* at para. 68. Consideration is given to the "seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence": *O'Connor* at paras. 77-78.
- [44] The common law doctrine of abuse of process was not extinguished in *O'Connor*. As noted in *United States of America v. Cobb*, 2001 SCC 19 at paras. 36-37, Canadian courts have an inherent jurisdiction and residual discretion at common law to control their own process and prevent its abuse.
- [45] In *R. v. Babos*, 2014 SCC 16, the Court considered the residual category of abuse of process. The Court, refining the requirements for both categories, set out three requirements for a stay of proceedings:
- [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
 - (2) There must be no alternative remedy capable of redressing the prejudice; and

- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).
- [46] The first or main category relates to ongoing trial fairness, asking whether the accused's right to a fair trial has been prejudiced, and whether that prejudice will be carried through the conduct of the trial: *Babos* at para. 34.
- [47] The residual category is concerned with "whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system": *Babos* at para. 35.
- [48] When considering trial fairness, the remedy of ordering a new trial will often be sufficient to redress the prejudice to the accused. In the case of the residual category, where the prejudice is to the integrity of the justice system, the focus is not on remedying the wrong to the accused, but whether a remedy short of a stay of proceedings "will adequately dissociate the justice system from the impugned state conduct going forward": *Babos* at para. 39.
- [49] The third requirement, the balancing stage, is of primary importance with the residual category. As noted at para. 41 of *Babos*:

However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

- [50] Generally, the balancing is considered in the full context of the case: *Babos* at para. 73.
- [51] As noted in *R. v. Nixon*, 2011 SCC 34, prejudice to the accused's interests, although relevant, is not determinative. The residual category focusses on "society's expectations of fairness in the administration of justice": *Nixon* at para. 41.
- [52] Mr. Moazami invokes both the trial fairness and residual category of abuse of process, and submits that Mr. Fisher's conduct was such to amount to a miscarriage of justice.

[53] At the outset of the appeal, Mr. Moazami indicated that the remedy he seeks is a new trial. He does not seek a stay of proceedings.

iii) Fresh Evidence

[54] An appellate court has the power to admit fresh evidence pursuant to s. 683(1)(d) of the Criminal Code:

683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

- (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[55] The leading case in terms of adducing fresh evidence on appeal remains *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" [T]he following principles have emerged:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[56] The procedure for the consideration of fresh evidence was reaffirmed in *R. v Stolar*, [1988] 1 S.C.R. 480 at 491-492:

The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character

which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact...

- [57] When an appellant alleges a breach of the Charter based on non-disclosure by the Crown or police, the test for the admission of fresh evidence is modified, as found in *R. v. Dixon*, [1998] 1 S.C.R. 244, and *R. v. Taillefer*, 2003 SCC 70.
- [58] In *Taillefer*, the Court was dealing with the question of whether the test set out in *Palmer* applied to the admission of fresh evidence in the context of a breach by the Crown of its duty to disclose, or whether it was the *Dixon* rules that were properly applicable.
- [59] The Court in *Taillefer* considered *R. v. Creamer* (1995), 97 C.C.C. (3d) 108 (B.C.C.A.), a case where this Court held that the *Palmer* test must be modified when the fresh evidence sought to be entered on an appeal related to non-disclosure of relevant information. A line of cases emerged where the test to be applied, in situations of state misconduct, was whether the right to a fair trial may have been affected. The new evidence in those cases was not evidence that related to an issue decided at trial, but rather new evidence which put in question the trial process itself. This change reflected the reality that, unlike a *Palmer* situation, the purpose of the new evidence was to challenge the very validity of the trial process. The Court in *Taillefer* accepted *Creamer* and the various authorities that aligned with it.
- [60] In *Taillefer*, the Court recognized that since the new evidence raised issues relating to the validity of the trial itself, the applicable principles were the ones established by the Court in *Dixon*, not *Palmer*: at para. 77. In *Dixon*, the Court held that an accused seeking to have fresh evidence admitted by alleging a breach of his or her right to disclosure must demonstrate that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process: at para. 34, emphasis in original. The *Palmer* test, by comparison, requires that the new evidence reasonably be expected to have affected the result: at 775.
- [61] Importantly, in *Taillefer*, the Court noted that the *Dixon* test was "much more flexible", requiring an assessment not only of the impact of the fresh evidence on the result of the trial, but on its overall fairness: at para. 77. The adoption of the flexible approach in cases of non-disclosure reflected the Court's resistance to imposing a high burden on an accused seeking to admit fresh evidence "where the accused was deprived of that evidence because of a breach by the Crown of its duty to disclose": at para. 78.
- [62] The Court in *Taillefer* summarized the relevant principles from *Dixon*:

First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

[63] Taillefer and Dixon are clear that the applicable test is made up of two steps.

[64] First, where there is undisclosed information by Crown, or otherwise misconduct by the state, the onus is on the accused to demonstrate that there is a reasonable possibility that the verdict might have been different but for the Crown's failure to disclose all of the relevant evidence, or other misconduct, as the case may be. In Dixon, the Court held that: "[i]mposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice": at para. 34.

[65] Application of the first branch of the Dixon test requires that "the appellate court determine that there was a reasonable possibility that the [trier of fact], with the benefit of all of the relevant evidence, might have had a reasonable doubt as to the accused's guilt": Taillefer at para. 82. This means constructing an "overall picture of the evidence that would have been presented to the [trier of fact]", having regard to the evidence in its entirety: *ibid.*

[66] Second, and regardless of whether there is no reasonable possibility of a different verdict at the first stage of the test, the appellate court must inquire as to whether there is a reasonable possibility that the failure to disclose affected the overall fairness of the trial process: Taillefer at para. 83. This means a reviewing court must consider the potential usefulness of the fresh evidence to the defence, which "must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure": Taillefer at para. 84, citing Dixon at para. 34, *emphasis in original*. The appellate court must assess whether the failure to disclose deprived the accused of certain evidential or investigative resources: Taillefer at para. 84.

[67] In summary, when fresh evidence is tendered that addresses trial fairness, a modified Palmer test is applied. The fourth Palmer element, that the evidence "must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be

expected to have affected the result" is replaced with "a reasonable possibility the non-disclosure [or other conduct] affected the outcome at trial or the overall fairness of the trial process": Palmer at 775; Taillefer para. 78, emphasis in original. Thus, if the fresh evidence, being reliable and relevant, demonstrates a reasonable possibility that the outcome or overall fairness of the trial process was affected, then the evidence will be admitted.

Hearsay

[68] The Supreme Court of Canada, in *R. v. O'Brien*, [1978] 1 S.C.R. 591 at 602, clearly stated that in order for fresh evidence to be adduced, it must be admissible evidence. The Court said:

Section 610 of the Criminal Code lends no assistance to respondent's case. It is a prerequisite that any evidence sought to be adduced under the discretion granted by that section be admissible evidence. The section manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. If that were so we would have the anomalous situation in which counsel could seek to adduce on appeal that which the common law prohibits at trial. The section is not operative until the threshold for admissibility as defined by common law and statute is crossed. That threshold has not been crossed in the instant case.

[69] This Court reaffirmed the inadmissibility of hearsay on an application to adduce fresh evidence in *R. v. Teneycke* (1996), 108 C.C.C. (3d) 53 at para. 18 (B.C.C.A.), where it refused to admit the affidavit of a lawyer appending an unsworn statement of an inmate.

[70] More recently, this Court has held that in order to be admissible as fresh evidence, the evidence must be in a form that would admit the evidence. Hearsay evidence, unless it meets one of the principled exceptions, is not admissible: *R. v. Jia*, 2016 BCCA 475. In *Jia*, this Court wrote:

[37] As with any other evidence, fresh evidence must be in admissible form. Fresh evidence is not admissible if it is hearsay evidence and does not fall within any of the exceptions to the hearsay rule: see *The Queen v. O'Brien*, [1978] 1 S.C.R. 591 (or, if it does not potentially fall within one of the established exceptions, it is not admissible on the principled approach to hearsay as set out in *R. v. Khan*, [1990] 2 S.C.R. 531, and subsequent decisions).

b) Position of the Parties

[71] Mr. Moazami submits that Mr. Fisher's conduct affected the credibility of the complainants and the integrity of the trial. He submits that had he been aware of the misconduct, he could have cross-examined the complainants on the incidents with Mr. Fisher, and that would have made them less credible. Furthermore, he would have chosen trial by jury, and would have considered not testifying. In addition, he submits that Mr. Fisher created a private Facebook account so he and the complainants could communicate with each other, and that account has never been disclosed to him. He says that thus, there is a reasonable possibility that the overall fairness of the trial was affected. Additionally, he says that even if trial

fairness was not affected, the integrity of the justice system has been called into question by the conduct of Mr. Fisher to the degree that a new trial must be ordered.

- [72] Mr. Moazami submits that the time frame to consider whether a miscarriage of justice or an abuse of process was engaged continued throughout his trial to the imposition of his sentence.
- [73] Mr. Moazami says that the fresh evidence is admissible. As the evidence he filed is hearsay, he relies on a category of evidence referred to as "investigative hearsay", in relation to police reports and Crown counsel reports. In *R. v. Van*, 2009 SCC 22, the Court considered so-called "investigative hearsay" in the context of the Crown tendering inadmissible hearsay of the police investigation and the officer's opinion that Mr. Van committed the offence. The Court concluded that the evidence was inadmissible, and a limiting instruction to the jury was required with respect to its use. Mr. Moazami says that the evidence is admissible as investigative hearsay, as he has filed Reports to Crown Counsel and the fruits of the police investigation into Mr. Fisher.
- [74] The Crown submits that, with one exception, all of the conduct of Mr. Fisher occurred after the complainants or witnesses testified, and that therefore the evidence tendered does not and could not affect the fairness of Mr. Moazami's trial. The Crown says that granting Mr. Moazami a new trial on the basis that Mr. Fisher's conduct was so egregious that the integrity of the justice system was brought into disrepute would simply punish the complainants who have been victimized by both Mr. Moazami and Mr. Fisher. The Crown submits that the appropriate time frame to consider Mr. Fisher's conduct is before each witness testified.
- [75] The Crown says that there is no evidence that Mr. Fisher had a Facebook account where the complainants could communicate with each other.
- [76] The Crown submits, with the exception of certain evidence in relation to the complainants and witnesses who were the subject of Mr. Fisher's criminal charges, that none of the fresh evidence is admissible. The evidence was submitted as exhibits appended to an articling student's affidavit. Other than Mr. Moazami's affidavit, it is all hearsay. There are no other first person affidavits filed. It submits that there is no reasonable possibility that the fairness of the trial was affected, nor that the administration of justice has been impugned. Therefore, the fresh evidence application must be dismissed.

c) Scope of Misconduct

- [77] It is first necessary to examine the scope of the misconduct by Mr. Fisher. The Crown and Mr. Moazami agree on some of the conduct, but there is significant disagreement with respect to much of what is alleged.

- [78] In terms of trial fairness, in this case, we agree with the Crown submission, that the appropriate time frame to consider Mr. Fisher's misconduct is prior to the testimony of each impugned witness. Conduct by Mr. Fisher after they testified could not affect Mr. Moazami's fair trial rights. We also agree, again, in this case, that when considering the "cumulative effect" of Mr. Fisher's conduct, to assess whether the integrity to the administration of justice has been impugned, it is when Mr. Fisher's conduct became known.
- [79] As noted above, the investigation into Mr. Fisher began as a result of a complaint made on March 25, 2016, to the VPD by Z.C.
- [80] A task force was established to investigate Mr. Fisher and question every willing complainant. Several witnesses involved in Mr. Moazami's case were interviewed. Criminal charges were laid against Mr. Fisher with respect to four women: Z.C., H.W., M.N. and E.S. H.W. and M.N. were complainants in the Avails trial, and E.S. was a witness. Z.C. was not involved in the prosecutions against Mr. Moazami.
- [81] Mr. Fisher eventually pleaded guilty to offences in relation to Z.C. and H.W.
- [82] The Crown accepts the evidence as stated in the court proceedings involving Z.C and H.W. and the sworn statements of M.N. and E.S. The Crown submits that otherwise, the evidence is double, triple and quadruple hearsay, which it is.
- [83] It is important to examine the claims of Mr. Moazami in the context of the actual evidence that has been filed. The fresh evidence has been sorted into four categories based on the type of document. Category One are the Reports to Crown Counsel, Informations, agreed facts, and reasons for sentence in relation to Mr. Fisher. Category Two are the police investigation documents (including witness statements) into Mr. Fisher's conduct. Category Three are thousands of text messages. Category Four documents are the pleadings in a civil action by two individuals brought against Mr. Fisher and the VPD. The evidence is appended to the affidavit of an articling student. Other than Mr. Moazami's affidavit, there are no first-person affidavits. Mr. Moazami deposed that if he were aware of Mr. Fisher's misconduct, he would have elected a trial by jury, and considered not testifying.
- [84] Mr. Moazami places some emphasis on the evidence Mr. Fisher gave at trial. Mr. Fisher was one of five police officers who testified on voir dire #16, relating to H.W.'s statements. He was cross-examined about his interviewing practices and specific aspects of some witness statements, and he explained the manner in which he approached interviews with the complainants. During cross-examination, defence counsel suggested that Mr. Fisher had an animus against Mr. Moazami, and that he was an advocate for the girls, both of which Mr. Fisher denied. His credibility was not at issue on the voir dire. In admitting H.W.'s videotaped statement to the police, the judge accepted the evidence of Mr. Fisher that H.W.'s statements were provided voluntarily and without threat or promise: *R. v. Moazami*, 2013 BCSC 2399 at para. 22. Mr. Fisher did not testify at any other point in the Avails trial.

- [85] Mr. Moazami argues that Mr. Fisher's overall inappropriate conduct with nine of the eleven complainants, cumulatively, is sufficient to require a new trial. Mr. Moazami concedes there is no misconduct by Mr. Fisher in relation to S.K. or T.H.
- [86] We will address the evidence in relation to the four women (M.N., H.W., E.S. and Z.C.) in which charges were laid against Mr. Fisher last. In addition to those four, Mr. Moazami claims that Mr. Fisher misconducted himself sexually with E.B., S.W. and I.T.
- [87] He submits that Mr. Fisher had other improper conduct with complainants C.B., S.H., J.C., J.C.H., and witnesses L.D., E.V., and M.R.
- [88] We will address the allegations more or less from the least egregious to the most serious.
- [89] The complainant J.C. testified on September 30, 2013 and October 1, 2013. The only allegation regarding J.C. is that she asked Mr. Fisher for a job reference on December 8, 2014, and he agreed. There is no evidence as to whether he actually provided a reference. J.C. advised, through her mother, that Mr. Fisher did not act inappropriately with her. There is no evidence that Mr. Fisher's conduct affected or could have affected her evidence.
- [90] The complainant C.B. testified on October 23, 2013. The only allegation regarding C.B. is that she contacted Mr. Fisher on March 23, 2016, to see whether her American boyfriend would be able to visit her in Canada. She gave Mr. Fisher the dates of his United States convictions. Mr. Fisher did checks and stressed it was important that the boyfriend tell the truth at the border and told her that he "can now apply for a temporary resident permit by contacting the Canadian consulate in Los Angeles. There is a fee". When interviewed by the investigators, C.B. said that Mr. Fisher never asked her to lie or change her evidence. She said he was never unprofessional with her. There is no evidence that Mr. Fisher affected or could have affected her evidence.
- [91] The complainant S.H. testified on November 28 and November 29, 2013. The only evidence in relation to S.H., found in statements and investigation reports, is the hearsay evidence of L.M. (H.W.'s victim worker), that H.W. told her that Mr. Fisher told H.W. that H.W.'s "tits looked nice", in front of S.H. L.M. also said that Mr. Fisher "may possibly" have had an inappropriate relationship with S.H. S.H. denied this, and said there was nothing inappropriate in Mr. Fisher's conduct towards her. In her police interview, she said Mr. Fisher never asked her to change her evidence or lie. She said she had never met with Mr. Fisher alone, and there was nothing sexual about their relationship. In our view, there is no admissible evidence that Mr. Fisher affected or could have affected her evidence.
- [92] E.V. was a witness at the trial. She testified on October 24, 2013. She told the investigators that Mr. Fisher was always professional with her, and there was no sexual contact. There is no evidence that Mr. Fisher's conduct affected or could have affected her evidence.

- [93] M.R. was a witness at trial, testifying for the defence on March 5, 2014. She told investigators that she had only met Mr. Fisher twice. There is no evidence that Mr. Fisher's conduct affected or could have affected her evidence.
- [94] The complainant J.C.H. testified on October 2 and October 3, 2013. The allegations made with respect to J.C.H. are from the Report to Crown Counsel, other investigatory statements, and text messages. The text messages revealed that on September 26, 2014, J.C.H. asked Mr. Fisher to run her boyfriend's name as the police were looking for him. On October 24, 2014, J.C.H. again asked Mr. Fisher to run her boyfriend's name for the same reason.
- [95] The details, revealed in other texts messages, of that allegation of "misconduct" related to J.C.H. telling Mr. Fisher about an outstanding warrant and subpoena for her boyfriend who wanted to work out attending court. Mr. Fisher looked into it and texted: "His lawyer should arrange it with the Crown" and recommended he "go to the Crown office and they can serve him" with the subpoena. Later, J.C.H. had difficulty understanding why, after the substantive charge against her boyfriend was dropped, he still had court dates for a related breach charge. Mr. Fisher texted: "I can talk speak [sic] to Crown".
- [96] On October 28, 2015, Mr. Fisher told J.C.H. that they had arrested another "pimp", and that "Damienne" [Ms. Damienne Darby was the senior prosecutor at Mr. Moazami's trial] was prosecuting again. He told her the age range of the complainants, how many there were and that they were using drugs. On December 23, 2015, J.C.H. asked Mr. Fisher to help her boyfriend regarding a warrant out for his arrest, and Mr. Fisher said he would speak with Crown. It is unknown if he did so. In December 2016, Mr. Fisher dropped off a Christmas hamper to J.C.H. Also in December 2016, there are texts between Mr. Fisher and J.C.H. regarding helping her with a problem, which appears to be in relation to helping her with the Christmas hamper for her children. In 2016, he helped J.C.H. remove a sexual picture of herself from Facebook. Texts reveal that Mr. Fisher was worried that the post constituted child pornography. On December 25, 2016, Mr. Fisher texted J.C.H. and says he will explain the "Earl's experience", which appears to be in relation to going to Earl's restaurant.
- [97] When interviewed, J.C.H. told the investigators that Mr. Fisher picked her up and dropped her off at the courthouse a couple of times. J.C.H. told investigators that Fisher told her to be 100% honest at trial. She said that Mr. Fisher was always professional, and nothing sexual or inappropriate occurred between them. There is no evidence that Mr. Fisher's conduct affected or could have affected J.C.H.'s testimony.
- [98] L.D. was a witness in the trial, not a complainant. She testified on November 1, 2013. She testified that she used drugs with Mr. Moazami, knew him as a pimp, knew him by certain names, and exchanged Facebook messages with him. She was not cross-examined, and was referred to only briefly in the judge's reasons.

- [99] Mr. Moazami alleged that: L.D. met with Mr. Fisher alone, Mr. Fisher told L.D. background information about H.W., Mr. Fisher told L.D. that I.T. was not doing well, Mr. Fisher explained to L.D. what "babysitting" the complainants meant before she testified, and provided updates about L.D.'s ex-boyfriend.
- [100] There is no evidence as to the timing of the information Mr. Fisher gave to L.D. about H.W. and I.T. (whether it was before she testified), and whether it even related to the matters about which she gave evidence.
- [101] There was evidence that Mr. Fisher told L.D. about Mr. Moazami's breach conviction, but that took place more than two years after she gave her evidence, in February 2016.
- [102] There is also no direct evidence from L.D. about whether L.D. previously knew what the term "babysitting" meant. The updates Mr. Fisher provided regarding L.D.'s ex-boyfriend were in relation to a peace bond L.D. had in respect of her ex-boyfriend, to protect her daughter. Mr. Fisher took a recorded statement from L.D. for the peace bond and gave her information about the court system online.
- [103] In her statement to the investigators, L.D. said that Mr. Fisher never asked her to change her testimony, that he was "nice" to her, and that there was no sexual relationship. There is no evidence that Mr. Fisher's conduct affected or could have affected L.D.'s evidence.
- [104] I.T. was interviewed by Mr. Fisher on January 27, 2012, and testified as a complainant at trial on October 31, 2013. Other than rumour and innuendo, there is no actual evidence that Mr. Fisher had sexual contact with I.T.
- [105] Again, in statements to the police, in 2014, L.G. (a counsellor at RainCity Housing) says she confronted I.T. about Mr. Fisher. She said that I.T. said she did not want to get "cut-off" and needed money to support her drug habit. On February 28, 2014, Mr. Fisher took I.T. to a hair salon. The salon staff called the police as they were concerned about her condition, and that an older man was with her. Mr. Fisher lied to the officers who attended, as he told them he was "boosting her confidence" for testifying and that she was in witness protection (I.T. had already testified at this point). On August 16, 2016, Detective King told Sergeant Burchart he was aware of allegations of sexual misconduct by Mr. Fisher against I.T. On September 14, 2016, I.T. texted Mr. Fisher for money.
- [106] On March 23, 2017, I.T. denied (through a worker) that Mr. Fisher had done anything inappropriate with her; she only had good things to say about him. There is no admissible evidence supporting the allegations regarding Mr. Fisher and I.T. There is no evidence that Mr. Fisher's conduct affected or could have affected I.T.'s evidence.
- [107] S.W. was a complainant and testified at the Avails trial on November 12 to 15, 2013, and at the Obstruct trial on July 7 and 8, 2015. The evidence in relation to S.W. 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.). Thus, 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's conduct.

- [108] E.B. was interviewed by video by Detective Constable McLachlan and Mr. Fisher on September 13, 2011. The interview continued by video with Mr. Fisher on October 7, 2011. It is not entirely clear from the transcript, but other police officers may have also been present. The videos were entered into evidence pursuant to s. 715.1, which permits the evidence of a witness under the age of 18 years taken by video to be tendered as the evidence, provided the witness adopts the statement on the witness stand. E.B. testified on October 28 to 30, 2013.
- [109] According to a police statement, E.B.'s boyfriend said that E.B. told him that she had been giving Mr. Fisher "hand jobs" in exchange for money. This triple (or perhaps quadruple) hearsay statement is countermanded by E.B.'s statement to the police that Mr. Fisher had done nothing to her, and had always been professional.
- [110] One year after giving her evidence, E.B. asked Mr. Fisher for money via text messages a number of times between October 2014 and December 2015. She received \$1,395 from Mr. Fisher via Western Union wire transfers, with the first payment sent in October 2014, and the last in 2015. The text messages show E.B. asked Mr. Fisher for money for various things, including to pay her bills and for a hotel room when she needed a place to stay. In March 2015, there are text messages seemingly arranging a meeting. E.B. called Mr. Fisher "babe" in the texts. None of the above constitutes evidence of conduct by Mr. Fisher that affected or could have affected E.B.'s evidence.
- [111] I turn now to the more serious of the complaints made in relation to Mr. Fisher.
- [112] M.N. was a complainant at the Avails trial, and testified on November 27, 2013. On March 3, 2014, she was recalled by Mr. Moazami to give evidence in relation to bank records and accounts (this recall evidence was ultimately uncontroversial).
- [113] The Crown accepts what M.N. said in her statement. The sexual assaults against M.N. occurred between December 2013, and February and March, 2014. Mr. Fisher's charges in relation to M.N. did not proceed.
- [114] M.N. was clear in her statement that the sexual activity with Mr. Fisher first occurred about a month after she first testified. He asked her for a "hand job" in exchange for money. She did not want to, but she did because she was "dope sick" and needed the money. Similar acts occurred 3 to 4 times. He once took her to a hotel where he wanted to have sex with her, but she refused, so he masturbated in her presence. He gave her \$275 for her rent before they went into the hotel. On one occasion, he went to her hotel room to give her some money,

and tried to entice her into sexual activity, but she refused. Between February 2014 and February 2016, M.N. texted Mr. Fisher at least 18 times asking for money.

- [115] The bulk of M.N.'s evidence against Mr. Moazami was given prior to the commencement of Mr. Fisher's offences against her. M.N. also said in her statement to police that Mr. Fisher never asked her to lie or change her testimony. On the whole, the evidence demonstrates that Mr. Fisher's conduct, though egregious, did not affect, nor could have affected, M.N.'s evidence at the Avails trial.
- [116] E.S. was a witness, not a complainant, in the Avails trial. She was interviewed by Mr. Fisher on January 27, 2012, and by both Mr. Fisher and Detective Tchang on January 8, 2013. E.S. testified on November 18, 2013. She knew Mr. Moazami as a drug dealer, and was his friend at one point. She recruited girls for Mr. Moazami, and placed ads for him.
- [117] At the Avails trial, E.S. also gave evidence about a violent incident in Victoria (the "Victoria bear-spray incident"), corroborating E.B.'s evidence. E.S. had travelled with Mr. Moazami and E.B. to Victoria, where they worked out of a hotel room downtown. E.B. had received a substantial tip from one of the "johns", and E.B. and E.S. hid the extra money, giving the rest to Mr. Moazami. E.S. testified that she and E.B. then left the hotel to grab food, and ended up purchasing alcohol and cocaine, arriving back to the hotel hours later. During this time, Mr. Moazami had been calling and texting E.S. and E.B., sending them angry messages to return to the hotel. Eventually, they did. E.S. said that she went to take a shower, and when she emerged, Mr. Moazami was "screaming" and "raging". Mr. Moazami kicked E.S. and E.B. out of the hotel room, and began throwing their things from the balcony. At this point, E.S. was still dressed only in a bath towel. E.S. managed to get back into the hotel and up to the room, where she testified that Mr. Moazami had maced the hallway with bear-spray to prevent them from returning. E.S. testified that the bear-spray burned her eyes and skin. A Facebook message sent by Mr. Moazami later corroborated his use of the bear-spray. After managing to grab some of her things from the room, E.S. testified that she ran back to the elevator. She stated that Mr. Moazami jumped in the elevator with her and punched her in the back of the head. E.B. testified that she saw Mr. Moazami punch E.S.
- [118] Mr. Fisher was charged with sexually assaulting E.S. between October 22, 2011 and June 15, 2012. Mr. Fisher was charged with breach of trust in relation to E.S. between October 22, 2011, and June 15, 2012. These charges were stayed. The Crown accepts E.S.'s sworn statement as described below. The Crown does not accept E.S.'s unsworn statement. The Crown admits that Mr. Fisher kissed E.S. at some point before the Avails trial ended.
- [119] On January 3, 2017, E.S. was interviewed by the investigators. This is the statement the Crown emphasises was unsworn. She told them that the first time she met Mr. Fisher, he offered her weed. She told them the second time he met her, he took her to Earl's and it "felt like a date". She explained, during this statement, that the meeting at Earl's took place prior to Mr. Moazami's trial. In 2012, he arrived at her house to speak with her. She had just gotten out of the shower and was wrapped in a towel. He wanted to interview her right

away, but her mother intervened, and said that she would change first. She went out and sat in his car, and he kissed her on the lips and gave her money. Afterwards, he texted and apologized to her. The next time she met him, he took her to the Grouse Mountain parking lot, and asked her to give him a blow job, which she reluctantly did. She said Mr. Fisher told her that he would help her with the "court stuff", as she was afraid that Mr. Moazami was going to be released.

- [120] On January 11, 2017, E.S. gave the police a "KGB" statement, a statement where she was under oath, and warned of the criminal consequences of making a false statement: *R. v. B(K.G.)*, [1993] 1 SCR 740. In addition to the kissing incident referred to above, she told the police that Mr. Fisher added her to his Facebook account, and requested naked photos of her. She did not send him naked pictures. She recounted going to Earl's, but was not as clear in terms of the chronology. Bank records and a receipt show that Mr. Fisher visited the Earl's location E.S. spoke about on June 15, 2012. Mr. Fisher gave E.S. money, and her friend suggested she blackmail him. E.S. said Mr. Fisher gave her \$20 the day of the kiss, and around \$200 another time because she told him she needed it to pay a debt or she would be killed.
- [121] E.S. refused to recount the incident she had disclosed at the Grouse Mountain parking lot during the KGB statement. She told the police that Mr. Fisher never asked her to lie or change her evidence. She said, "[Mr. Fisher] never told me what to say or make [Mr. Moazami] look worse than he already did, like I don't think he really could have anyways . He looked pretty bad anyway".
- [122] E.S. provided the police with her Facebook password, but they could not find anything in relation to Mr. Fisher as he had already deleted his account.
- [123] E.S. has also filed a civil suit against Mr. Fisher, the City of Vancouver, the VPD, the Province, and Jane and John Doe (alleged to be Mr. Fisher's supervisors).
- [124] In order to assess the effect of whether Mr. Fisher's conduct in some way affected her evidence at trial (or whether there was a reasonable possibility), it is necessary to examine carefully the prior statement given by E.S. in respect of Mr. Moazami on January 8, 2013, which was primarily taken by Detective Tchang, although Mr. Fisher was present, and her testimony at trial.
- [125] In her statement from January 8, 2013, E.S. told the police that she met Mr. Moazami when she was 15 years old. She said they were good friends, and he would give her free drugs. Sometimes they would do drugs together, often at his various residences. She confirmed these details in her testimony.
- [126] E.S. told police that she figured out that Mr. Moazami was making money through the prostitution of the complainants. E.S. explained that Mr. Moazami would pretend to be the girls' boyfriend, and that they would believe it. She said that when she started hanging around the girls more, she started to figure out that they were not "working" for themselves,

but for Mr. Moazami. She told police that Mr. Moazami told her he was "taking care" of the girls, so they would not work on the street. She noticed, however, that they never had money, and they were never allowed to leave. E.S. also told police that despite Mr. Moazami's assurances that he was protecting the girls, she would notice things that made her believe differently (for example, threatening to make them pay for anything, mocking their drug habits, etc.). Each of these details were confirmed and restated in her testimony. E.S. told the police, in her statement, that Mr. Moazami would always ask the girls "where's my money" in Farsi, or "poolan coo" [phonetic]. E.S. said that "poolan coo" was also his caller I.D. name. This exact detail she confirmed in her evidence at trial.

- [127] She told police that she knew that men were coming to the apartment to have sex with the girls, for example, S.W. She said that Mr. Moazami never tried to get her to "work" for him, but did ask her to write the online ads, which she occasionally did. E.S. told police in her statement that she was "[Mr. Moazami's] spy pretty much on these girls". Her testimony detailed the portion of her statement about her role in the online ads and her role in "watch[ing] the other girls", stating, however, that it was "not necessarily to spy". Her testimony also confirmed that she knew why men were frequenting the apartment.
- [128] In her statement, E.S. told the police about how she and Mr. Moazami hid in the laundry room of the apartment "twice" when the complainants were meeting with "johns". She confirmed this in cross-examination, stating that while she and Mr. Moazami would typically leave the apartment, "only maybe once or twice" she and Mr. Moazami hid in the back room (which was a "laundry room or a storage room"). In her statement to police, she explained that Mr. Moazami had set up surreptitious cameras in stuffed animals to film the complainants while they were working, which she confirmed in her testimony. In her statement, she told police that when a "date" came over, she would stay in the laundry room or she would go "like outside", but did not mention being in the bedroom during this time. In her testimony, she stated that there were occasions where she was in the bedroom while a complainant would be working.
- [129] Also in her statement, E.S. told the police about Mr. Moazami's methods of dealing with the girls' menstruation while working, including the use of sponges and red condoms. E.S. subsequently testified to these exact details.
- [130] E.S. told the police in her statement about Mr. Moazami's violence towards the girls' pets. She was not asked about this at trial. E.S. said in her statement that on a couple of occasions she visited Mr. Moazami's mother's house, but never met his mother. She was also not asked about this at trial.
- [131] The most contentious portion of E.S.'s evidence concerned the Victoria bear-spray incident. As mentioned earlier, E.S.'s evidence on this particular incident was corroborated by the testimony of E.B., and by Facebook messages sent by Mr. Moazami. In her police statement on January 8, 2013, E.S. reports substantially the same details regarding the Victoria bear-spray incident as she did in her testimony.

- [132] In her statement, E.S. said she and E.B. went to Victoria with Mr. Moazami when E.S. was 16 years old. E.S. told police the purpose of the trip was for Mr. Moazami to make money from "E.B. turning tricks"; this was confirmed in her evidence at trial. She told police they stayed in a hotel on Douglas Street, by the Shark Club. She recounted that she and E.B. had left the hotel at one point, and got lost drinking and "looking for dope". She told police that when they got back to the hotel, Mr. Moazami punched her in the head and bear maced the hallway, so "[she] couldn't get back in". She told police that the bear spray "[stuck] in the air". She also said that Mr. Moazami cut E.B.'s cheek. In the end, she said her mum came and picked her up and took her home. She testified consistently to all these details, as canvassed in para. 117 of these reasons.
- [133] In E.S.'s sworn statement, she told investigators that Mr. Fisher never asked her to lie or change her evidence. Mr. Moazami has not demonstrated anything to suggest that Mr. Fisher's admitted misconduct with respect to E.S. altered or affected her testimony. Thus, in our view, there is no evidence that Mr. Fisher's misconduct in relation to E.S. affected or could have affected her evidence against Mr. Moazami in the Avails trial.
- [134] On October 26, 2015, Z.C. gave a sworn statement to Mr. Fisher in an unrelated trial. She was a complainant in a case involving another "pimp" by the name of Bannon.
- [135] Mr. Fisher was charged with sexually assaulting Z.C., and committing breach of trust in relation to Z.C., between August 22, 2015 and December 7, 2015. The agreed statement of facts in Mr. Fisher's trial reveals that there were three assaults against Z.C. Between August 22 and 30, 2015, Mr. Fisher kissed Z.C.; on November 21, 2015, Mr. Fisher kissed Z.C.; and on December 7, 2015, Mr. Fisher kissed Z.C. She was 17 years old at the time of these offences against her.
- [136] On March 25, 2016, Z.C. was at a rave party in Vancouver and she was apprehended by security for drug possession. She was taken to the police, and subsequently disclosed the kissing incidents with Mr. Fisher. As a result, an investigation into Mr. Fisher's conduct commenced.
- [137] The VPD investigation into Mr. Fisher's conduct included engaging Z.C. and H.W. (discussed below) as police agents (on June 15, 2016, and September 23, 2016, respectively), and intercepting phone calls and recorded meetings with Mr. Fisher.
- [138] Though Z.C. was not involved in Mr. Moazami's case, Mr. Fisher's conduct in relation to her is relevant to the overall picture of what occurred. However, Mr. Fisher's misconduct towards Z.C. could not have affected the fairness of Mr. Moazami's trial.
- [139] In relation to H.W., Mr. Fisher was initially charged with sexual assault of H.W., and obstructing justice by misleading a police officer in relation to an offence committed by H.W. (referred to as the "Burnaby stabbing incident"). Mr. Fisher pleaded guilty to committing a breach of trust by kissing H.W. for a sexual purpose between December 3 and December 6, 2015.

- [140] H.W. first gave three videotaped statements concerning Mr. Moazami to the police: on March 17, August 26 and December 14, 2011. She admittedly lied to the police in the first statement, identifying herself as S.W., and answering the questions as if she were S.W. The second statement was made when she was in a "safe" house in Calgary. Detective McLachlan and Mr. Fisher interviewed her, and she gave details regarding her dealings with Mr. Moazami. The third statement was in relation to her dog, Gucci. H.W. was aiding the police in identifying Gucci. H.W. explained how Mr. Moazami had possession of Gucci, and was refusing to give Gucci back until H.W. paid Mr. Moazami \$11,000.
- [141] H.W. testified on October 15 to 18, and October 22, 2013. Her videotaped statements were first tendered by the Crown as admissible pursuant to s. 715.1 of the Criminal Code (allowing admission of a videotaped statement given by a person under age 18 if adopted as true). H.W. did not adopt the statements as true: she had significant memory loss, to the point the trial judge permitted the Crown to cross-examine H.W. as an adverse witness. The Crown called the officers who took the statement, including Mr. Fisher. The second statement was ultimately admitted under the principled exception to the hearsay rule, as meeting the necessity and reliability test: see the Oral Ruling re Admissibility of Statements of H.W., indexed as 2013 BCSC 2399 (the "Ruling"). The trial judge stated, at para. 15 of the Ruling, that it was "difficult to imagine a less credible witness than H.W.", and held that she would only give weight to the parts of H.W.'s evidence that were corroborated by other evidence.
- [142] Mr. Moazami was charged with five counts in relation to H.W.: procuring to become a prostitute (Count 24), living on the avails of prostitution with coercion (Count 25), controlling her for the purpose of exploitation (Count 26), sexual exploitation of a young person (Count 27) and sexual assault (Count 28). The trial judge concluded as follows: Count 24, acquitted; Count 25, acquitted of coercion, but convicted of included offence of living on the avails of prostitution of a person under the age of 18 years; Count 26, acquitted; Count 27, convicted; and Count 28, acquitted.
- [143] Mr. Moazami alleges that Mr. Fisher began acting inappropriately with H.W. in 2011. We will address each complaint to ascertain the true scope of Mr. Fisher's misconduct in relation to H.W.
- [144] The complaint to the police in relation to H.W. was through a victim worker, L.M., on May 27, 2016. L.M. reported a number of incidents apparently told to her by H.W.; however, they had occurred within the previous year.
- [145] Mr. Moazami alleges that Mr. Fisher did favours for H.W. as an underage sex worker, including: tracking down "johns" to apologise for assaulting her; giving her money; obtaining a no-contact order for her against a person who threatened that she would "be exposed"; and taking her to detox. Mr. Moazami also alleges that Mr. Fisher engaged in misconduct relating to H.W., including making inappropriate comments to her; and touching her breasts.

[146] The following is from the Agreed Statement of Facts filed in Mr. Fisher's sentencing:

81. Fisher helped [H.W.] in many ways:

- a. She had phoned him 3 times in applying for jobs, to find out what her SIN number was. He finally started keeping her SIN in his phone so he could provide it to her when she needed it;
- b. He served a warning letter to a male who was sending her threatening text messages. That male then left her alone;
- c. He tracked down a man with whom she had had a "bad date";
- d. He (and the CEU) worked with her for 5 years. They took her to the emergency room and detox when she was dope sick. She called Fisher when she felt overwhelmed by her drug addiction;
- e. He worked with American authorities in an attempt to have a photo posting of [H.W.] removed from the internet. A male had posted this photo without [H.W.]'s consent and [H.W.] wanted it taken down; and
- f. He responded to her questions about the laws surrounding prostitution related offences.

[147] The evidence does not disclose that Mr. Fisher conducted himself inappropriately until, at the earliest, 2014. The only evidence of Mr. Fisher touching H.W.'s breasts prior to 2014 was in the double hearsay police statement provided by L.M., who said that H.W. told her that Mr. Fisher touched her breasts when she was 17. The offence Mr. Fisher pleaded guilty to occurred in December 2015.

[148] The evidence does disclose that Mr. Fisher made supportive efforts for H.W. early on. H.W. told investigators that, in the beginning, Mr. Fisher was always professional, and she became close to him. He was "like a father" to her, which is why his breach of trust was aggravated.

[149] Mr. Moazami alleges that on October 22, 2013, H.W. testified that Mr. Fisher promised her \$50,000. This is evidence that was canvassed at trial. On appeal, Mr. Moazami tried to characterize it as Mr. Fisher offering H.W. money to testify, when it was nothing of the sort. H.W. testified that Mr. Fisher called her and told her that he was getting two million dollars and that she would get \$50,000 for testifying; she should see one of the Crown counsel to receive it. H.W. testified that she found out that the \$50,000 "was a joke". In 2012, prior to trial, as a matter of public record, the federal government had announced two million dollars in funding for federal, provincial and municipal police departments aimed at anti-human trafficking measures.

- [150] Mr. Moazami alleges that in October 2014, the investigation showed an unusual level of familiarity between Mr. Fisher and H.W., including communication on both "work" and personal Facebook accounts. This is a mischaracterization of the evidence. H.W. knew that Mr. Fisher had two accounts, and he asked her to use his work Facebook account for purposes of communication.
- [151] On January 22, 2015, H.W. texted Mr. Fisher for advice about seeing an underage client. Mr. Moazami says that Mr. Fisher gave her advice. The evidence demonstrates that what Mr. Fisher did was tell her what the law said, and that he could not "give her permission".
- [152] On January 29, 2015, Mr. Fisher told H.W. about other unrelated investigations. H.W. said that an individual (it is unclear who this person was) was sending her death threats. Mr. Fisher told H.W. to keep all the messages. H.W. was asking Mr. Fisher to help her to delete something this individual had posted on Facebook. That same day, H.W. asked Mr. Fisher if CH2 was a missing person; Mr. Fisher did not reply.
- [153] Mr. Moazami alleges that on June 8, 2015, Mr. Fisher advised H.W. how to cover up the Burnaby stabbing incident. On that date, a physical altercation took place in Burnaby between the male victim and another male, and the victim was stabbed. A female was seen trying to jump on the victim's back. The male suspect and the female left in a car, later determined to be stolen. The victim told police he had met with the female to buy drugs.
- [154] H.W. admitted to being involved in the Burnaby stabbing incident, but was given immunity when she cooperated in the investigation into, and prosecution of, Mr. Fisher. The Agreed Statement of Facts in Mr. Fisher's sentencing sets out in detail what occurred, and is summarized below.
- [155] H.W. gave a statement to police on September 16, 2016. She told investigators that, on the day of the Burnaby stabbing incident, she and her ex-boyfriend travelled to Burnaby to sell the victim Suboxone. She said that after selling the Suboxone, a physical altercation began between her ex-boyfriend and the victim, and she believed the victim was going to kill her ex-boyfriend. In defence of her ex-boyfriend, she stabbed the victim with a knife, and then fled the scene.
- [156] In her statement, H.W. explained her communications with Mr. Fisher subsequent to the Burnaby stabbing incident. The day after the incident, on June 9, 2015, H.W. texted Mr. Fisher and asked him to meet her that day, in private. By way of text message, Mr. Fisher agreed to meet but wrote: "Adam will be with me. We can still talk in private though " They met that day and discussed the Burnaby stabbing incident. H.W. learned from Mr. Fisher that: the victim's injuries were not life-threatening, the police did not know who the female at the scene was, and the victim knew details about H.W.'s ex-boyfriend.

- [157] Then, on June 10, 2015, Mr. Fisher called the Burnaby RCMP and spoke with Constable Grant. He advised that he had received a phone call from H.W. who had witnessed the stabbing, and provided the Burnaby RCMP with H.W.'s information. Constable Grant attempted to text message H.W., but she did not respond.
- [158] That same day, Mr. Fisher texted H.W., telling her that he had spoken with Burnaby RCMP and that they wanted to meet with her. He provided H.W. with contact information for Constable Grant. H.W. expressed to Mr. Fisher hesitation about reaching out to the Burnaby RCMP, and Mr. Fisher responded: "They will definitely be calling you. Going to them is way better for you. Get ahead of it instead of it chasing you".
- [159] On June 14, 2015, Constable Von Ferson emailed Mr. Fisher to request his assistance in contacting H.W. Mr. Fisher responded on June 25, 2015.
- [160] On June 15, 2015, H.W. began using a new phone number. From June 16, 2015 onwards, the text messages between H.W. and Mr. Fisher used only her new number. Between June 16 and June 18, 2015, H.W. and Mr. Fisher exchanged 15 text messages. Between June 15 and June 24, 2015, H.W. and Mr. Fisher exchanged 7 phone calls. The last of these lasted more than 22 minutes.
- [161] Mr. Fisher's reply email to Constable Von Ferson, dated June 25, 2015, stated that Mr. Fisher had been trying to reach H.W. by various means, and that H.W. had called him and left him a message. Mr. Fisher provided Constable Von Ferson with the phone number Mr. Fisher claimed H.W. had called him from when she left the message--but provided H.W.'s old phone number. Mr. Fisher said he had tried calling that number, but had been unable to reach H.W. He said that he did not know where H.W. resided, but stated: "If I find a way to reach her I will pass on your information and ask her (again) to call you".
- [162] Mr. Fisher never provided the Burnaby RCMP with H.W.'s new number, and H.W. never spoke with the Burnaby RCMP regarding the Burnaby stabbing incident.
- [163] Mr. Moazami alleges that Mr. Fisher deleted information from the police report to "cover up" the Burnaby stabbing incident. There does not appear to be any admissible evidence that this actually occurred. Rather, the evidence is from the investigator's report. That report was based on the support worker's statement, which in turn was based on what the support worker said she was told by H.W. about what Mr. Fisher told H.W. he would do.
- [164] On November 3, 2015, H.W. texted Mr. Fisher and asked for advice regarding a rental for an in-call (sex trade work). Mr. Moazami suggests that Mr. Fisher then provided her advice on what to do. The actual texts are as follows:

FISHER: I'm not giving permission for anything. Just advice. Be careful who you deal with. Make sure they can be trusted.

H.W.: That's not to [sic] bad

H.W.: Oh okay

FISHER: They would be legally responsible for rent and any damages.

H.W.: If I am putting it in my friends [sic] name because they won't rent to me. Whould [sic] that person be liable for anything?

FISHER: It's a risk but not big.

FISHER: There will be condo rules about running a business from the unit. Most don't allow business in the place. The only criminal law Would be receiving a benefit from prostitution but there are exemptions to that law. We aren't sure if renting out a place by the hour is illegal. Also there much interest [sic] in investigation unless a woman is being exploited.

H.W.: Am I breaking a law, or am I like liable for anything, if I rent a condo, & then rent it out as an Incall to my gfs? Like for a daily rate?

[165] Mr. Moazami says that Mr. Fisher on two occasions told H.W. about in-call locations that were about to be "busted". One of the in-call locations was run by H.W., and one by C.D.

[166] In respect of the first occasion, on November 3, 2015, H.W. asked Mr. Fisher about renting out a condo. Immediately after, H.W. was working out of a condo owned by C.D. On November 19 and 25, 2015, H.W. and Mr. Fisher exchanged text messages about an underage girl ("S2") working there. It was during this time that H.W. informed C.D. that the police would be investigating the condo, and S2 was kicked out. At one point, M.N. confirmed with Sergeant Jette that "S2" was one of her working names.

[167] Concerning the second occasion, H.W. told investigators that an underage girl (N.V.) was working and that, as a result of Mr. Fisher's tip about a possible "bust", she kicked N.V. out. H.W. said that, on March 21 and March 22, 2016, Mr. Fisher provided her with further information about N.V. This is therefore likely when the second in-call incident took place.

[168] As the Crown points out, both incidents arose years after H.W. gave her police statements in relation to Mr. Moazami and testified at trial.

[169] Mr. Moazami also says that Mr. Fisher helped H.W. recruit girls to work in the sex trade. Mr. Moazami points to "CH2" as an example. However, text messages between Mr. Fisher and H.W. suggest that Mr. Fisher did not introduce H.W. and CH2, but rather that they already knew each other. Those text messages do not evince any misconduct on the part of Mr. Fisher in relation to either H.W. or CH2.

[170] On January 31, 2016, H.W. asked Mr. Fisher for help to find her father.

- [171] On October 2, 2016, H.W. told investigators that Mr. Fisher was, at some point, instructed by his superior not to meet H.W. in the absence of his partner because of rumours at CEU that they were having sex. H.W. said, however, that she continued to meet up with Mr. Fisher alone. H.W. told investigators that even if Mr. Fisher's partner was present, Mr. Fisher and H.W. would "still talk privately", for example, "around the corner".
- [172] On December 6, 2016, Mr. Fisher told H.W. to delete all texts and Facebook messages between them. By this time, H.W. was a police agent, and did not delete the information.
- [173] Thus, it is clear that the misconduct with H.W. commenced after she testified. In any event, the trial judge clearly did not rely on her evidence, except where it was corroborated by other witnesses.
- [174] The facts, which the Crown accepts in the absence of an affidavit of H.W., in relation to Mr. Fisher's plea are set out in the provincial court judge's reasons for sentence, indexed as 2018 BCPC 210:
- [27] On December 3, 2015 (after the Moazami trial), [H.W.] sent a text message to Mr. Fisher. Mr. Fisher responded asking [H.W.] to meet with him to discuss an investigation into a pimp. Mr. Fisher met [H.W.] in his personal vehicle alone.
- [28] While in his vehicle with [H.W.], Mr. Fisher complimented her on her physical appearance calling her attractive. They chatted for about fifteen minutes and as they were saying goodbye they hugged. Mr. Fisher asked [H.W.] for a goodnight kiss and he kissed her on her lips.
- [29] [H.W.] exited Mr. Fisher's vehicle and began to cry. She was upset over the kiss in his vehicle. She called her ex-boyfriend to pick her up. Following the kissing incident, [H.W.] told the police that she began to drink every day. At the time of this incident [H.W.] felt that she and Mr. Fisher were very close. She viewed him as a father figure. She trusted him more than anyone else in her life.

Analysis

- [175] The issues in this case have been raised, for obvious reasons, for the first time on appeal. Thus, this Court is addressing the issues of miscarriage of justice and abuse of process in the first instance. Both carry similar tests, invoking trial fairness and the integrity of the administration of justice.
- [176] It was not argued by either party that the abuse of process doctrine falls within the miscarriage of justice power of the appellate court (s. 686(1)(a)(iii)), but was argued as a separate doctrine giving rise to a separate remedy, as it would had it been considered in the trial court. We do not think that is the correct approach when the appellate court is considering the issue for the first time on appeal, nor have we found a case that has addressed this issue. It seems to us that when the issue of abuse of process is raised for the first time on appeal, this Court's ability to give a remedy lies in whether there is a

miscarriage of justice pursuant to s. 686(1)(a)(iii). The tests are similar (or perhaps identical in the appeal context), so that the conclusion on one would follow the other. Thus, if this Court found an abuse of process, then it follows that there has been a miscarriage of justice and the remedy falls within s. 686(1)(a)(iii).

- [177] Given that we would reach the same conclusion regardless of the analytical approach to the issues, and there was no issue raised or argument on the point, we will say no more regarding the interplay between the statutory provision and the doctrine of abuse of process.
- [178] Mr. Moazami submits that the cumulative effect of the evidence in relation to Mr. Fisher's misconduct satisfied the "reasonable possibility" test set out in *Taillefer*. He says that in a new trial he would be able to cross-examine the complainants, and Mr. Fisher, on the text messages and other allegations, undermining their credibility. The test, however, is not whether there is a reasonable possibility that the fresh evidence would be useful in a new trial, but whether it could have affected the outcome or the fairness of the trial under appeal.
- [179] Mr. Moazami submits that all the evidence meets the test in *Taillefer* as it is reliable on the basis of "investigative hearsay".
- [180] The Crown says that none of the evidence, other than that which has been conceded, is admissible. It is all otherwise hearsay, and therefore inadmissible at the outset.
- [181] In our view, the Crown is correct. Mr. Moazami's fresh evidence has been submitted as appended to the affidavit of an articling student. No one can be cross-examined on the evidence provided, except for Mr. Moazami on his affidavit (and he was cross-examined before this Court on that affidavit). In our view, the evidence does not meet the bare threshold of admissibility.
- [182] Investigative hearsay is evidence that can set out the narrative of a police investigation. As noted above, it does not make the evidence admissible for the truth of the contents, which is what is required for the evidence to assist Mr. Moazami. Mr. Moazami argued that he was not tendering the evidence for the truth, but to show that had the evidence been available before or at trial, Mr. Moazami would have been able to cross-examine, and pursue the potential for undue influence. As already shown, only one witness, E.S., could have been cross-examined at trial as all of the other alleged conduct occurred after the complainants had given their evidence. In our view, the fresh evidence is not admissible as "investigative hearsay": see *Van* at paras. 26 and 38.
- [183] However, it is not necessary to decide the case solely on that basis. Assuming that the evidence is in an admissible form, the best that could be determined for Mr. Moazami based on the evidence filed (including that filed by the Crown) is that Mr. Fisher's impugned conduct with any of the complainants occurred after they testified. The one exception was M.N., who was recalled and gave uncontroversial evidence in relation to financial records.

- [184] In *R. v. Johnston*, 2019 BCCA 107, in an application for disclosure in this Court, the Court concluded that there was no reasonable possibility that events that occurred after a witness testified could have affected his credibility, and were therefore not relevant:
- [185] To begin with, I see no basis for concluding that post-trial management of Person Y within the corrections system after he was admitted into the WPP [witness protection program] could be relevant in the prosecution of the appeal. I do not see a reasonable possibility that this could have affected Person Y's testimony or challenges to his credibility, nor could it have been disclosed prior to trial. In my view, the records relating to Person Y's WPP status and time in custody after he testified and following his acceptance into the WPP are irrelevant. The appellants' applications for these records must be dismissed.
- [185] Even if the evidence were admissible, it is clear that the only witness whose evidence could have been compromised by Mr. Fisher's odious actions was that of E.S. Her evidence required careful scrutiny. Her detailed statement, albeit given in 2013, was consistent with her trial evidence. The most contentious part of her evidence, relating to the bear-spray incident, was corroborated by E.B. and Mr. Moazami. She was clear in her sworn statement to the investigators that Mr. Fisher never asked her to change or alter her evidence.
- [186] Whether there was a miscarriage of justice, or an abuse of process, in this case is fact-driven. No one disputes that Mr. Fisher's conduct was abhorrent, and breached the highest of trusts in terms of the women whom he offended against. However, based on the timing of his actions, it is clear that his conduct did not in any way affect the fair trial rights of Mr. Moazami. There is no evidence that supports the argument that such rights were affected. Save for E.S., all of the conduct alleged occurred after the testimony was given at trial. There is no evidence capable of supporting the allegation that the evidence of any of the complainants or witnesses was changed to the prejudice of Mr. Moazami.
- [187] We have addressed E.S.'s testimony above. In our view, her evidence was not tainted by Mr. Fisher's conduct. And even if it were, her evidence was of little significance in the overall trial. She was not a complainant, and the gist of her evidence was repeated by a number of other witnesses.
- [188] Mr. Moazami's arguments on trial fairness that he would cross-examine the complainants on Mr. Fisher's contact with them at a new trial, or impugn their credibility somehow, are irrelevant. Similarly irrelevant is his evidence that he would have elected a trial by jury, or considered not testifying. The question is not what Mr. Moazami would do if he had a new trial, it is whether there was a reasonable possibility that Mr. Moazami's trial was unfair. The answer is a resounding no.
- [189] Turning to the residual category, which is concerned with the reputé of the administration of justice, the question is whether, cumulatively, Mr. Fisher's conduct was so egregious that a new trial is required to restore the public's faith in the administration of justice.

[190] In our view, when balancing the prejudice to the integrity of the justice system, the answer again is a resounding no. Mr. Fisher's conduct was appalling. Nothing we say in any way condones his actions as revealed in this case. Mr. Fisher has been convicted and punished for his conduct, and lost his career. To give the benefit of a new trial to Mr. Moazami, requiring the complainants to testify again, would, in our view, bring the administration of justice into disrepute and impugn the integrity of the justice system. H.W., E.S., M.N. and Z.C. were abused by Mr. Fisher and Mr. Moazami. It defies logic to conclude that the administration of justice requires that Mr. Moazami receive a new trial based on Mr. Fisher's conduct.

d) Disclosure of the Facebook Accounts

[191] Mr. Moazami complains that Mr. Fisher deleted his Facebook account that had been set up for the complainants. He submits that this was important information, and tantamount to the destruction of evidence by the police.

[192] Mr. Moazami has been aware that Mr. Fisher had a Facebook account since 2015. Indeed, Mr. Fisher testified about his Facebook account during the Obstruct trial. He testified that he set up an account so he could communicate with the complainants, not so the complainants could communicate with each other.

[193] In March 2014, the defence made an application relating to Facebook evidence, namely "accidental captures", which are messages unexpectedly gathered by the police in the course of the investigation. In an in camera proceeding on March 10, 2014, the judge dismissed the application due to the lengthy delay and because Mr. Moazami had "failed to establish the likely relevance of the records, because the accused [had] failed to demonstrate that the records are necessary to permit him to make full answer and defence", and that it was not in the interests of justice to grant the application. No appeal is taken from that ruling.

[194] The failure of the police to seek an order producing documents from Facebook pursuant to the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.), was raised before this Court during an application for further disclosure, but this Court accepted the Crown's explanation that there were insufficient grounds for such a request: *R. v. Moazami*, 2020 BCCA 3 at paras. 54, 58-59. In addition, this Court did not find it necessary to appoint a special commissioner to investigate the disclosure issues: at para. 60.

[195] The evidence suggests that Mr. Fisher had two Facebook accounts. One was a work account, and the other may have been a personal account. Mr. Moazami argues that he should obtain a new trial on the basis that he should be entitled to explore the issue of Mr. Fisher's Facebook accounts. There is no evidence that the complainants were communicating with each other through the Fisher Facebook accounts. This Court has already concluded that there was insufficient relevance to order further disclosure. Mr. Moazami was invited by this Court in his earlier application to make further applications for records, but did not pursue that avenue of disclosure.

[196] There is nothing beyond speculation that there were Facebook accounts by which surreptitious communication between the complainants was occurring. It appears to us that Mr. Moazami is looking for something that might have undermined the evidence of the complainants as a result of what might have been found on the Facebook account. There is no evidence, for instance, that the Facebook accounts were set up before the complainants gave their initial statements.

[197] In our view, the fresh evidence does not meet the test in *Dixon and Taillefer*, or *O'Brien, Teneycke or Jia*.

[198] It follows that we do not give effect to this ground of appeal and we refuse to admit the fresh evidence.

Ineffective Assistance of Trial Counsel

[199] The second issue on appeal concerns Mr. Moazami's allegation of ineffective assistance of trial counsel.

a) Legal Framework

[200] Ineffective assistance of counsel is capable of producing a miscarriage of justice that undermines the verdicts reached. Usually a submission of this ground of appeal requires the admission of fresh evidence as provided for in s. 683(1)(d) of the Criminal Code.

[201] In this case, Mr. Moazami's complaints of ineffective assistance of counsel rely on the record, and it is the Crown's application before us to adduce fresh evidence from trial counsel in answer. That application, too, is assessed on the general principles regarding fresh evidence discussed above. In respect of an issue of ineffective assistance of counsel, this Court in *R. v. Hamzehali*, 2017 BCCA 290, analyzed the issue this way:

[34] The evidence tendered does not relate to a factual matter in terms of an element of the offence.

[36] In *R v Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667, this Court said:

[35] The most significant modification of the Palmer principles, where the fresh evidence goes to the integrity of the trial process, is the relaxation of the due diligence criteria: *R. v. Appleton* (2001), 156 C.C.C. (3d) 321, 55 O.R. (3d) 321 ¶16-17 (C.A.).

[36] Where the fresh evidence goes to the integrity of the trial process, appellate courts also have not rigidly adhered to the procedure for admitting fresh evidence on appeal set out in *R. v. Stolar*, [1988] 1 S.C.R. 480, 62 C.R. (3d) 313, 40 C.C.C. (3d) 1: see, e.g., [*R. v. Joannis*, [1995] O.J. No. 2003 (C.A.)] at 43-44; *R. v. W.W.*, (1995), 25 O.R. (3d) 161, 100 C.C.C. (3d) 225 at 233-34 (C.A.); *R. v. Peterson* (1996), 27 O.R. (3d) 739, 106 C.C.C. (3d) 64 at 80 (C.A.); *R. v. Dean* (1997), 95 B.C.A.C. 278, 39 B.C.L.R. (3d) 287 ¶73. In each of these cases, the court admitted fresh evidence so that it could properly evaluate the integrity of the trial process. This inquiry differs from the usual situation contemplated in *Stolar* where the fresh evidence goes to a

substantive issue at trial and a ruling that it is admissible means, according to the fourth Palmer criterion, that the fresh evidence could reasonably be expected to have affected the result at trial. Instead, where the fresh evidence is adduced to challenge the integrity of the trial process, the fresh evidence can be admitted and the question of whether a miscarriage of justice occurred then assessed to determine whether a new trial is required.

- [37] Although the due diligence factor and strict Stolar procedure may be disregarded in the context of the present case, the other Palmer criteria remain applicable. In particular, the relevance of the fresh evidence and its credibility are important factors to consider: *R. v. Hector* (2000), 146 C.C.C. (3d) 81 ¶20-21, 132 O.A.C. 152 [Hector]; *Joanisse*, supra at 48-49. In addition, it is clear that the fresh evidence must be otherwise admissible in the sense that it complies with the generally applicable rules of evidence: *R. v. O'Brien*, [1978] 1 S.C.R. 591, 35 C.C.C. (2d) 209 at 216-17; *W.W.*, supra at 234; *R. v. Gumbly* (1996), 112 C.C.C. (3d) 61 at 71-72, 155 N.S.R. (2d) 117 (C.A.); *R. v. P.(T.)* (2002), 165 C.C.C. (3d) 281, 4 C.R. (6th) 369, 59 O.R. (3d) 577 at 582 (C.A.). Evidence comprised of hearsay, speculation, opinion or mere argument is no more admissible as fresh evidence on appeal than it is at trial: *R. v. Teneycke* (1996), 77 B.C.A.C. 138, 108 C.C.C. (3d) 53 ¶18; *R. v. I.B.* (2001), N.B.R. (2d) 195, [2001] N.B.J. No. 199 ¶8 (C.A.).
- [37] This approach was reaffirmed in *R. v. Aulakh*, 2012 BCCA 340.
- [39] The way to approach the admissibility issue is to determine whether, based on the fresh evidence, there was a miscarriage of justice as a result of counsel's conduct in the context of the applicable legal framework. If so, the evidence should be admitted and the appeal allowed.
- [202] What is meant by a miscarriage of justice is discussed in *Davey* at paras. 50-51, as quoted above.
- [203] Whether there has been a miscarriage of justice by reason of ineffective assistance of counsel engages the legal principles set out in *R. v. G.D.B.*, 2000 SCC 22. Justice Major explained that there are two components to such a claim--a prejudice component and a performance component:
- [26] The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
- [27] Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[28] Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

Further, the onus is on the appellant to draw a link between the alleged incompetence and the prejudice suffered: *R. v. Dunbar*, 2003 BCCA 667 at para. 24.

[204] G.D.B. generally directed appellate courts to address first the prejudice component of the claim of ineffective assistance, and to dispose of the claim on that basis if it is possible to do so.

[205] The prejudice component was described by this Court in *Dunbar* by referring to Justice Doherty in *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.):

[26] He explained that a miscarriage of justice can result where the appellant establishes a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood": *Joannis*, supra at 62; *R. v. Strauss* (1995), 61 B.C.A.C. 241, 100 C.C.C. (3d) 303 at 319. Alternatively, a reliable outcome may still constitute a miscarriage of justice where the process through which that verdict was reached was unfair: *Joannis*, supra at 62; *D.B. v. British Columbia (Director of Child, Family & Community Services)*, supra ¶63-64.

[206] As to the performance component, the test is deferential, and recognizes that different counsel may have different views on how the Crown's case may be challenged: *R. v. White* (1997), 114 C.C.C. (3d) 225 at 297 (Ont. C.A.), approved in *R. v. Mehl*, 2021 BCCA 264 at para. 136. See also, in respect of ineffective assistance of counsel, *R. v. Yellowhead*, 2015 BCCA 389, *R. v. Atzenberger*, 2018 BCCA 296, *R. v. Ball*, 2019 BCCA 32, and *R. v. Tallio*, 2021 BCCA 314.

b) The Allegations of Ineffective Assistance of Counsel

[207] The allegations of ineffective assistance of counsel pursued before us, as explained in *R. v. Moazami*, 2020 BCCA 357, relate to two counts of sexual assault: Count 12 naming S.W., and Count 23 naming J.C.

[208] In answer to the complaints of Mr. Moazami, expressed initially in affidavits, the Crown has applied to admit the affidavits of Mr. Markovitz and transcripts of the examination of Ms. Bastow before the special commissioner. Mr. Moazami applied to cross-examine counsel on that evidence. The Crown applied to cross-examine Mr. Moazami. Those cross-examinations of counsel and cross-examination of Mr. Moazami took place before us.

[209] Mr. Moazami's complaints rely upon the judge's references to an absence of cross-examination of J.C. and S.W. on the issue of consent on the charges of sexual assault, and to the absence of confrontation of both complainants with the version of events that Mr. Moazami described when he testified at trial. Mr. Moazami does not say the judge erred

in referring adversely to the absence of cross-examination or confrontation. Instead, he says the judge took a view pursuant to *Browne v. Dunn* (1893), 6 R. 67 (H.L.), of the lack of confrontation that would not have been available to her had his trial counsel met the well-known standard of competence of ensuring alternative versions of central events were put to earlier-called witnesses. He says the judge's references to the absence of cross-examination and confrontation establish the prejudice component described in G.D.B., and that the absence in turn establishes the performance component.

[210] In our view, the complaints of ineffective assistance of counsel, individually and together, do not meet the criteria described in G.D.B.; these complaints do not establish a miscarriage of justice.

i) The Complaint Concerning J.C.

[211] J.C. was the named complainant in counts of procuring a person to become a prostitute (Count 20), living on the avails of prostitution (Count 21), human trafficking (Count 22), and sexual assault (Count 23). Mr. Moazami was convicted on all four counts.

[212] This ground of appeal concerns the conviction on Count 23, sexual assault. It was not disputed that Mr. Moazami had sexual intercourse with the complainant "on the first night that he introduced her to prostitution". The judge described the issue on this count as one of consent, with the defence saying J.C. was capable of consenting to sexual intercourse notwithstanding she had consumed cocaine and GHB, and the Crown contending that she was not capable of consenting because, due to the consumption of drugs, she was not sufficiently conscious to appreciate consent. This issue engaged the extent of J.C.'s drug consumption.

[213] The judge accepted the evidence of J.C. and found the evidence of Mr. Moazami did not raise a reasonable doubt. She said:

[565] The evidence is uncontradicted that Mr. Moazami provided J.C. with GHB and cocaine, which made her feel more inebriated. While J.C. testified that she received five or six doses, Mr. Moazami testified that it was only one dose. J.C. was not cross-examined about the amount of GHB she consumed that night. J.C. testified that she began to lose consciousness due to the GHB and she became more intoxicated when Mr. Moazami subsequently provided her with cocaine. After having sex with Mr. Moazami's friend in the shower, J.C. recalled that she blacked out and woke up with Mr. Moazami having sex with her in the living room. Mr. Moazami testified that J.C. invited him to have sex in the shower, which was not put to J.C. in cross-examination. Further, Mr. Moazami testified that she consented to having sex with him in the living room, which was also not put to J.C. in cross-examination. Mr. Moazami also testified that they talked "fully about it" without providing any of the content of their conversation. This version of the events was also not put to J.C. in cross-examination. I find Mr. Moazami's evidence to be incredible; I do not believe it and it does not raise a reasonable doubt. None of his testimony concerning J.C.'s consumption of GHB or her consent to having sex was put to her in cross-examination. As stated earlier,

Mr. Moazami's evidence was in general improbable, illogical and contrived.

[566] On the other hand, J.C.'s testimony that she was very high from the drugs and barely conscious was also unchallenged. J.C.'s evidence that she blacked out from the GHB and next recalled having sex with Mr. Moazami while they were in the living room was unchallenged. I accept this evidence as credible. While there are blanks in J.C.'s testimony concerning the events that occurred between getting out of the shower and waking up having sex with Mr. Moazami, it is apparent that J.C. could not have been capable of consenting to sexual intercourse with Mr. Moazami throughout the sexual act because she was unconscious for at least part of that time. Thus even if J.C. had consented to sex at the outset, that consent could not have continued to operate after she became unconscious. As the Supreme Court of Canada said in J.A., consent must be "ongoing, conscious and present" to be effective. A person cannot consent if there is no conscious, operating mind capable of granting consent throughout the sexual act: J.A. at paras. 44 and 65. Accordingly, I am satisfied beyond a reasonable doubt that J.C. was incapable of giving her consent to sexual intercourse throughout the sexual intercourse.

[214] Mr. Moazami's complaints against his counsel in respect of the conviction of sexual assault of J.C. are:

1. Mr. Markovitz asked no questions of J.C. in cross-examination on the issue of consent;
2. Mr. Markovitz never cross-examined J.C. on a KGB statement she had made, which Mr. Moazami says casts doubt on J.C.'s evidence that she did not consent, and
3. Mr. Markovitz never put to J.C. the version of events related by Mr. Moazami in his testimony, causing the judge to comment adversely on the omissions in cross-examination of J.C.

[215] In making these submissions, Mr. Moazami relies heavily on Mr. Markovitz's acknowledgement before us that J.C.'s direct evidence of ingesting drugs given to her by Mr. Moazami, of having sexual intercourse with another man in the shower, and of blacking out and awaking to Mr. Moazami having sexual intercourse with her, on its face, and without "testing" for credibility, met the elements of sexual assault. He says that being so, it was incumbent on Mr. Markovitz to directly challenge J.C. on consent as well as on the version of evidence Mr. Moazami was going to give denying the encounter was non-consensual and challenging the amount of drugs J.C. said she was given by Mr. Moazami.

[216] The Crown rests its response entirely on the performance component. It urges us to consider the complex case against Mr. Moazami and the interrelationship of the counts against him. The Crown makes several submissions. It observes first that the finding of an absence of consent was reliant on the evidence J.C. had "blacked out" and could not have been consenting during the black out--a feature that makes the question of the amount of drugs J.C. had received and consumed a matter carrying significant risk given Mr. Moazami's role in providing them. The Crown says these circumstances required the

application of professional judgment which we should not second guess. Second, the Crown says that counsel cannot be found to be incompetent in failing to put an accused's version of events to a witness when the accused's account has not been disclosed in a timely way: Yellowhead at para. 61. They say this approach applies equally to a situation in which the accused is inconstant. Third, on the issue of the KGB statement, the Crown refers us to Mr. Markovitz's testimony that the statement was ambiguous, and says that the reference in the statement, as best as can be seen on the record, related to the amount of drugs J.C. had consumed. This is a matter that was within trial counsel's discretion to let lie quiet. Finally, the Crown says that the judge made all sentences in respect of J.C. concurrent by applying the totality principle, with the result that this offence produced no additional incarceration. The concurrency of the sentences, says the Crown, further demonstrates the intertwining of the counts and vindicates Mr. Markovitz's defence of the case through a comprehensive approach.

- [217] Given the Crown's response on the issue of ineffective assistance of counsel with respect to J.C., we will address only the performance component. The Crown's submissions, in our view, are well supported by counsels' evidence, which we accept.
- [218] Both counsels' evidence included a description of Mr. Moazami as heavily involved in the defence, and inconstant in his accounts of events. Mr. Markovitz described his task as seeing to it that Mr. Moazami "had a path towards reasonable doubt", and said that he considered, and still considers, the line of cross-examination proposed in this appeal would not have assisted Mr. Moazami's case. With reference to *Browne v. Dunn*, Mr. Markovitz did not agree he was obliged to put the questions suggested in this ground of appeal to J.C. He testified that he considered aspects of J.C.'s evidence, beyond the assertion of non-consensual sexual intercourse, made her evidence weak enough that Mr. Moazami had "an opening", and said any such questions would not have put Mr. Moazami in a better position were he to testify, an event that was expected but not firmly decided when J.C. testified. In respect of the KGB statement, Mr. Markovitz said J.C. had been ambiguous, and that questioning on the statement would be at "the risk of her amplifying [Mr. Moazami's] behaviour on that night, at the risk of her amplifying even more the manner in which he administered the drugs, at the risk of many things". He considered that features of J.C.'s evidence, including that she met with Mr. Moazami to get into prostitution and had sexual intercourse with Mr. Moazami's friend, left it open to Mr. Moazami to testify that the sexual intercourse was consensual. He characterized J.C.'s answers up to then as not "as bad as what could have been", and in the context of the whole case said, "it didn't seem to be wise for me to pursue that at that point in time".
- [219] The performance component requires that counsel's representation fell below the standard of reasonable professional judgment expected from a lawyer: *R. v. Aulakh*, 2012 BCCA 340 at para. 44; *G.D.B.* at para. 27. This is a stern standard and we accord high deference to counsel in assessing his or her performance. The standard recognizes that different reasonable counsel may hold different views on the conduct of a case and the handling of

witnesses, and reasonable representation of an accused allows for a broad range of decisions and styles, informed by the differing experiences of counsel and the complexity of each case. What may be effective for one counsel or in one case may not be transferrable to other counsel or another case, and advocacy being incapable of certainty, not every well considered and reasonable strategy or examination will produce the desired result.

- [220] We accept Mr. Markovitz's explanation of his approach to cross-examining J.C. as being to preserve a path to reasonable doubt for Mr. Moazami, and in the context of this case, we should not second guess his view that examination of J.C. on the issues now proposed would not have been wise, and could have led to reinforcement of the case against his client.
- [221] Nor should we second guess counsel's view that the now proposed line of cross-examination of this witness risked damaging the defence, taken as a whole.
- [222] As to cross-examination on the KGB statement, the statement itself is not before us. The scanty information we have concerning it is that it was ambiguous, likely on the issue of the amount of drugs provided by Mr. Moazami to J.C. We can find no fault in counsel's view that cross-examination on the statement would not have been helpful.
- [223] The last consideration is the failure to confront J.C. with Mr. Moazami's version of events, or to cross-examine her on the issue of consent.
- [224] The rule in *Browne v. Dunn* was described in *R. v. Podolski*, 2018 BCCA 96, as "the confrontation principle", to which this Court said:
- [145] ... It is rooted in fairness. Its object is to prevent the "ambush" of a witness on an essential matter. The rule does not "require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change": *R. v. Khuc*, 2000 BCCA 20 at para. 44. Nor does it compel counsel to cross-examine on insignificant details: *R. v. Verney* (1993), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.).
- [225] At paras. 160-62, this Court in *Podolski* confirmed that the principle can be applied to challenges to a witness's evidence not only through calling subsequent contradictory evidence not put to that witness, but also through closing submissions.
- [226] The risk that *Browne v. Dunn* applies can be vexing for trial counsel, and requires counsel to apply professional judgment as to whether a witness must be confronted to prevent the "ambush" that the principle is designed to avoid. Yet a trial judge is given broad latitude in applying a *Browne v. Dunn* approach, and it will not always be evident to counsel how that latitude may apply in a given circumstance. Balanced against a *Browne v. Dunn* concern may be a reasonable concern that more harm may result from certain questioning than not.

[227] Much as in *Yellowhead*, we do not consider that counsel can be faulted for failing to put details of events to a witness that are subsequently proffered by the accused when the accused himself was changeable in his account of events to counsel.

[228] Defence of this count was fraught with risks. We cannot say counsel stepped outside the bounds of reasonable counsel in his handling of this charge. In our view, Mr. Moazami has not satisfied the performance component of ineffective assistance of counsel on the subject of cross-examining J.C. on the count of sexual assault; no miscarriage of justice has been established in respect of Count 23.

ii) The Complaint Concerning S.W.

[229] S.W. was the named complainant on charges of living on the avails of prostitution of a person under the age of 18, with coercion (Count 10), sexual exploitation of a young person (Count 11), and sexual assault (Count 12). The conviction of sexual assault was stayed on the basis of the *Kienapple* principle (*Kienapple v. R.*, [1975] 1 S.C.R. 729) and his conviction of sexual exploitation of S.W.: see *R. v. Moazami*, 2015 BCSC 2055 at para. 4.

[230] It was not disputed that Mr. Moazami had anal intercourse with S.W. on the identified occasion. The judge described the issue as one of consent or honest but mistaken belief of consent. The defence said that S.W. had consented to anal intercourse, or that Mr. Moazami honestly but mistakenly believed she had consented. The Crown agreed S.W. had consented to sexual intercourse with Mr. Moazami but contended she had, expressly, not consented to anal intercourse. The Crown theory was that Mr. Moazami engaged in this activity as readying S.W. for similar activity in her prostitution work. The judge accepted the evidence of S.W. and found the evidence of Mr. Moazami did not raise a reasonable doubt. The judge said:

[569] S.W. testified that she had argued with Mr. Moazami about having anal sexual intercourse with clients. She refused and he insisted that she provide this service. When Mr. Moazami attempted to have anal sexual intercourse with S.W. after they had begun having "normal sex", she said no but he continued to engage in this type of sex against her wishes. This incident occurred when they lived at 888 Hamilton Street. Regarding this incident, S.W. testified:

Q And how did you feel afterwards?

A I wasn't like, I was a little angry. I wasn't scarred or anything. It was okay after the initial first part of it, and then I was upset because, later, I discovered that the reason why was not really for his pleasure, but so that I could start doing it with clients.

[570] Mr. Moazami testified that S.W. preferred anal sex to regular sex and they engaged in consensual anal sex almost every time they had sex. It was Mr. Moazami who was shy about having anal sex. None of Mr. Moazami's evidence was put to S.W. in cross-examination. Further, Mr. Moazami did not dispute that S.W. refused to have anal sex with clients. Again, Mr. Moazami's testimony on this point is far-fetched and exaggerated. Mr. Moazami

testified that he engaged in anal sex with several of the other complainants. He could hardly have been "shy" about engaging in this type of behaviour. I find his testimony is not believable and does not raise a reasonable doubt.

- [571] Turning to S.W.'s evidence, the fact that she was only angry about Mr. Moazami's actions because he forced anal sex on her to ready her for doing this with clients is not inconsistent with saying no. S.W. was a young, naïve girl in an exploitative relationship with an older man who dominated her. It is unlikely that S.W. believed she was entitled to be angry with Mr. Moazami for having anal sex with her without her consent. I accept S.W.'s evidence that she did not consent to anal sex. It is uncontradicted that S.W. did not want to perform this service on clients and Mr. Moazami argued with her about this matter. Her version of the events is consistent with these surrounding circumstances and with the exploitative relationship between S.W. and Mr. Moazami. Forcing her to have anal sex against her wishes is consistent with the other types of coercive and intimidating behaviour Mr. Moazami used to control S.W. and ensure she continued to obey his demands.
- [572] Lastly, there is nothing in Mr. Moazami's testimony that would lead me to conclude that there is a reasonable doubt concerning his honest but mistaken belief that S.W. consented to anal sexual intercourse. I reject his evidence entirely and find that it does not raise a reasonable doubt for the reasons described earlier. Further, there is no evidence that he took any steps to ascertain whether S.W. was consenting at the time to anal sexual intercourse. Instead, I find that S.W. said no and he continued despite her wishes.
- [231] Mr. Moazami complains that Mr. Markovitz did not cross-examine S.W. on her allegation that she did not consent to anal intercourse with Mr. Moazami, and so allowed the judge to rely upon an absence of confrontation--the *Browne v. Dunn* approach.
- [232] Mr. Markovitz gave as his reason for declining to challenge S.W. on the issue of consent, his view that S.W.'s evidence of absence of consent was sufficiently weak that, absent Mr. Moazami's evidence, he should not have been convicted.
- [233] In our view, the judge's reasons reveal a path to conviction that is not dependent on a failure to cross-examine S.W. on Mr. Moazami's version of events, and we need not address the performance component in respect of this complaint. The judge found that S.W. refused to have anal intercourse with clients, consistent with refusing such intercourse with Mr. Moazami. The judge's reasons, at para. 571, negate the prejudicial component required to establish this ground of appeal. The prejudicial component is further negated by the stay of the count of sexual assault under the *Kienapple* principle, which left the count of sexual exploitation the effective conviction, a conviction that was not reliant on an incident of non-consensual anal intercourse.
- [234] Accordingly, Mr. Moazami has not established a miscarriage of justice in respect of Count 12.

c) The Fresh Evidence Application

- [235] Given our conclusions on the substance of the complaint of ineffective assistance of counsel, the proposed fresh evidence on this ground of appeal is not admissible because it could not affect the trial result.
- [236] We would like to make an observation regarding how fresh evidence is addressed in the context of ineffective assistance of counsel (or any issue affecting the integrity of a trial). The test for the admission of such evidence is a modified Palmer test, as outlined in both this section and in the abuse of process section of these reasons. The jurisprudence from this Court frames the issue in two ways, once the evidence has been found to be reliable and relevant: i) the evidence is "admitted" for the limited purpose of determining the issue at hand: Aulakh at para. 68, and cases that have followed it such as Ball at para. 103 and R. v. Jerace 2021 BCCA 94 at para. 108; and ii) the Court "receives" the evidence (per the language in s. 683(1)(d) set out above), and "admits" the evidence only if a miscarriage of justice is shown. Once admitted, a remedy (usually a new trial), is granted: Mehl at para. 23, Hamzehali at para. 39
- [237] In our view, the two approaches are not different in substance, only language. The language used in the second approach is perhaps more consistent with the Criminal Code and Stolar at para. 14, but both have the same end result. In this case, we have received and considered all of the evidence submitted, but have dismissed the applications to adduce fresh evidence.

Conclusion

- [238] The appeal is dismissed, as are the applications to adduce fresh evidence.

"The Honourable Madam Justice Saunders"

"The Honourable Madam Justice Bennett"

"The Honourable Mr. Justice Hunter"

Appendix A

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/21/03/2021BCCA0328.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-moazami-2021>

Prepared on 25 October 2026 · Esheria