

CANADA / JUDGMENT

R. v. Mohsenipour

2023 BCCA 6

COURT

British Columbia Court of Appeal

DECIDED

10 January 2023

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2023 BCCA 6 R. v. Mohsenipour

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mohsenipour,

2023 BCCA 6

Date: 20230110

Dockets: CA45957; CA45961

Docket: CA45957

Between:

Rex

Respondent

And

Kasra Mohsenipour

Appellant

- and -

Docket: CA45961

Between:

Rex

Respondent

And

Tamim Albashir

Appellant

Corrected Judgment: The judgment has been corrected
on the title page on January 27, 2023.

SEALED (IN PART)

Restrictions on Publication: Section 486.5(1) Criminal Code: An order under s. 486.5(1) bans publication of any information that could identify a victim or a witness. This publication ban applies indefinitely unless otherwise ordered.

Restrictions on Publication: Section 486.4(1) Criminal Code: An order under this section bans publication of any information that could identify a complainant or a witness. This publication ban applies indefinitely unless otherwise ordered.

Publication Ban Description:

Before:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated
January 29, 2018 (R. v. Albashir, 2018 BCSC 736, Vancouver Docket 27174).

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Place and Date of Hearing:

Vancouver, British Columbia

October 5-7, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 10, 2023

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Justice Griffin

The Honourable Mr. Justice Grauer

Summary:

The appellants were jointly tried in the Supreme Court for multiple offences arising out of an "escort" service they operated in Vancouver and Edmonton. They were convicted of all counts in which they were named as an accused, and sentenced to substantial, cumulative periods of imprisonment. They appeal from their convictions on multiple grounds, alleging legal errors and a deprivation of their right to make full answer and defence by the Crown's non-disclosure of relevant material.

HELD: appeals from conviction allowed, but only for the purpose of entering a conditional stay against four convictions on the basis of the "Kienapple principle". The appellants have not established unreasonable verdicts; legal error by the trial judge; or a miscarriage of justice. The non-disclosure of information from an unrelated prosecution file does not justify appellate interference. There is no reasonable possibility that with the benefit of this information, the trial judge might have had a reasonable doubt as to guilt. Nor is there a reasonable possibility that the non-disclosure affected the overall fairness of the trial.

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Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] The appellants, Kasra Mohsenipour and Tamim Albashir, operated an "escort" service in Vancouver and Edmonton. Following a 38-day trial by judge alone in the Supreme Court, they were found guilty of multiple offences involving three complainants who worked for them. For part of the relevant period, one of the complainants was under 18. The unpublished reasons for conviction are indexed as 2018 BCSC 736. The appellants did not testify at their trial.
- [2] The judge found that the appellants' interactions with the complainants included threatened and actual violence. He found that they exercised significant control over the complainants and exploited them. The appellants were found guilty of what is commonly referred to as "human trafficking".
- [3] The appellants challenge all of their convictions, other than a conviction for attempting to obstruct justice by offering money to one of the complainants not to testify against them. They allege multiple errors in principle that they say irreparably tainted the judge's reasoning process, credibility assessments, and his management of the trial. Relying on fresh evidence, the appellants say the trial was unfair because they were wrongly denied disclosure that was relevant to challenging the credibility of the complainants and to otherwise making full answer and defence. The appellants further apply for leave to raise a constitutional issue on appeal, alleging that the human trafficking offence in the Criminal Code, R.S.C. 1985, c. C-46 [Code] is overbroad, vague and otherwise constitutionally infirm. Notice has been provided under the Constitutional Question Act, R.S.B.C. 1996, c. 68.
- [4] Finally, the appellants submit that if their convictions are sound, the judge nonetheless erred in not conditionally staying some of them on the basis of *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14 (SCC) [Kienapple].
- [5] For the reasons that follow, I would allow the appeals, but only for the purpose of conditionally staying four of the appellants' convictions based on *Kienapple*. The remainder of the convictions should remain intact.

Background

- [6] For convenience, a chart setting out the charged offences, the dates of the offences, and the sentences imposed is attached as "Appendix A" to these reasons.
- [7] The offences were committed between May 2013 and August 2016. Legislative change occurred during that period. The Code's prostitution-related offences were amended effective December 6, 2014.
- [8] In *R. v. Mohsenipour*, 2020 BCCA 160, *aff'd R. v. Albashir*, 2021 SCC 48, a Crown appeal from acquittal involving these same appellants and the same facts, Justice Bennett explained the amendments:
- [50] all prostitution-related offences were moved from Part VII of the Criminal Code, "Disorderly Houses, Gaming and Betting", to Part VIII, "Offences Against the Person and Reputation". As well, the amendments criminalized, for the first time in Canadian history, the purchase and advertisement of sexual services: see ss. 286.1 and 286.4. These legislative changes reflected Parliament's newly minted stance towards prostitution as a sexually exploitative practice, fraught with risk, which disproportionately impacts women and girls. No longer would prostitution be viewed and treated as merely a public nuisance, as it had been in the previous iteration of the Criminal Code.
- [51] [Parliament] repealed s. 212 [of the Code] and created the "material benefit offence" in s. 286.2
- [Emphasis added.]
- [9] Because of the amendments, some of the charges against the appellants were split in two. Conduct that pre-dated December 6, 2014, was charged using the predecessor provisions. Conduct that occurred after December 6, 2014, was prosecuted under the amended provisions.
- [10] The changes to the Code were enacted in response to *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [Bedford]. In that case, the Supreme Court struck down several prostitution-related offences for contravening s. 7 of the Charter. This included s. 212(1)(j) of the Code, which prohibited living on the avails of prostitution.
- [11] At the trial, the judge quashed two counts on the indictment that charged the appellants under s. 212(1)(j) (counts 6 and 13). He did so because he found that although the appellants committed these offences while Bedford's declaration of non-constitutionality was suspended, they could not be convicted and sentenced for an offence that did not meet constitutional requirements.
- [12] The Crown appealed that ruling. This Court allowed the appeal and entered convictions for both counts: 2020 BCCA 160. The convictions on counts 6 and 13 now form part of this appeal, with the appellants challenging their validity on different bases.

- [13] In the course of her reasons in 2020 BCCA 160, Justice Bennett summarized the factual background of the appellants' case. For present purposes, that summary provides sufficient context for understanding the appellants' interactions with two of the three complainants -- KC and SC:
- [6] Mr. Mohsenipour, Mr. Albashir, and one Omar Alameddin headed an "escort" operation in which the complainants KC, SC, and NV provided sexual services to clients for money while the men financed and orchestrated logistics. They rented the premises from which the complainants worked; arranged and paid for website advertisements; provided transportation, supplies, and security; and organized the time and place for meetings with prospective clients. Mr. Mohsenipour and Mr. Albashir collected the proceeds derived from the operation and paid the complainants after deducting their percentage of the profits.
- [7] Mr. Albashir contacted KC in 2014. He expressed an interest in becoming her pimp together with his partner Mr. Mohsenipour. They agreed to terms whereby KC would receive 40% of the monies paid for sexual services and Mr. Albashir would receive 60%. In exchange, Mr. Albashir would provide supplies, advertisements, transportation, security, a location, and clients.
- [8] In the ensuing years, KC worked at various locations in the Lower Mainland. At one point, the operation shifted to Edmonton for a short time.
- [9] Mr. Albashir was violent towards KC. On one occasion, he struck her in the face and caused a black eye. On another, he grabbed her by the throat, threw her to the ground, and placed his knee on her face.
- [10] KC complained to the authorities in April 2016.
- [11] SC had heard about Mr. Albashir through her relationship with KC. Eventually, she and Mr. Albashir met. They discussed the terms of an escorting arrangement and she began taking clients immediately. Again, the respondents financed and organized all aspects of the operation.
- [12] After three weeks, SC wanted out of the business. She missed her family. She left the condominium supplied by the respondents and returned to her former home. Within a matter of days, and following multiple demands from the respondents, SC moved to a location in downtown Vancouver with KC and resumed escorting.
- [13] Like KC, SC worked at multiple locations in Vancouver between 2014 and 2016. She also moved to Edmonton for a period of time with the others. SC's relationship with the respondents was marked by the threat of violence, both physical and psychological.
- [14] SC provided a statement to the police in July 2016.
- [16] On December 22, 2016, the Crown charged Mr. Mohsenipour, Mr. Albashir, and Mr. Alameddin with 18 counts of prostitution-related offences, and one count of obstructing justice. Counts six and 13 alleged that the men lived on the avails of the prostitution of KC

and SC, contrary to s. 212(1)(j), from March 15, 2014 to December 5, 2014, and May 15, 2014 to December 5, 2014, respectively. Mr. Mohsenipour and Mr. Albashir were also charged under s. 286.2(1), the new material benefit offence, for conduct committed after December 6, 2014--when the replacement provision came into force.

- [17] Mr. Alameddin failed to appear at trial, but the Crown nonetheless proceeded against Mr. Mohsenipour and Mr. Albashir in his absence. Following the close of the Crown's case, Mr. Mohsenipour sought leave to apply to quash counts six and 13 on the indictment.
- [18] On January 29, 2018, Mr. Justice Masuhara issued oral reasons for judgment addressing the merits of the case as well as Mr. Mohsenipour's motion to quash.
- [14] The third complainant, NV, met the appellants in May 2013. She was 15 years old. A short time later, she began to work for the appellants, providing sexual services to men from an apartment in downtown Vancouver. She would collect the fees and give the money to the appellants. NV received a third of these funds. NV also performed sex work on "out calls". The appellants transported NV to and from these calls.
- [15] In August 2013, the appellants were made aware that NV was underage. She continued to work for them. In February or March 2014, NV went to live with a boyfriend; however, the relationship did not last and she returned to the appellants. At the time, she was addicted to heroin. She continued to provide sexual services. Her interaction with the appellants stopped again in 2014.
- [16] In the fall of 2015, Mr. Albashir arranged for NV to return to work for the appellants. She did so and in January 2016, she moved into a downtown Vancouver condominium. The financial and working conditions remained the same as before. A few weeks later, she left after an argument with Mr. Albashir and that was the end of her interaction with the appellants. NV testified that on one occasion while involved with the appellants, Mr. Albashir confronted her with what looked like a gun. This was in response to NV asking permission to take her mother out for lunch. She was told that she had to work and that she "belonged" to Mr. Albashir.
- [17] NV provided a statement to the police in October 2016.

Trial Judgment

- [18] The reasons for judgment are lengthy, consisting of 383 paragraphs. It is not necessary that I refer to the sections of the judgment that address the conviction for attempting to obstruct justice (count 19), or the motion to quash counts 6 and 13 on constitutional grounds. Neither of those matters are relevant to the appeal.

- [19] The judge began his reasons by identifying the nature of the evidence called at the trial and various legal principles he was invited to apply. This included the concept of party liability under ss. 21(1) and (2) of the Code. He then turned to "evidentiary matters" that required his attention, including application of the co-conspirator exception to the rule against hearsay evidence: *R. v. Wang*, 2013 BCCA 311 at para. 48, leave to appeal ref'd, 35539 (19 December 2013).
- [20] The judge was satisfied that the Crown had proved the existence of a conspiracy in this case: at para. 32. He found that the "evidence establishe[d] a common intention" between the appellants and a third accused, Omar Alameddin, to engage in a money-making "joint venture" in which the three men:
- [30] recruited girls and young women to work for them as "prostitutes", exercised control and direction over them and exploited them with the intent of using the money earned by these girls and young women to finance their own lifestyles which included designer clothing, regular gym workouts, rental of luxury downtown condos, expensive cars and delivered meals.
- [21] At para. 31 of his reasons, the judge summarized the evidence in support of a conspiracy. This summary and the implied findings of fact ultimately played an integral role in the analysis of whether the Crown had met its burden of proof on individual counts. As such, I will excerpt the findings in their entirety:
- Mr. Albashir and Mr. Mohsenipour, the two accused, met with N.V. together when an offer of working as an escort for them was extended to her.
 - The two accused together met with C.H. when an offer of working as an escort for them was extended to her.
 - The two accused together took N.V. to Surrey Central mall to buy her a cell phone.
 - The two accused, Mr. Albashir and Mr. Mohsenipour, rented the apartment at 111 West Georgia St. together, and both of their names and signatures appear on the lease.
 - Mr. Albashir and Mr. Mohsenipour were together when N.V. was picked up from her home and taken to the apartment at 111 West Georgia St.
 - Mr. Albashir and Mr. Mohsenipour were together when C.H. was taken to the mall to purchase lingerie.
 - Mr. Albashir and Mr. Mohsenipour were together during the photo shoot for N.V. and C.H. from which photos were used for ads for N.V. and C.H.'s sexual services.
 - Mr. Albashir and Mr. Mohsenipour lived with N.V. and C.H. in the apartment at 111 West Georgia St. and stayed in the living room of the apartment while the girls provided sexual services to men directed to the apartment by both accused.

- They collected all the money earned by C.H. and N.V. from providing sexual services.
- They together drove N.V. and C.H. to "outcalls".
- They were together, along with Mr. Alameddin, in the lobby at 111 West Georgia St. when N.V. was arrested on August 6, 2013.
- Mr. Mohsenipour and Mr. Alameddin spoke to the police together in the lobby of the apartment after N.V.'s arrest.
- The two accused spoke to the police together outside 111 West Georgia St. on August 6, 2013; and left together after their interaction with police.
- The two accused and N.V. stayed in hotels after her arrest on August 15, 2013. Mr. Mohsenipour paid for one hotel using his credit card.
- Mr. Albashir and Mr. Mohsenipour together were stopped by police numerous times in 2013 and 2014 in one or the other's vehicle. On several occasions, there was a young woman in the car with them, and on two occasions, the woman identified as "Lexi" or [SP] was in the car. Lexi or [SP] was identified by K.C. as a fellow escort who worked for the two accused. Seen in the light of the rest of the evidence, the only logical inference to be drawn from these circumstances is that the accused were transporting her to or from an "outcall".
- On January 2, 2014, the police stopped all three men with "Lexi"/[SP] in the 2006 infinity registered to and driven by Mr. Albashir.
- On May 20, 2014, at 2:00 a.m. in the morning, the police stopped Mr. Albashir and Mr. Alameddin in Mr. Albashir's black Mercedes after seeing them enter and then exit 588 Broughton Street.
- On June 12, 2014, all three men were stopped together in the black Mercedes.
- The two accused were together in the apartment at 588 Broughton St. when K.C. came to meet Mr. Albashir for the first time.
- The two accused were living together in a nearby apartment.
- They came together to the apartment at 588 Broughton to collect money earned by "Nebs" and K.C. from providing sexual services.
- They together drove K.C. and "Lexi" to outcalls.
- Mr. Alameddin and Mr. Albashir were together when S.C. met Mr. Albashir for the first time.
- Mr. Alameddin and Mr. Albashir took S.C. on the first day she met them to an apartment in Mr. Alameddin's name and, as will be addressed later, procured her into prostitution.
- S.C. was "working" for Mr. Alameddin, though she believed from what she observed that Mr. Albashir was the "boss".

- S.C. gave evidence of a hierarchy among the three men with Mr. Albashir at the top, followed by Mr. Mohsenipour and then Mr. Alameddin.
- Both Mr. Alameddin and Mr. Albashir contacted S.C. after she left the first time and was convinced to return.
- Mr. Albashir, Mr. Mohsenipour, and Mr. Alameddin were together at 588 Broughton Street when S.C. was told that she would now be working for Mr. Mohsenipour.
- Mr. Albashir and Mr. Mohsenipour and the complainants, K.C. and S.C., went to Alberta together, where both women worked providing sexual services to dates arranged by the two men.
- Mr. Albashir and Mr. Mohsenipour lived together in another apartment while in Edmonton.
- Mr. Albashir and Mr. Mohsenipour came to collect money from K.C. and S.C. daily and together drove them to and from outcalls in Edmonton.
- Mr. Mohsenipour was present when Mr. Albashir assaulted and threatened K.C.
- Albashir was present when Mr. Mohsenipour assaulted and threatened S.C.
- Mr. Albashir and Mr. Mohsenipour together assaulted "Nebs" another escort who was involved with the men.
- Mr. Albashir and Mr. Mohsenipour were together when they reported the car registered to Mr. Albashir stolen in Edmonton.
- Mr. Albashir and Mr. Mohsenipour drove K.C. and S.C. to and from outcalls together when they returned to Vancouver in 2015.
- Mr. Albashir and Mr. Mohsenipour were together with K.C. and [SF] when they went to Edmonton in the fall of 2015.
- Mr. Albashir and Mr. Mohsenipour drove K.C. and [SF] to outcalls together in Edmonton.
- Mr. Albashir and Mr. Mohsenipour were together in a 2003 Mercedes when stopped in Edmonton in December 2014.
- Mr. Albashir and Mr. Mohsenipour together picked up N.V. from Mr. Schafer's home in late December 2015 or early January 2016.
- Mr. Albashir and Mr. Mohsenipour lived together in the apartment building where Mr. Albashir was arrested in April 2016.
- Text messages between Mr. Mohsenipour and Mr. Albashir evidenced by phone records.
- Text messages between K.C. and Mr. Mohsenipour and K.C. and Mr. Albashir.
- Business communications between the two accused via text.

- Handling of each other's escorts.
 - Recorded conversations between Mr. Albashir and Mr. Mohsenipour while Mr. Albashir was in North Fraser Pretrial.
 - Text messages between K.C. and Mr. Alameddin in April 2016.
 - Contacts in telephone phones. During an analysis of phone seized from the two accused, 458 common phone numbers were found (i.e., a number on at least one of Mr. Albashir's phones was also found on at least one of Mr. Mohsenipour's phones).
 - Albashir and Mr. Mohsenipour worked together to bump ads and to house their escorts. K.C. identified certain exhibits as her escort ads.
- [22] After listing this evidence, the judge provided his "overall" interpretation of the "escort" service operated by the appellants:
- [56] Overall, the evidence indicates that Mr. Albashir, Mr. Mohsenipour and Mr. Alameddin worked with the complainants at varying times. They arranged for the rental of premises from which the escorts would work. They arranged for photographs to be taken of the complainants for website ads and made the ads on websites for escort services. The men would pay for the ads related to the complainants to be "bumped". They would provide the supplies such as condoms, lubricants and wipes for the escorts. They would also provide transportation for the escorts to and from out calls. They also were responsible for responding to calls from prospective clients and arranged the time and place for the call. They also purported to provide security to the escorts when needed. They collected the money from the escorts and paid the escorts after deducting their take. Mr. Mohsenipour and Mr. Albashir drove high end vehicles, lived in a condo in downtown Vancouver, and received gifts from the escorts. They appear in the evidence to be fit and muscular men. My assessment of the evidence is that the role of Mr. Albashir, Mr. Mohsenipour, and Mr. Alameddin come within the general definition of a "pimp".
- [23] At this point, the judge turned to the individual counts on the indictment, assessing the credibility of each complainant and the evidence specific to the counts that involved them.
- [24] The judge found each of the complainants to be credible. In assessing credibility, he considered the frailties of their evidence. Despite the frailties, he was satisfied he could rely on their evidence about their dealings with the appellants.
- [25] NV was 19 at the start of the trial. The judge acknowledged lapses in her memory; her addiction to heroin and cocaine; past and current charges for criminal offences (including robbery using a knife); her reluctance to testify; and her history of lying. NV was in custody when she testified, awaiting sentencing for one or more offences.
- [26] KC was 27 when she testified. At times, she had little to no recall. There were also times that she was "adversarial, argumentative, unresponsive to questions, and detached" while giving her evidence. She admitted to robbing a client with the appellants. Before the trial, KC

agreed to disavow her sworn statements to the police in exchange for \$5,000 from the appellants and received half of the money in advance. She later told the police about this arrangement and did not recant. KC regularly used crystal methamphetamine, including while appearing in court. She engaged in welfare and tax fraud by not declaring her income as a sex worker. There were omissions in her statement(s) to the police.

- [27] SC was 27 when she testified. The judge was also alive to SC's testimonial frailties. She found it difficult to give evidence and displayed "angry outbursts" in the courtroom. She had lapses in recall. Details emerged at the trial that were not contained in her statement to the police.
- [28] Relying on the complainants' testimony and confirmatory evidence where available, the judge found both appellants guilty of counts 1-3, 6-11 and 13-19 of the indictment. Mr. Albashir was also found guilty of counts 4-5 and 12 (Mr. Mohsenipour was not charged in these counts). I do not consider it necessary to detail the evidence surrounding each count. Where specifics are required, they will be addressed in the course of analyzing the grounds of appeal.

Issues on Appeal

- [29] Between the two of them, the appellants raise nine grounds of appeal. They allege that the judge:
- a) did not properly apply the co-conspirator exception to the rule against hearsay evidence;
 - b) erred in his application of party liability under s. 21(2) of the Code;
 - c) erred in his assessment of the complainants' credibility;
 - d) rendered an unreasonable verdict on the charge of procuring NV;
 - e) erred in his interpretation and application of s. 279.01(1) of the Code (the human trafficking offence);
 - f) erred in his analysis of the offence of receiving a material benefit from human trafficking under s. 279.02(1); and,
 - g) erred in failing to enter conditional stays for some of the convictions based on Kienapple.
- [30] Both appellants also allege that their trial was unfair because of non-disclosure of information they say was relevant to challenging the credibility of the complainants and otherwise making full answer and defence. They also contend that the judge mishandled this aspect of the proceeding and committed related errors in principle. In support of this ground of appeal, the appellants apply to introduce fresh evidence.
- [31] Finally, Mr. Albashir seeks leave to raise a constitutional issue for the first time on appeal. Depending on the manner in which s. 279.01(1) of the Code is interpreted by this Court, Mr. Albashir says the provision contravenes s. 7 of the Canadian Charter of Rights and Freedoms [Charter]. Mr. Mohsenipour does not seek to raise this issue; however, if leave is granted and

the constitutional issue is decided in favour of Mr. Albashir, any remedy granted under s. 52 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, would logically inure to Mr. Mohsenipour's benefit.

- [32] If successful on their appeals, the appellants seek to have their convictions overturned on all counts other than the count for attempting to obstruct justice, and acquittals entered. In the alternative, they seek a new trial. In the further alternative, they seek conditional stays for some or all of the convictions entered on counts 4, 5, 6, 7, 8, 9, 13, 14, 15 and 16 of the indictment.

Discussion

- [33] I will address each ground of appeal in turn. The appellants filed separate factums on the substantive issues raised in their respective appeals, and a joint factum addressing the disclosure issue. In seeking new trials, they rely on their own material, as well as the issues raised and arguments made by their co-appellant. For the purpose of these reasons and for ease of reference, I will treat each ground of appeal as having been raised by both.
- [34] Before addressing the merits of the grounds of appeal, it is important to say something about appellate review of a trial judge's reasons.

Reasons are Reviewed Functionally and Contextually

- [35] Reasons for judgment are assessed applying a functional and contextual approach. This means they must be read as a whole and in the context of the live issues at the trial, informed by the positions taken by the parties. They must also be read "with sensitivity to the trial judge's role and advantage in making findings of fact and credibility": *R. v. G.F.*, 2021 SCC 20 at para. 5.
- [36] Appellate review must not consist of a "technical search for error": *G.F.* at para. 5. Where "ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error": *G.F.* at para. 79, citing *R. v. C.L.Y.*, 2008 SCC 2 at paras. 10-12. "It is not enough to say that a trial judge's reasons are ambiguous -- the appeal court must determine the extent and significance of the ambiguity": *G.F.* at para. 79. Reasons must be read "generously" and "with the presumption that the judge knows the law": *R. v. Gerrard*, 2022 SCC 13 at para. 2.
- [37] Finally, it is necessary also to say something about the sufficiency of a trial judge's reasons. The appellants have not advanced this issue as a stand alone ground of appeal. However, throughout their submissions, both in writing and at the hearing of the appeal, they raised concerns about the judge's use of conclusory statements in his reasons and a lack of substantive analysis on various legal or evidentiary issues.

- [38] A functional and contextual review of a trial judge's reasons recognizes that judges need not advert to every piece of evidence in explaining their pathway to conviction, address every conflict or issue raised by the parties, reconcile every alleged evidentiary frailty, or detail and explain each of the material findings: *R. v. R.E.M.*, 2008 SCC 51 at paras. 15-20, 48-57.
- [39] Nor are judges required to "demonstrate [in their reasons] their knowledge of basic criminal law principles": *G.F.* at para. 74. As explained in *R.E.M.*: "The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated in the context of the record, the issues and the submissions of counsel at trial": at para. 37, italics removed. The question to ask is whether the "foundations for the trial judge's conclusions" are discernable. If the answer is "yes", then the "functions of reasons for judgment are met": *R.E.M.* at para. 37.

Were the Appellants Unfairly Deprived of Disclosure?

- [40] It is appropriate to start the analysis of the appeals with the disclosure complaints. If the appellants succeed on this ground of appeal, it would result in an order for a new trial and obviate the need to address the other issues raised by them.
- [41] The appellants make two disclosure complaints: (a) non-disclosure that is said to have deprived them of the ability to make full answer and defence, rendering their trial unfair; and (b) errors in principle by the judge in managing disclosure.
- [42] The disclosure at issue involves two distinct subjects:

First, the conduct of Detective Constable Jim Fisher, a member of the Vancouver Police Department ("VPD"), who participated in the investigation of the appellants and has since resigned from the police force. While engaged in the investigation, Mr. Fisher was himself the subject of a covert police investigation for alleged sex crimes against sex workers, as well as other offences. Five months before the start of the appellants' trial, Mr. Fisher was charged with criminal offences arising from the latter investigation. Mr. Fisher eventually pleaded guilty to some of those offences and was sentenced to 20 months' imprisonment: *R. v. Fisher*, 2019 BCCA 33.

Second, information about communication between NV, KC and SC and investigators, and money received by them.

- [43] The appellants wanted access to the investigative materials surrounding the allegations against Mr. Fisher (the "Fisher Investigation"). Some of this material was provided by the Crown before their trial. The appellants subsequently brought disclosure applications for additional material. Only partial disclosure was ordered and it was not until this appeal that the appellants received copies of three Reports to Crown Counsel that were prepared in the Fisher Investigation (the "RTCCs"). The RTCCs summarize the investigation and the evidence against Mr. Fisher.

- [44] The appellants say the judge mismanaged their requests for disclosure specific to the Fisher Investigation. He is said to have erred by: (a) acceding to a Crown request to defer an application for additional material until after NV completed her testimony; (b) failing to order disclosure of the Fisher Investigation RTCCs; (c) inadequately reviewing redactions of material that was ordered disclosed; and (d) failing to order disclosure of text messages and Facebook messages between Mr. Fisher and complainants and a witness in the Fisher Investigation until the end of the appellants' trial.
- [45] The appellants also complain that the Crown failed to comply with a disclosure order made by the judge in relation to the Fisher Investigation, to the appellants' detriment.
- [46] The second category of disclosure consists of emails and/or text messages between police investigators in the appellants' case and NV, KC and SC. This material has been disclosed on appeal and reveals, among other things, that NV, KC and SC received money for certain expenses while the investigation was ongoing. The funds were provided to them under the auspices of "Project Connect: Building Connections within our Communities". This is a program administered by the VPD that provides outreach services to sex workers who wish to leave the industry. Between April 2016 and September 2017, NV received \$172.39 from the program. KC and SC received \$633.65 and \$543.80, respectively.
- [47] In support of their disclosure ground of appeal, the appellants have filed a fresh evidence application which consists of an agreed statement of facts setting out the chronology of the impugned disclosure, and various pieces of disclosure received by them in the trial court and after they filed their notices of appeal.

Relevant Legal Principles

- [48] As explained in *R. v. Moazami*, 2021 BCCA 328 [Moazami (2021)], an appeal from conviction that raises non-disclosure as a ground of appeal and is accompanied by a fresh evidence application is governed by the principles established in *R. v. Dixon*, [1998] 1 S.C.R. 244, 1998 CanLII 805 (SCC) and *R. v. Taillefer*, 2003 SCC 70. The Court stated in *Moazami* (2021):
- [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.

[*Italic emphasis in original; underline emphasis added.*]

See also *R. v. Johnston*, 2021 BCCA 34 at paras. 263-269.

- [49] The Court went on to say that "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": Moazami (2021) at para. 67, *emphasis added*.
- [50] Before applying these principles to the issues raised by the appellants, it is important to understand the chronology of relevant disclosure events at their trial.

Requests for Disclosure of the Fisher Investigation

- [51] The appellants' trial began on June 8, 2017.
- [52] Before it started, the Crown provided the appellants with information specific to the Fisher Investigation. The appellants received: (a) notice that in December 2016, Mr. Fisher had been charged with sexual exploitation (three counts); sexual assault; breach of trust and obstruction of justice; and (b) police statements provided in the Fisher Investigation by each of NV, KC and SC.
- [53] In her statement, NV said she had known Mr. Fisher for a "very long time". During their interaction, he asked her some "weird questions" about her personal life, including questions about her sexual relationships. She thought the questions were "odd". However, Mr. Fisher had never given NV money. Nor was there anything intimate or sexual between them.

- [54] KC described Mr. Fisher as a "nice guy" and said she "never expected" the allegations against him. She did not think he was a "bad guy" based on her dealings with him and she found the allegations "shocking". KC had never met with Mr. Fisher alone and he had never given her money. He had never asked her to lie or to change her evidence in any way.
- [55] SC also described Mr. Fisher as "very nice". She did not feel "like he was a bad person at all". He had never given her money. He never asked her to change her testimony. There was never anything sexual between them. He did not try to have an unprofessional relationship with her. Nor did he "creep [her] out" or make any kind of "weird comments" to her. SC was "really shocked" about the allegations against him.
- [56] On the first day of the trial, the Crown provided the appellants with copies of the charging document(s) sworn against Mr. Fisher.
- [57] That same day, and before NV testified, defence counsel raised the issue of outstanding disclosure with the judge. Defence counsel told the judge that among other things, they had asked the Crown for a copy of any RTCC produced in the Fisher Investigation. They had also requested disclosure of any "undocumented [off the record] contact" between Mr. Fisher and the complainants in this case. Defence counsel said they were concerned that Mr. Fisher had "inappropriate contact" with NV, KC and SC, and that he "tried to bribe them or that he tried to influence their evidence, and [that] this happened off the record". Defence counsel told the judge that the Crown declined to provide the requested information and, as a result, the defence would be applying for disclosure.
- [58] Defence counsel said they had an agreement with the Crown that the application for additional material in the Fisher Investigation would proceed after NV began her testimony, but before she was cross-examined. However, the Crown had since changed its position and no longer wanted NV's testimony to be interrupted. The defence asked the judge to rule that NV's cross-examination must await the disclosure application, which was scheduled for June 16, 2017.
- [59] The Crown responded by saying that since its initial discussion with the defence about interrupting NV's evidence, it had learned that there was no contact between Mr. Fisher and the three complainants in this case that "revealed interactions of concern". NV, KC and SC each provided statements in the Fisher Investigation. None of them spoke of "any attempts by Fisher to influence them or bribe them or any[thing] of that sort". Nor did the statements "reveal any contact with Detective Fisher outside of the contact they had with him during the course of the investigation into the matter before the [judge]". The Crown had also reviewed the then-existing RTCC(s) in the Fisher Investigation and "found no reference to any of the three complainants in [this] case". It did not plan on calling Mr. Fisher as a witness at the appellants' trial.

[60] It was on this basis that the Crown no longer agreed to adjourn NV's cross-examination to await the defence disclosure application. The Crown was of the view that it had disclosed everything from the Fisher Investigation that was "obviously relevant" to the case against the appellants. There was:

no evidence that [NV] had undocumented contact with Jim Fisher. There [was] no evidence that she had contact with him outside of contact during the course of her interviews with police in connection with this matter when there were other police officers present, except when she went outside to have a smoke during an interview, and that fact and the circumstances of that fact are recorded in her statement to the investigators

[61] When making this submission, the Crown pointed out that if the defence succeeded in its application for additional disclosure after NV testified, she could be recalled as a witness to address anything that arose from the material.

[62] On June 9, 2017, the judge ruled that NV's evidence should not be interrupted and she should complete her testimony before the disclosure application:

I have reviewed the materials. I know there is an application which [defence counsel] is going to bring forward, but from the perspective of the materials that have been disclosed and the submissions and discussion I had yesterday with counsel, I am of the view that we will, following the direct examination of the witness, move to the cross-examination.

Any other steps that are required, should the application for disclosure be successful, can be dealt with at that time

[Emphasis added.]

[63] The disclosure application was heard on June 16, 2017. By this time, NV's cross-examination had finished. The judge reserved his decision. On June 19, he granted part of the disclosure application: 2017 BCSC 2577.

[64] In his reasons, the judge noted the defence position that the sought-after disclosure was relevant to the credibility and reliability of the complainants. The defence argued that it "may tend to show that Fisher subverted the investigative process and counselled [NV, KC and SC] or otherwise influenced or impacted their evidence ": at para. 4. The judge was persuaded that transcripts of statements made by two complainants and a witness in the Fisher Investigation (who were not complainants in this case), and transcripts of intercepted telephone conversations between Mr. Fisher and those same individuals should be produced: at para. 10. However, he directed that "any aspects requiring redaction with respect to privacy interests be made ": at para. 10. In response to questions posed by the judge, defence counsel indicated that " if there [were] passages where the complainants [in the Fisher Investigation] describe how they were sexually assaulted ", the defence was "not interested" in them: at para. 24.

- [65] On June 26, 2017, the Crown disclosed further information from the Fisher Investigation. This included redacted copies of statements provided to the police by the two complainants and witness in that investigation, and various intercepted conversations. At this time, KC was in the midst of cross-examination. Her cross-examination finished on June 28.
- [66] On July 18, the defence advised the judge that they would be asking to have the redactions reviewed. By this time, SC had begun her testimony. Her direct examination started on June 29, 2017. It was interrupted until July 17 and completed on July 20.
- [67] On July 20, the judge agreed to review the redactions. On August 11, 2017, he was provided with the unredacted versions of the disclosed material, along with a memorandum prepared by the Crown explaining the redactions. A copy of the memorandum was also provided to the defence.
- [68] Around that same time, the defence received further material arising out of the Fisher Investigation that had not been disclosed in follow-up to the June 19, 2017 order. This disclosure consisted of additional intercepts between Mr. Fisher and a complainant in the Fisher Investigation, as well as a second part of a statement provided by that same complainant.
- [69] On September 11, 2017, the judge addressed his review of the redactions. He found that the redactions were "largely appropriate". Subject to specific requests for follow-up that he made of the Crown, the judge was satisfied that the Crown's vetting was "reflective of what [he] indicated in [his earlier] ruling".
- [70] On September 12, 2017, the Crown provided the defence with amended redactions specific to the police statements taken from the Fisher Investigation complainants and witness. As I understand it, these amendments flowed out of the September 11 hearing.
- [71] The issue of disclosure was again before the judge on October 17, 2017. The defence claimed that the Crown had failed to comply with the judge's directions from September 11 and sought further material from the Fisher Investigation. This material consisted of alleged text messages between Mr. Fisher and the complainants and witness in the Fisher Investigation. By this time, the Crown had closed its case and defence counsel had informed the judge that neither appellant would be calling evidence at the trial.
- [72] In its October 17 submissions, the Crown disagreed with the defence that the judge had ordered disclosure of text messages involving the complainants and witness in the Fisher Investigation.
- [73] The next day, on October 18, the judge informed counsel that he had reviewed his disclosure rulings and the related documents, and was satisfied that his orders for disclosure did not include the text messages sought by the defence. It is apparent from the record that he was mistaken about this fact.

- [74] At this point, the defence brought a formal application for disclosure of text messages between Mr. Fisher and two complainants in the Fisher Investigation (ZC and HW); Facebook messages between Mr. Fisher and those complainants; and "any other communications between Detective Fisher and those complainants". The defence sought this same material in relation to interactions between Mr. Fisher and ES, who was a witness in the Fisher Investigation. Defence counsel justified the disclosure request on the basis that the messages may show there was an "abuse of process" involving Mr. Fisher; an obstruction of justice or "some subversion of the process"; or, the messages might contain discussion about the appellants. This application was brought the day closing submissions were set to begin in the appellants' trial.
- [75] The judge made a partial disclosure order on October 18, 2017. His reasons are indexed as 2017 BCSC 2684. The judge ordered that the Crown disclose any text messages, Facebook messages or emails that referenced the appellants, or any aliases they were known to have, for the period of 2013-2016.
- [76] On October 20, the Crown provided the defence with seven pages of electronic messages that fell within the scope of the judge's ruling.
- [77] The appellants were convicted of their offences on January 29, 2018.
- [78] After they filed notices of appeal, the Crown provided the appellants with copies of three RTCCs prepared in the Fisher Investigation. This material was provided without conceding its relevance. The RTCCs are dated November 28, 2016, February 24, 2017 and May 1, 2017, respectively.
- [79] On appeal, the Crown also disclosed emails from police officers involved in the investigation of the appellants, as well as some text messages between investigators and the complainants in this case.
- [80] It is common ground that at no point during the trial did the appellants apply to recall any of NV, KC or SC for the purpose of cross-examination arising from the disclosure they received in relation to the Fisher Investigation. Nor did they seek to call Mr. Fisher as a witness.

Parties' Positions on Appeal

- [81] The appellants contend that the disclosure sought from the Fisher Investigation was first party disclosure and the Crown was duty bound to provide it to them in accordance with the principles established in *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, 1995 CanLII 130 (SCC) and *R. v. McNeil*, 2009 SCC 3.
- [82] From their perspective, information from the Fisher Investigation was patently relevant to their case. They summarize the purported relevance in their factum (at paras. 68, 74, 81-82):

the profile of the Fisher victims matched the profile of the Trial Complainants the temporal nexus between Fisher's criminal acts and his role in the investigation of the appellants was very strong the information sought was necessary so the defence could have an understanding of Fisher's modus operandi of exploitation, so as to explore the credibility and reliability of the Trial Complainant's evidence and, potentially, to support an abuse of process claim.

a police officer who played a significant part in the case was charged with crimes, allegations of egregious breach of trust, sexual exploitation, and sexual assault against multiple sex trade workers who were witnesses in prosecutions of pimping offences. And this was a pimping prosecution. And these complainants had contact with that same officer within the same time frame.

The case for disclosure was very strong serious charges had been brought against Fisher Fisher's role in the investigation was not peripheral - he was lead investigator on some counts, was an affiant with respect to searches whose fruits the Crown sought to lead, and N.V. had testified he likely improperly influenced her evidence

[83] The appellants say the Crown's failure to disclose, the manner in which the judge handled the related applications (including deferring the first one until after NV testified), the piecemeal production from the Fisher Investigation, and the heavy redactions, individually and in their cumulative effect, deprived the appellants of their right to "meaningful, usable and timely disclosure, and violated their rights under s. 7 of the Charter". They contend that information from the Fisher Investigation could have been used to meet the Crown's case against them, advance a defence, or make a decision that could have affected the conduct of their defence. The material they did receive is said to have come too late and was so heavily redacted that it was of no use.

[84] As noted, there is a second category of non-disclosure with which the appellants take issue. It consists of information about money that was received by NV, SC and KC from the police during the investigation of the appellants. The appellants received disclosure of this material after they filed their notices of appeal.

[85] The appellants contend that this material also constitutes first party disclosure and the Crown should have provided it to them before the trial. In their factum, they contend that the information (at paras. 95 and 97):

demonstrate[s] that financial benefits were provided to the Trial Complainants by the VPD and that there was a very significant degree of communication before and at trial between the [investigators] and the Trial Complainants. The texts reveal that the Trial Complainants discussed with [police] members requests for money for lawyers, tattoo removal, and other identified and unidentified needs, prior to and during the trial. Disclosure was particularly necessary given the context, which was that the Trial Complainants were vulnerable women who struggled with substance abuse, and the [investigative unit] was Fisher's police unit when his misconduct occurred.

The text messages and emails also reveal a large number of otherwise undocumented contacts between the Trial Complainants and investigators, numerous interactions not contained in the officers' notes or other disclosed documents. Given the context of [the investigative unit], the shadow cast by Fisher's criminal misconduct, and the case generally, the non-disclosure of such information also breached disclosure rights.

- [86] The Crown says the only information from the Fisher Investigation that was conceivably relevant to the appellants' case was information from that file that directly involved NV, KC or SC, or the appellants. Everything else was irrelevant. Moreover, given the fact that the records sought by the defence arose in the context of an unrelated criminal investigation, they were properly characterized as third party records and subject to the disclosure regime established in *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 (SCC). In seeking disclosure, the appellants did not comply with that regime. See also *R. v. Quesnelle*, 2014 SCC 46 at paras. 11-13; *R. v. Gubbins*, 2018 SCC 44 at paras. 18-29; *R. v. Schirmer*, 2022 BCCA 214.
- [87] The Crown accepts that in accordance with *Stinchcombe*, it was mandated to provide to the appellants any non-privileged or non-statutorily protected fruits of the investigation specific to them, as well as any material outside of that investigative file that was obviously relevant and in the possession of the prosecuting Crown or, once made aware of its existence, reasonably available to the prosecuting Crown through inquiries: *Stinchcombe*, *McNeil*, *Quesnelle*, *Gubbins* and *Schirmer*.
- [88] The Crown says the fact that Mr. Fisher had been criminally charged did not automatically make information surrounding those charges a first party record and therefore subject to the Crown's mandatory disclosure obligation. In *McNeil*, the Supreme Court held that an accused does not have an entitlement to "automatic disclosure of every aspect of a police officer's employment history, or to police disciplinary matters with no realistic bearing on the case": at para. 53, emphasis added. It is for this reason that investigative files involving third parties and police disciplinary records usually fall to be determined under the *O'Connor* regime: *R. v. Moazami*, 2020 BCCA 3 at para. 41 [*Moazami* (2020)].
- [89] The Crown says that at the trial, the appellants bore the onus of establishing the likely relevance of the additional material they sought from the Fisher Investigation and now raise as an issue on appeal. They did not do so. As such, at the trial and now on appeal, they have actually received more than what they were properly entitled to. The Crown emphasizes that in this appeal, the appellants bear the onus of showing a reasonable possibility that the verdicts might have been different had there been greater disclosure from the Fisher Investigation, or a reasonable possibility that the non-disclosure affected the overall fairness of their trial. They say the appellants are not able to meet that test.
- [90] The Crown submits that the material the appellants sought from the Fisher Investigation would not have made any difference. Nor did the manner in which the judge handled the disclosure issues render the trial unfair. The only substantive nexus between the two investigations that was asserted by the appellants at the trial consisted of an allegation that

Mr. Fisher was the individual who introduced NV to the appellants for the purpose of sex work and, by so doing, potentially laid a foundation for a defence of entrapment. On appeal, the appellants withdrew this allegation, acknowledging there was no evidence to support it.

- [91] The Crown says the appellants' disclosure request was (and remains) grounded in speculation and an unsupported theory that because Mr. Fisher sexually exploited sex worker complainants in another case, inappropriately shared information with them and was prepared to obstruct justice, he must have engaged in that same conduct here and influenced NV, SC and KC's evidence in a way that not only undermined their credibility and the reliability of what they testified to, but provided a basis from which to seek constitutional relief, including a potential stay of proceedings for abuse of process. The Crown's response to this position is stated thusly in its factum (at paras. 63-65):

The appellants do not assert that any link [other than the now-abandoned allegation of possible entrapment] exists between Fisher's offences and the issues at trial. The Fisher Complainants were not witnesses at [the appellants'] trial, and nothing that occurred between Fisher and [those complainants and the witness] involved the appellants, the charges, or their investigation by police.

Fisher was not a witness at [the appellants'] trial. While his role in the investigation of the appellants was not peripheral, it was nonetheless confined to specific tasks. Of those tasks, he met each of the complainants and interviewed two of them, but no misconduct occurred. Fisher was the lead investigator for the obstruction investigation, count 19, which was proven by K.C.'s evidence and jail calls obtained through two judicial authorization written by him. However, count 19 has not been substantively challenged on appeal. In any event no impropriety has been identified in Fisher's applications for those authorizations, or otherwise in his investigation of the appellants, much of which was marginal

Given that Fisher's offences were entirely extrinsic to the convictions under appeal and the underlying investigation, the details of Fisher's offences were not relevant at trial.

- [92] In relation to the second category of non-disclosure -- information about money received by NV, SC and KC from the VPD -- the Crown acknowledges that in *R. v. Johnston*, 2019 BCCA 107, it was held that the "promise of any benefits or special treatment pre-trial, can bear on the witnesses' motives and states of mind during trial testimony, and whether those inducements influenced them to shape their testimony": at para. 90, citing *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 (SCC) at para. 32. However, the Crown says that the money provided to the complainants in this case consisted of small amounts, formed part of a funded program to assist sex workers in exiting the industry, and could not reasonably have impacted the complainants' motives for testifying against the appellants or their states of mind at the trial. Even if this information had been disclosed, there is no reasonable possibility it could have affected the verdicts.

Analysis

- [93] In resolving this ground of appeal, I will consider five issues: (a) the legal regime that properly governed the appellants' request for material from the Fisher Investigation; (b) the nature and content of the material they received; (c) the nature and content of the material that was not disclosed to them; (d) whether the appellants have established a reasonable possibility the verdicts would have been different but for the non-disclosed material; and (e) whether they have established a reasonable possibility the non-disclosure affected the overall fairness of the trial.
- [94] In my view, if the appellants cannot show a reasonable possibility that the verdicts would have been different but for the non-disclosure, or a reasonable possibility that the non-disclosure affected the fairness of the trial, it is dispositive of this ground of appeal.
- [95] The inability to meet this test would render their fresh evidence inadmissible. Moreover, the disclosure errors alleged to have been committed by the judge and the Crown, even if shown to have some merit, would be inconsequential because the material the appellants say those errors deprived them of could not realistically have affected the verdicts or rendered their trial unfair.

What Disclosure Regime Governed?

- [96] At no point during the disclosure applications did the judge determine the appropriate regime that applied to the requests for access to the Fisher Investigation. As correctly noted by the appellants, he made no reference to the governing legal principles; did not identify what party bore the burden on the applications; nor did he set out the standards he was bound to apply.
- [97] From my review of the record, it is apparent Crown counsel believed that once they disclosed the fact of criminal charges against Mr. Fisher, and any Fisher Investigation material directly involving NV, KC, SC, or the appellants, they had complied with their first party disclosure obligation. Records beyond that fell subject to O'Connor principles (or, possibly, s. 278.3 of the Code). The Crown filed written submissions for the purpose of the June 16, 2017 disclosure hearing. Paragraphs 2-3 of the submissions read this way:

The Crown is opposed to this application on the grounds that the appropriate foundation has not been laid to establish the likely relevance of the Fisher investigation to the accused in this prosecution. The first party disclosure that both fairness and the Stinchcombe principles require, as well as the police misconduct disclosure that both fairness and the principles in McNeil require, have already been made.

Any further disclosure application relating to the Fisher Investigation is an application for third party disclosure and should properly be made pursuant to *Regina v. O'Connor*

[Emphasis added.]

- [98] Defence counsel saw the issue differently. They viewed the Fisher Investigation records as first party records and took the position that the Crown was obliged to produce what they were asking for unless able to show that the information was privileged, clearly irrelevant or otherwise governed by law: McNeil at para. 18.
- [99] It is unfortunate the judge did not resolve this issue. As recently noted in Schirmer at paras. 51-52, clarifying whether records sought by the defence are properly characterized as first or third party records carries important process and onus implications. See also World Bank Group v. Wallace, 2016 SCC 15 at paras. 112-115 and R. v. Stipo, 2019 ONCA 3 at paras. 78-89.
- [100] To gain access to third party records, the defence must apply for those records and serve notice on the relevant record holders, along with a subpoena (unless waived), requiring that the records be brought to court for possible review: Schirmer at para. 54, citing O'Connor, McNeil at para. 27 and Gubbins at para. 25.
- [101] Once the records are before the court, the defence must then show they are "likely relevant" to an issue raised at the trial or to testimonial competency. If the defence meets this onus, the court will review the records, assess them for actual relevance, and balance relevant competing interests: Schirmer at para. 54, citing McNeil at para. 35. It is only once this process has been completed that the records may then be produced to the defence, in whole or in part.
- [102] Establishing "likely relevance" is not an onerous burden; however, it does require consideration by the trial judge. Assessing whether the defence has met its onus enables the judge to properly fulfill their role as a gatekeeper in preventing unmeritorious or time-consuming disclosure applications. Adhering to the requirements of the O'Connor regime also ensures a properly informed assessment and weighing of relevant competing interests.
- [103] As explained in Gubbins (at paras. 26-27):

Information will be "likely relevant" where there is "a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify": O'Connor, at para. 22 (emphasis deleted). The "likely relevant" threshold has been described as significant, but not onerous: O'Connor, at para. 24; McNeil, at para. 29. The reason that the relevance threshold is "significant" is to allow the courts to act as gatekeepers, preventing "speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming" requests for production: O'Connor, at para. 24, quoting R. v. Chaplin, [1995] 1 S.C.R. 727, at para. 32.

Nevertheless, the burden on the accused is not onerous. "Likely relevance" is a lower threshold than "true relevance", and has a "wide and generous connotation" that "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence": McNeil, at para. 44; see also O'Connor, at para. 21. Only after information has been shown to be likely relevant will the courts assess the actual relevance of the record sought. The courts then consider competing interests at the second stage of an O'Connor application: McNeil, at para. 39. It may be apparent "upon inspection by the court

that the claim of likely relevance established at the first stage of the O'Connor application is simply not borne out": McNeil, at para. 40.

[Emphasis added.]

[104] I am of the view that the Fisher Investigation records not directly involving NV, KC, SC or the appellants were third party records and should have been treated as such. They arose in the context of an unrelated prosecution and, importantly, they involved allegations of sexual exploitation and sexual assault made by complainants or witnesses who were not in any way involved in the appellants' case, and for whom the materials in the Fisher Investigation likely gave rise to reasonable expectations of privacy. An informed balancing of countervailing interests was required.

[105] The appellants suggest in their factum that although the defence did not oppose the details of Mr. Fisher's sexual assaults being redacted from material provided to them, these details were disclosable "in law". Respectfully, this is not a correct statement of the law that governs records of this nature.

[106] At paras. 33-39 of Quesnelle, the Supreme Court acknowledged that police occurrence reports (or RTCCs), which is what the appellants wanted access to:

may reveal family status, health information (including statements concerning mental health or the use of drugs and alcohol), and details about housing and employment. They may reveal personal conflicts or details about relationships between individuals. Moreover, they very often reveal the extent of an individual's engagement with the criminal justice system. Most significantly, they can reveal previous instances where the witness or complainant has been the victim of criminal activity, including previous sexual assaults.

The disclosure of the information described above engages complainants' and witnesses' "[i]nformational privacy", "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"

The disclosure of police occurrence reports that contain intimate personal information — such as details of previous allegations of sexual assault — may do particularly serious violence to the dignity and self-worth of an affected person.

Where an individual voluntarily discloses sensitive information to police, or where police uncover such information in the course of an investigation, it is reasonable to expect that the information will be used for the purpose for which it was obtained: the investigation and prosecution of a particular crime. Similarly, it is reasonable to expect individual police officers to share lawfully gathered information with other law enforcement officials, provided the use is consistent with the purposes for which it was gathered.

[Internal references omitted.]

- [107] In deciding that the additional material sought by the defence constituted third party records, I have found Moazami (2020) instructive. Information arising out of the Fisher Investigation was also at issue in that decision, albeit within the context of an application for production on appeal. It is not necessary to detail the whole of the background in Moazami. Suffice it to say that on appeal, the Crown disclosed considerable information from the Fisher Investigation to Mr. Moazami. He had been convicted of numerous prostitution-related offences. Mr. Fisher was involved in the investigation against Mr. Moazami. Importantly, unlike the situation before us, one or more of the complainants in the Fisher Investigation were also complainants or witnesses in Mr. Moazami's trials. There was obvious overlap between the two prosecution files.
- [108] Notwithstanding that connection, this Court held that Mr. Moazami was not entitled to the entirety of the material relating to the Fisher Investigation.
- [109] The Crown had voluntarily disclosed all "underlying investigative materials concerning any of the complainants in the Fisher [I]nvestigation who were also complainants or witnesses in the Moazami trials": at para. 51, emphasis added. Mr. Moazami took the position that this was not enough and there was likely other material from the Fisher Investigation that could assist in his appeals. Accordingly, he applied for a "complete inventory" of the file: at para. 32.
- [110] Mr. Moazami's application was dismissed. This Court was not persuaded that the Crown had failed to discharge its first party disclosure obligations on appeal: at para. 59. As a result, if Mr. Moazami wanted further disclosure from the Fisher Investigation, he was required to bring an O'Connor application: at para. 60.
- [111] In this case, the Crown disclosed to the defence all of the Fisher Investigation material that directly involved NV, KC and SC. This included statements provided by each of NV, KC and SC in the Fisher Investigation: 2017 BCSC 2577 at paras. 7-9. The remainder of the material sought by the defence related to allegations made against Mr. Fisher by complainants or a witness who were not involved in the appellants' case. Consistent with the ruling in Moazami (2020), and the treatment of police occurrence reports in Quesnelle, I consider the additional material sought by the appellants to have fallen outside of the Crown's first party disclosure obligation. Consequently, it was subject to the O'Connor disclosure regime.
- [112] Before us, the appellants repeated the submission they made at the trial, namely, that because Mr. Fisher had been charged with serious criminal offences and was a member of the team that investigated the appellants, the Fisher Investigation material should have been disclosed to them by the Crown without prompting. From their perspective, Mr. Fisher's involvement in their case and, importantly, his engagement with NV, KC and SC as witnesses who were as equally vulnerable as the complainants in the Fisher Investigation, automatically entitled them to know the circumstances underlying the allegations against him.

- [113] This position erroneously presupposes that the mere fact of disciplinary proceedings or allegations of criminal conduct against a police officer who participated in an investigation engages the Crown's first party disclosure obligations. This is not correct at law and overstates the effect of McNeil. Under McNeil, police disciplinary records or allegations of criminal conduct only constitute first party disclosure when they have a "realistic bearing" on the case: McNeil at para. 53. When these records are produced as part of the Crown's first party disclosure obligation, it is as an "exception to the general rule that police records are third party records": Moazami (2020) at para. 41, emphasis added.
- [114] The argument that the impugned records were first party records also fails to account for the nature of those records, the reasonable expectations of privacy that likely attached to them, and the obvious need for a balancing of relevant competing interests prior to disclosure.
- [115] These records did not form part of the "fruits of the investigation" into the appellants' criminal conduct. They were not "acquired by means and in consequence of that investigation": R. v. Jackson, 2015 ONCA 832 at para. 93, leave to appeal to SCC ref'd, 36829 (30 June 2016). As helpfully explained by Justice Watt in Stipo:

84 The term "fruits of the investigation" refers to police investigative files, not to operational records or background information. In other words, the term describes information generated or acquired during or as a result of the specific investigation into the charges against the accused. This information may relate to the unfolding of the narrative of material events, the credibility of witnesses or to the reliability of evidence that may form part of the case an accused is required to meet: Gubbins, at para. 22; Jackson, at paras. 92-93.

- [116] Nor were the RTCC(s) in the Fisher Investigation, the statements of the complainants and witness involved in that investigation, or communication between Mr. Fisher and those individuals, "obviously relevant" to the appellants' case. To meet this standard, a record need not be potentially decisive of an issue at the trial: Stipo at para. 120. However, the relevance must be clear or self-evident: Schirmer at para. 64. As explained in Stipo:

86 The Supreme Court has stressed that "obviously relevant" does not create a new standard or degree of relevance: Gubbins, at paras. 23 and 36. Nevertheless, the term should be understood with reference to the stage of the process at which the relevance inquiry takes place. Unlike in the second step of the O'Connor application, the court will not have the records before it for examination. Therefore, the relevance of the records must be "obvious" without such examination.

87 No one suggests that every police record is subject to the first party disclosure regime of Stinchcombe: see, for example, McNeil, at para. 59. It follows that the third party disclosure regime of O'Connor occupies a vital role for disclosure of records which are neither part of the investigative file nor obviously relevant and thus fall outside the first party disclosure regime: Gubbins, at para. 24.

[Emphasis added.]

- [117] When defence counsel first explained to the judge why they wanted material from the Fisher Investigation beyond that already provided by the Crown, they said they were concerned about "inappropriate contact" between Mr. Fisher and NV, SC and KC. They contended that the Fisher Investigation would assist the defence in exploring whether Mr. Fisher "tried to bribe [NV, KC or SC] or tried to influence their evidence, and [that] this happened off the record".
- [118] At the time of this submission, NV, KC and SC had each provided a statement in the Fisher Investigation denying that anything like this had occurred. The Crown had also reviewed the then-existing RTCC(s) in the Fisher Investigation and there was no reference to NV, KC or SC. Furthermore, the Crown had determined that it would not be calling Mr. Fisher as a witness at the appellants' trial.
- [119] In this context, it is not clear to me how information surrounding interactions between Mr. Fisher and other complainants or a witness in an unrelated prosecution was "obviously relevant" to the appellants' case, even with the undeniable reprehensibility of his conduct. There was no evidentiary grounding for a suggestion of inappropriate relationships or undue influence between Mr. Fisher and NV, KC or SC. Other than the statements they provided in the Fisher Investigation (which had been disclosed), there was no discernable nexus between the two prosecutions. I do not consider it unreasonable, in these circumstances, for the Crown to have adopted the position that it had met its Stinchcombe obligations and the additional material sought by the defence did not constitute first party disclosure. It was rational for the Crown to determine there was no reasonable possibility that the additional material would assist the appellants in making full answer and defence: McNeil at para. 44.
- [120] Ultimately, the judge ordered that the appellants receive some, but not all of the requested information from the Fisher Investigation. He did so on the basis that this information was necessary for "full answer and defence": 2017 BCSC 2577 at para. 10. Although the judge did not identify the disclosure regime to which he was giving effect, nor the principles he applied in reaching this determination, for purposes of this appeal, I will assume it was the O'Connor framework and will treat the judge's conclusion as a finding that the appellants were able to meet the test of "likely relevance", specific to the material that was ordered to be disclosed. (The Crown also raised s. 278.3 of the Code in the court below. Whether that regime was also engaged by these records is best left to another day.)
- [121] I will also assume that the judge assessed the actual relevance of this same material and decided the issue in favour of the appellants; again, specific to that which was disclosed. Finally, in directing that the Crown redact the material he ordered disclosed for privacy interests, I will assume the judge engaged in a balancing of relevant competing interests as required under the O'Connor framework, which would have entitled him to order only partial disclosure.

[122] In their factum, the appellants say there is no legal support for witness statements to be "pruned" in the manner that occurred here. They also contend that if this Court affirms the approach taken here:

it [will] be open to the Crown in all cases to redact witness statements in the same manner, line-by-line, and disclose to the defence only butchered, skeletonized versions, or versions that need to be "stitched together" by combining the unredacted content from the different accounts given of the same incident.

[123] In my view, this contention overstates the implications of the judge's ruling given the context in which it was made and, importantly, is grounded in an erroneous presupposition that the sought-after material from the Fisher Investigation constituted first party records. ZC, HW and ES were not involved in the appellants' trial.

[124] The Crown suggests in its factum that there was no basis for the judge to order disclosure of material from the Fisher Investigation and that he erred in his assessment of "likely relevance". Although I consider the Crown's position to have considerable merit (for reasons that will become apparent), I do not consider it necessary to answer this question in resolving the first ground of appeal. Rather, it is sufficient to address the matter on the basis of the complaints advanced by the appellants, namely, that the disclosure they received from the Fisher Investigation was grossly insufficient, and that the deprivation of disclosure and the manner in which the defence applications were handled by the judge rendered their trial unfair.

What Did the Appellants Receive?

[125] To address these latter issues, it is important to first understand what the appellants received prior to the completion of their trial, specific to the Fisher Investigation.

[126] They received disclosure of Mr. Fisher's role in the investigation against them, including his interactions with NV, KC and SC, and his role in any statements taken from them.

[127] They received statements provided by NV, KC and SC in the Fisher Investigation.

[128] The appellants knew that on December 29, 2016, Mr. Fisher was charged with a number of offences, including sex offences, breach of trust and obstructing justice. On the first day of their trial, they received a copy of the then-sworn charging document(s), which would have identified the offences, their timeframes, and the alleged victims.

[129] After NV's testimony, the appellants received redacted statements from two complainants (ZC and HW), and from a witness (ES), in the Fisher Investigation, and redacted intercepts of conversations between some of these individuals and Mr. Fisher. The unredacted portions of the material revealed that in addition to allegations of sexual offending, Mr. Fisher was said to have:

- chatted with ZC "everyday over text", offered her tickets to the PNE, bought her something from Starbucks a couple of times, and given her a book about someone's struggle with addiction;
- told ZC that someone had reported to the police that they had "slept together" and, as a result, "internal may be investigating [him]". Mr. Fisher coached ZC on what to say if contacted about the situation. Among other things, he told her "how to say that [she] didn't know what [they were] talking about"; or that she was "high" at the time or that it never happened; and,
- given advice to HW about how to cover up a violent crime or to lie about it and, on another occasion, was said to have interfered with an Alberta investigation involving HW, resulting in the police in that jurisdiction letting her go.

[130] The unredacted portions also revealed that:

- from HW's perspective, Mr. Fisher was "shady. Always [doing] illegal shit". He gave her information about "people and stuff" that he was not authorized to do. He would run licence plates for her, tell her about ongoing investigations and was always "like creeping, like looking at all the girls that [were] working with [her]";
- if HW "needed a pimp or something", she would ask Mr. Fisher and he would give her names. She would then "go hit them up". This included the appellants; and,
- Mr. Fisher gave ES money from time to time and, on one occasion, offered to get her marijuana. He "totally made [her] feel like [she] could just call him and ask him for anything", but, at the same time, he "made [her] feel like [she] owed him".

[131] In their combined effect, the fact of sworn allegations of sexual misconduct and the unredacted portions of alleged victims' statements in the Fisher Investigation provided the appellants with a basis from which to cross-examine the complainants in this case about their interactions with Mr. Fisher and the presence of sexual or otherwise inappropriate conduct between them, including attempts by Mr. Fisher to influence their testimony or counsel untruthfulness.

[132] Indeed, NV, KC and SC were asked questions about their relationships with Mr. Fisher when they testified.

[133] Salient portions of NV's testimony include the following:

- NV said she had known Mr. Fisher for about six years;
- She saw him multiple times after their first meeting and every time she was arrested for an offence (other than shoplifting);
- Mr. Fisher would ask her "weird questions" when other police officers were not around, including questions about her sexual history, her personal life and her relationship with Mr. Albashir;
- He would not act this way when he was in the presence of others;

- Mr. Fisher's questions made NV uncomfortable and it was "creepy";
- At one point in her testimony, NV said that Mr. Fisher never attempted to influence her. But later, she agreed with defence counsel that it was "possible" and "very likely" that Mr. Fisher had suggested to her what she should say at the trial, but that she just did not remember he had done so. She agreed that Mr. Fisher would say "bad things" about Mr. Albashir;
- Upon further questioning, NV agreed again that it was likely Mr. Fisher had influenced her statement about the appellants, and that she just did not remember this fact because of her heroin use;
- However, in re-examination, NV testified that nothing she said in her statement to police about the appellants was something that Mr. Fisher told her to say;
- Mr. Fisher never gave her money. Nor did he send her text messages or emails; and,
- She was surprised that he was charged with sex offences.

[134] KC's testimony also addressed Mr. Fisher. This included the fact that:

- She was never alone with Mr. Fisher (although later, she said she could not remember if she was);
- She was never given any money by him;
- She gave her phone number to Mr. Fisher, as well as another police officer, so that she could keep in touch with them and she contacted Mr. Fisher for updates on Mr. Albashir's bail. She confirmed that she had Mr. Fisher's number in her address book. She said she did not communicate with Mr. Fisher on social media and he never contacted her outside of the case;
- Mr. Fisher did not tell her what to say before giving her statements to the police. She was told by him that there would be consequences if she changed her statement and she thought the consequence would be going to jail. He never asked her to "scrub" anything from a statement;
- She had a "pretty comfortable" relationship with Mr. Fisher and trusted him. She did not find it difficult to talk openly with him. He never asked her strange questions about her personal life. He did not treat her differently when the cameras were off versus when they were on when she provided statements; and,
- Nothing inappropriate happened between them. He never bribed her, asked her to change her evidence or offered to pay her for sex.

[135] SC was asked questions about Mr. Fisher when she testified. She said that:

- She never asked Mr. Fisher for money, nor did she receive any from him;
- He never told her what she should say or tried to influence her evidence. He did not suggest that she say things that would help the case against the appellants;

- She had contact with Mr. Fisher by phone and through a Facebook account. She had since deleted her Facebook exchanges with him, but not because there was something inappropriate about the messages. The messages were strictly professional;
- He never said or did anything inappropriate to her; and,
- He did not tell her things to say that would help the case against the appellants.

[136] It is apparent from this evidence that with the disclosure received by the appellants, they were able to canvass with NV, KC and SC their interactions with Mr. Fisher, the frequency and the nature of those interactions, and the extent to which Mr. Fisher may have attempted to influence their testimony.

[137] The appellants contend that because of the heavy redactions, the material they received from the Fisher Investigation "resulted in a false picture being painted of Fisher as a kindly fellow whose interactions with the Fisher Complainants were largely benign". I fail to see how that is so. Fisher had been charged with sex offences, breach of trust and obstructing justice. The unredacted portions of the statements taken from alleged victims of those offences described more than one form of improper conduct, including giving money and gifts to them; telling ZC about what to say if she was contacted by the police about his behaviour; counselling HW on how to cover up a violent crime; and improperly sharing information with them. This was not "benign".

[138] The redacted statements from the Fisher Investigation were disclosed after NV's testimony. However, it had been made clear to the appellants that if they had further questions for NV arising out of material they obtained as a result of their disclosure applications, they could apply to recall her. At no point did they do so. On appeal, the appellants say it was "an error for [them] to have closed their cases with the disclosure issue outstanding". But, they do not raise the ineffective assistance of counsel as a ground of appeal. As such, it is equally plausible that this was a strategic or tactical decision on the part of the defence.

What was Not Disclosed to the Appellants?

[139] The appellants did not receive full copies of the statements provided by the two Fisher Investigation complainants and witness. Nor did they receive a copy of any RTCC related to that investigation.

[140] They also did not receive disclosure of certain emails or other forms of communication between some of the police officers who were involved with the investigation against the appellants, nor material showing that NV, KC and SC received money from the VPD.

[141] I have reviewed the non-disclosed material that forms part of the fresh evidence application and which the appellants rely upon in support of this ground of appeal.

[142] The non-disclosed information specific to the Fisher Investigation is predominantly, if not exclusively, focused on that investigation. A not insignificant portion of this material is also focused on Mr. Fisher's sexual misconduct. At the trial and on appeal, the appellants have acknowledged that the details surrounding Mr. Fisher's sexual offences were not "critical" to them making full answer and defence.

[143] The RTCCs summarize:

- the content of statements taken from complainants and witnesses in the Fisher Investigation, including their descriptions of: the period of time they knew and interacted with Mr. Fisher; when and where that interaction occurred; their perceptions of his obsessive or fixated behaviour towards them or other young sex workers, including the extent and nature of his communication with them; gifts or money he provided to them; his overall participation and influence in their lives, including accompanying them to medical or other appointments; details of sexual contact with him, including the exchange of sexual contact for money; when and where the sexual contact took place; and inappropriate things said by Mr. Fisher, or information shared by him, including sexual comments;
- the content of statements taken from witnesses who received disclosures from the Fisher Investigation complainants and witness, including observations they made of them following sexual contact with Mr. Fisher and/or Mr. Fisher's interaction with these individuals in the presence of these witnesses;
- details of evidence gathered by the police that corroborated the Fisher complainants' and witness's narratives, including confirmation of dates, places and events referred to in their statements;
- details of one or more crimes alleged to have been committed by HW and Mr. Fisher's advice to her on how to cover up that crime;
- details of Mr. Fisher's attempt to interfere with, side track or manipulate an investigation into his own conduct, including coaching at least one complainant in that investigation on what to say and offering a quid pro quo in exchange for her co-operation;
- details of the investigative methodology employed in the Fisher Investigation, including using two complainants as police agents and intercepting conversations between them and Mr. Fisher;
- the content of statements taken from some of Mr. Fisher's co-workers;
- the content of information downloaded from one or more of Mr. Fisher's phones and the phone(s) of one or more of the complainants or witness;
- conclusions reached by investigators on the legal relevance and probative value of evidence gathered against Mr. Fisher; and,
- the bases on which investigators in the Fisher Investigation recommended that the Crown approve charges against Mr. Fisher and what they should consist of.

[144] The non-disclosed emails or other forms of communication between police officers and the complainants in this case (the second group of material at issue in this appeal), consist of brief exchanges about the status of the proceedings against the appellants or attach images of text messages that I understand were disclosed during the trial. There is also material showing that NV, KC and SC received money from the VPD, as described earlier.

Is There a Reasonable Possibility This Material Could Have Affected the Verdicts?

[145] Having considered the disclosure made available from the Fisher Investigation, the complainants' testimony about Mr. Fisher at the appellants' trial, and the records attached to the fresh evidence application, I have concluded there is no reasonable possibility that the non-disclosed material could have affected the verdicts in the appellants' case.

[146] The appellants say full access to the sought-after material was necessary so that they could "have an understanding of Fisher's modus operandi of exploitation [and] explore the credibility and reliability of [NV, KC and SC] and, potentially, to support an abuse of process claim". With respect to NV, in particular, the appellants stress that she acknowledged in her testimony that Mr. Fisher could have influenced her evidence. Yet, because of delays in disclosure and heavy redactions, the defence "could not attempt to refresh her memory [about how the influence may have occurred] by putting to her Fisher's modus operandi".

[147] There is no question that the circumstances that led to Mr. Fisher being charged with criminal offences represented, in the words of the appellants, a "gross violation of his duties as a police officer". However, before each of NV, KC and SC testified, they provided statements to the police in the Fisher Investigation and denied that Mr. Fisher had engaged in sexual misconduct with them. They also denied that Mr. Fisher had given them money, told them what to say, or otherwise attempted to manipulate their evidence. These denials were then affirmed when they testified, other than NV agreeing to a possibility or even a likelihood of having been influenced in her evidence and not being able to remember that fact. Defence counsel did not explain what they meant when using the term "influence" in cross-examination; ask NV to explain her understanding of the term; put specific manipulation-inducing scenarios to NV; or canvass possible ways in which the influence may have manifested itself. NV simply accepted the possibility of influence (undefined), and it was left at that. At the same time, she went on to confirm in re-examination that what she told the court about the appellants was true and that nothing she said in her police statement was something Mr. Fisher told her to say.

[148] From NV, KC and SC's own evidence, the interactions between Mr. Fisher and the complainants in this case were not the same as his dealings with the two complainants and the witness in the Fisher Investigation. Some of the things he said to NV, KC and SC and his demeanour when interacting with them were described as "creepy". However, there was no suggestion through the disclosure made available to the appellants before the trial, or, importantly, through the testimony of NV, KC or SC at the trial, that Mr. Fisher had perpetrated sexual assaults against them, coached them to lie or to cover up an offence, or

otherwise manipulated their evidence. NV's acknowledgment of possible influence over what she said about the appellants' conduct was equivocal. And, as noted, she ultimately confirmed in her testimony that the narrative she provided about her involvement with the appellants was her narrative, not one crafted for her by Mr. Fisher.

- [149] In *Moazami* (2021), the appellant raised Mr. Fisher's conduct as a ground of appeal in challenging his convictions on a 36-count indictment that contained prostitution-related, sex and human trafficking offences against eleven complainants. The offences were committed between February 2009 and October 2011. The trial commenced in September 2013 and ended in June 2014.
- [150] On appeal, Mr. Moazami alleged a miscarriage of justice and abuse of process arising out of Mr. Fisher's involvement with complainants and witnesses who testified against him. Some of those individuals were also complainants in the Fisher Investigation. Mr. Fisher sexually offended against them. He was a lead investigator in the proceedings involving Mr. Moazami and he acted in a support role for some of the Moazami complainants during the police investigation and at the trial.
- [151] Mr. Moazami filed a fresh evidence application in support of his appeal. The Court set out that evidence in its reasons and it appears to have included the RTCCs prepared in the Fisher Investigation which were requested by the appellants in this case.
- [152] In his appeal, Mr. Moazami submitted that the circumstances surrounding Mr. Fisher's misconduct justified a new trial. Among other things, it would allow Mr. Moazami to cross-examine the complainants or witnesses who testified against him about their relationships with Mr. Fisher and "undermin[e] their credibility": at para. 178.
- [153] This Court disagreed. Mr. Fisher's misconduct occurred after the complainants in Mr. Moazami's case testified: at para. 183. As the Court explained (at paras. 186-187):

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. [a witness in Mr. Moazami's trial], 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.

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.

- [154] The Court also found that a new trial was not required in Mr. Moazami's case to "restore the public's faith in the administration of justice" (at paras. 189-190):

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.

[Italics in the original.]

- [155] In my view, if there was no reasonable possibility that the circumstances surrounding Mr. Fisher's misconduct could have affected the verdicts in Moazami (2021), a different outcome in this case would be illogical. I say this fully appreciating that each case is different and must be treated as such. Accordingly, the outcome of the appeal in Moazami (2021) cannot be determinative. However, I do consider it instructive.
- [156] Unlike Moazami (2021), the complainants who testified in this case were not complainants in the Fisher Investigation. Moreover, they explicitly denied any sexual contact with Mr. Fisher or that he bribed or otherwise caused them to change their evidence. And, the appellants in this case did receive some disclosure surrounding Mr. Fisher's misconduct at their trial; they knew he had been charged with sexual offences against vulnerable sex workers; they knew he communicated extensively with those individuals; they knew he was alleged to have coached one or more of the Fisher Investigation complainants to lie or cover up evidence of a crime; the appellants had an opportunity to cross-examine or recall NV, KC and SC to the extent that they considered it advantageous after receiving the Fisher Investigation statements; and, importantly, in convicting the appellants, the judge considered the concerns raised by the appellants in respect of the potential influence by Mr. Fisher: at para. 61. This was a live issue at the trial and he specifically turned his mind to it.
- [157] I accept that from the appellants' perspectives, the credibility and reliability of the evidence of NV, KC and SC was a critical issue. However, I fail to see how cross-examining NV, KC and SC about Mr. Fisher's modus operandi in relation to other complainants or witnesses in an unrelated prosecution, of which they would have no direct knowledge, could have realistically affected their evidence and the verdicts. NV, KC and SC received an opportunity to be fully disclosive of any misconduct involving Mr. Fisher, whether sexual or otherwise manipulative in nature, when they provided their statements in the Fisher Investigation. They denied that anything of that nature had occurred. Both KC and SC expressed surprise at the allegations made against Mr. Fisher. In other words, it was not something they themselves would have contemplated based on their own experiences with him.

- [158] NV, KC and SC could not be cross-examined on the statements provided by the Fisher Investigation complainants or witness; they could not be asked to comment on what those individuals said, their perceptions of Mr. Fisher, or the details of Mr. Fisher's interactions with them. All the appellants could do is potentially take alleged facts from the Fisher Investigation and put them to NV, KC and SC, suggesting that "this too" had happened to them, notwithstanding their statements and testimony to the contrary. The material the appellants already had in hand allowed them to do that.
- [159] I agree with the Crown that in advancing this ground of appeal, the appellants have failed to establish any realistic probative link between the non-disclosed Fisher Investigation material and the complainants' evidence in this case, such that additional disclosure could have provided a meaningful (as opposed to speculative) basis for challenging the credibility and reliability of their testimony.
- [160] In the face of NV, KC and SC's denials that sexual misconduct, bribery or manipulation of their evidence occurred, the suggestion that Mr. Fisher's modus operandi as made manifest in the Fisher Investigation must have also presented itself here, is conjectural.
- [161] Finally, I am also satisfied there is no reasonable possibility that the second group of disclosure the appellants take issue with (payments made to NV, KC and SC), could have affected the verdicts. I accept that the Crown should have disclosed these facts as part of its Stinchcombe disclosure. However, there were only small amounts of money involved. There is no indication that the money was paid to secure the co-operation of NV, KC and SC in the investigation or the trial. Instead, the money was paid as part of a government-sponsored program to assist sex workers in leaving the industry. Understandably, the appellants did not spend much time on this material when arguing their disclosure ground of appeal. It would have had little, if any, impact in assessing the credibility and reliability of NV, KC and SC. I see no prospect of the judge having had a reasonable doubt based on this information. He was well aware of the frailties associated with the complainants' evidence; assessed and rationalized those frailties; and, in the context of his unique position as the trier of fact, he was prepared to accept their evidence. Information showing that they had received nominal amounts of money as part of a program designed to assist sex workers to leave the industry would not have made a difference.
- [162] I conclude that the appellants have not met the first branch of the Dixon and Taillefer test, as set out in Moazami (2021).

Could the Non-Disclosure Have Affected the Fairness of the Trial?

- [163] I am also satisfied the appellants have not established a reasonable possibility that the non-disclosure affected the overall fairness of their trial.

- [164] In their factum, the appellants say the Fisher Investigation material could have assisted them "in making decisions about how to conduct the defences, including what investigations to undertake, whether to challenge [the] admissibility of evidence obtained pursuant to judicial process where [Mr. Fisher] was the affiant, [and] whether to advance claims of abuse of process or entrapment". As noted, they have since abandoned the entrapment assertion.
- [165] The appellants have not persuaded me that the non-disclosure resulted in an unfair trial. The additional material they sought from the Fisher Investigation would not have realistically assisted in undermining the credibility and reliability of the testimony of NV, KC and SC. That was the primary focus of their disclosure applications. Nor, at law, could Mr. Fisher's misconduct with witnesses involved in a different prosecution have provided a basis for challenging the admissibility of evidence in this one.
- [166] The appellants had knowledge of allegedly criminal conduct committed by Mr. Fisher; they were given opportunities to explore the complainants' interactions with Mr. Fisher, the dynamics of those interactions and the extent to which the complainants were dependent on Mr. Fisher, or subject to his influence; and, after receiving the redacted statements from the Fisher Investigation, the appellants did not apply for details of the then-alleged sexual misconduct, or argue that greater access to that information would provide them with specific, additional avenues of investigative inquiry.
- [167] Instead, it appears they were content with the cross-examination they conducted (including not exploring with NV any particular ways in which Mr. Fisher might have influenced her testimony after she acknowledged this possibility); did not seek to recall any of the complainants; and closed their case with outstanding disclosure issues. One inference to draw from the decision to not recall NV, KC or SC for further cross-examination, is that the appellants were of the view that additional cross-examination, even with the further material, would not assist. Again, the appellants have not claimed on appeal that they were ineffectively assisted by their legal counsel at the trial.
- [168] It is also worth noting that access to the Fisher Investigation and cross-examination on the interactions between Mr. Fisher and his victims in that case carried the realistic potential of substantially broadening the scope of the appellants' trial, causing undue delay, and inviting the judge to consider additional, downstream disclosure orders or to engage in fact finding in relation to matters not properly before him. This potential is readily apparent from the appellants' factum. They note that a "covert investigation of a police officer regarding serious crimes would likely be complex, and involve information sources other than the Fisher Complainants. Thus, the Fisher Complainants' statements alone could not be expected to provide sufficient information" (emphasis added).

- [169] In my view, bringing the allegations involving Mr. Fisher into the appellants' trial, with no discernable nexus between the two prosecutions, would have unnecessarily complicated matters, unduly prolonged the trial, and exacerbated an already difficult testimonial process for obviously vulnerable complainants. Doing so was not in the interests of justice. As noted by the Supreme Court in *R. v. Grant*, 2015 SCC 9:
- [4] the accused's rights are not the only interests at stake [in a criminal trial]. The integrity of the administration of justice requires that the proceedings stay focused on the indicted crime and not devolve into trials within a trial about matters that may not be sufficiently connected to the case. Such tangents risk causing delays, confusion and distractions that undermine the trial's truth-seeking function
- [170] Specific to the possibility of an abuse of process argument, the comments made by this Court in *Moazami* (2021), carry even greater force here: in a case in which there is no overlap between complainants, "[i]t defies logic to conclude that the administration of justice requires that [the appellants] receive a new trial based on Mr. Fisher's conduct": at para. 190.
- [171] I conclude that the appellants have not met the second branch of the *Dixon and Taillefer* test, as set out in *Moazami* (2021). Accordingly, I would not admit any parts of the fresh evidence that do not already form part of the record in the trial court, and would dismiss the disclosure ground of appeal.
- [172] As a result, I do not consider it necessary to address and resolve the various errors in principle said to have been committed by the judge in managing the appellants' disclosure applications, or the alleged non-compliance with disclosure orders by the Crown. In my view, even if these arguments were shown to have some merit, in the context of the trial as it existed at the material time, the deprivations or impact said to have flowed from the stated errors and non-compliance would be inconsequential because the material the appellants say they were deprived of in making full answer and defence could not have affected the verdicts, or rendered their trial unfair.

Did the Judge Err in Applying the Co-Conspirator Exception?

- [173] In convicting the appellants, the judge admitted the "out of court acts and statements of one accused against the other as proof of the truth of its contents" on the basis of the co-conspirator exception to the rule against hearsay evidence: at para. 21. On this issue, he instructed himself relying on this Court's decision in *Wang*.
- [174] In *Wang*, Justice Bennett set out the admissibility framework for the co-conspirator exception:
- [46] The co-conspirator's exception to the hearsay rule permits out-of-court acts and declarations of others to be admitted into evidence against the accused for the truth of their contents

[47] On the other hand, triers of fact must not forget that this exception permits hearsay evidence before the court for the truth of its contents without the ability to cross-examine the maker of the statements

[48] In *Carter* [[1982] 1 S.C.R. 938, 137 D.L.R. (3d) 385], McIntyre J. established safeguards to test the exception to the hearsay rule (at 947-948). The "Carter test" is well-known, and requires consideration of the evidence in three stages. I restate them as follows:

- 1) The trier of fact must consider all of the evidence to determine whether the existence of a conspiracy has been proved beyond a reasonable doubt.
- 2) The trier of fact considers only the evidence directly admissible against the accused to determine if the accused is probably a member of the conspiracy.
- 3) Once the first two stages are established, the trier of fact may consider all of the evidence, including the out-of-court acts and declarations of other members of the conspiracy and made in furtherance of the conspiracy to determine if the accused is an actual member of the conspiracy. This determination is beyond a reasonable doubt.

See also *R. v. Smith*, 2007 NSCA 19 at paras. 194-197, affirmed 2009 SCC 5, [2009] 1 S.C.R. 146; *R. v. Yumnu*, 2010 ONCA 637 at paras. 338-340, affirmed 2012 SCC 73, 290 C.C.C. (3d) 323.

[49] In order to use the evidence of another co-conspirator, that co-conspirator must be a probable member in the conspiracy. In addition, the co-conspirator's acts and declarations must be in furtherance of the conspiracy. This does not mean that acts and declarations after the commission of the indictable offence are not admissible. The admission of the evidence relates to the agreement, not the substantive offence

[Internal references omitted; underlining in the original.]

See also *R. v. Correia*, 2016 BCCA 330 at paras. 24-29, and *R. v. Tran*, 2014 BCCA 343 at para. 78.

[175] The co-conspirator exception is an evidentiary rule and determines admissibility. Errors of principle alleged to have been committed in applying the rule are subject to a correctness standard of review. Findings of fact made during the course of the analysis are entitled to deference: *R. v. Potter*, 2020 NSCA 9 at para. 518; *R. v. Moir*, 2020 BCCA 116 at para. 82.

[176] The appellants allege errors in principle. They accept that the judge correctly recited the co-conspirator exception and the applicable "three-stage test". However, they say he erred in applying the exception. More specifically, the judge: (a) failed to explicitly identify one or more criminal purposes of the allegedly unlawful design or conspiracy; (b) failed to identify the evidence he relied upon in finding that each appellant was a likely member of the conspiracy, or demonstrate that he conducted a meaningful analysis at stage two of the test; and (c) failed to identify the specific acts and declarations of the appellants that were admissible against each other.

- [177] The appellants argue that given the importance of the co-conspirator exception in the context of this case, "it was necessary for the [judge] to provide sufficient reasons in support of his determination as to admissibility and the use he made of specific acts and declarations".
- [178] Referring back to my earlier comments about appellate review, a judge's reasons, including explanation of the rules of evidence they applied, are to be read "generously" and "with the presumption that the judge knows the law": Gerrard at para. 2. The judge need not advert to every piece of evidence they considered or detail and explain each of their material findings: R.E.M. at paras. 15-20, 48-57. Nor are judges required to "demonstrate [in their reasons] their knowledge of basic criminal law principles": G.F. at para. 74.
- [179] I am satisfied from paras. 21-45 of the reasons for conviction that the judge properly understood the admissibility framework he was obliged to apply in deciding whether the co-conspirator exception was available to the Crown; meaningfully considered each stage of the analysis; and, although his findings are briefly stated, the pathway to his application of the exception is discernable.
- [180] Specific to the errors alleged by the appellants, there is no merit to the suggestion that the judge failed to consider whether the "escort" operation involving the appellants was criminal in nature. (A criminal conspiracy requires proof of an intention to agree, the completion of an agreement and a common design to do something unlawful: *United States of America v. Dynar*, [1997] 2 S.C.R. 462, 1997 CanLII 359 (SCC) at para. 86 [*Dynar*]).
- [181] The Crown argued that the "criminal purpose" of the appellants' joint venture with Mr. Alameddin was to "make money for themselves and in furtherance of this common enterprise the [appellants] recruited girls and young women to work for them as "prostitutes", exercised control and direction over them and exploited them with the intent of using the money to finance their own lifestyles ": at para. 30, emphasis added. The judge agreed with the Crown that the evidence supported this inference: at para. 31. In other words, he found as a fact (and thereby identified), that the purpose of the appellants' "escort" operation was unlawful -- they sought to recruit, exercise control over and exploit young women as sex workers for their own financial gain.
- [182] The judge also found, at para. 42, that the appellants were engaged in a joint venture "to dissuade [KC] from giving evidence in a judicial proceeding", which violated s. 139(2) of the Criminal Code. (The appellants did not contest application of the co-conspirator exception to the evidence surrounding this count: para. 41.)
- [183] There is also no merit to the suggestion that the judge failed to identify the evidence he relied upon in finding that each appellant was a likely member of the two conspiracies. It is readily apparent from para. 31 of his reasons that in reaching his conclusion about the unlawful purpose(s) of the "escort" operation; in finding the existence of conspiracies; and in concluding that the appellants were probable members of those conspiracies, the judge considered the whole of the evidence, which consisted of evidence properly admissible

against each of the appellants and the overall context for their acts and declarations. The admissibility framework for the co-conspirator exception allows for this type of consideration: Wang at para. 53; Tran at paras. 116-119.

- [184] At para. 31 of his reasons, the judge lists the conduct engaged in by each appellant, both individually and in support of each other, specific to each complainant and in furtherance of the "escort" operation. He took a holistic approach to the evidence, while at the same time recognizing that there were distinctions between each appellant's degree of interaction with NV, KC and SC: at para. 32. The judge stated his conclusion on stage two of the co-conspirator exception succinctly and without an accompanying substantive or evidentiary analysis. However, in the particular circumstances of this case, the failure to do so does not constitute reversible error. The evidence that the judge considered in finding the existence of two conspiracies and the appellants' probable involvement in those conspiracies is self-evident from his reasons.
- [185] Finally, the appellants say the judge erred by failing to delineate the specific acts and declarations that were admissible under the co-conspirator exception.
- [186] The judge did not provide clarity on this point, specific to the first conspiracy. He did so in respect of the second: at para. 45. It would have been preferable for the reasons to address this issue. However, at the hearing of the appeal, the appellants were asked to direct the Court's attention to any place in the reasons that show the judge improperly used evidence specific to one appellant against the other. They were not able to do so in any meaningful way. Instead, the appellants seek to have this Court infer improper use of the co-conspirator exception based on the failure of the judge to expressly set out the evidence that properly fell within the scope of the rule.
- [187] I am not prepared to do so in light of the functional and contextual approach brought to bear on appellate review. It is apparent from his reasons that the judge was alive to the need to ensure that in determining the appellants' guilt, he did not rely on evidence for an improper purpose. For instance, at paras. 47-48 of his reasons, he instructed himself that while statements made by the appellants were admissible as "admission[s] against interest", text messages sent by the complainants could not be used to corroborate the complainants' testimony because it would amount to oath-helping. The judge clearly did turn his mind to proper and improper uses of evidence and, applying G.F. and Gerrard, he is presumed to know the law. He is as equally entitled to the benefit of that presumption in respect of the co-conspirator exception, as he is to other aspects of the judgment.

Did the Judge Err in His Approach to Party Liability?

- [188] The judge referred to s. 21 of the Code four times in his reasons. Section 21 sets out the bases upon which someone can be found liable as a "party" to a criminal offence.
- [189] First, at para. 13, the judge noted that in prosecuting the appellants, the Crown invoked both ss. 21(1) and (2) of the Code. He then set out the provisions:

21 (1) Every one is a party to an offence who

- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.
- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[190] At para. 14 of his reasons, the judge clarified the Crown's position. Its "primary position" was that the appellants were "co-principals or co-perpetrators" of the charged offences. Section 21(2), often referred to as the "common intention" provision, was invoked by the Crown as an "alternative".

[191] This understanding of the Crown's position was reiterated at paras. 21-22 of the reasons. The Crown's "primary position" was that the appellants (along with Mr. Alameddin), were "co-principals in a joint venture under s. 21(1)(a) of the Code". If the appellants were "not caught under s. 21(1)(a), then they may be [culpable] under s. 21(1)(b) or (c) as aiders or abettors, or 21(2)" (emphasis added).

[192] The fourth and last reference to s. 21 appears at para. 114 of the reasons. In that paragraph, the judge described Mr. Mohsenipour as a "co-conspirator in the recruitment of girls for the sex trade and the operation of a pimping business", and found him guilty of count 1 of the indictment "based on s. 21(2) of the Criminal Code". Count 1 charged the appellants with procuring or attempting to procure NV to become a prostitute.

[193] The appellants say that in finding them guilty of counts 1-18, the judge mixed up or conflated ss. 21(1) and (2); failed to appreciate the distinctive elements of these provisions, or the findings of fact that were necessary to properly invoke them; and, he provided no meaningful analysis of party liability. The appellants contend the findings of guilt were expressed in conclusory terms and it is impossible to discern the pathway to culpability from the judge's reasons. These are errors in principle and subject to a correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[194] The Crown says there is no merit to this ground of appeal. It argues the judge did not confuse ss. 21(1) and (2) and the convictions entered for counts 1-18 are easily explained with reference to these provisions.

[195] The distinctions between ss. 21(1) and (2) are helpfully set out in *R. v. Simon*, 2010 ONCA 754, leave to appeal ref'd, 33983 (5 May 2011):

- [39] Persons who participate in the offence actually committed, whether as a principal, an aider or an abettor, have their liability determined under s.21(1).
- [40] Section 21(2) extends liability for crime in two respects. The first has to do with the persons whose participation in an unlawful enterprise may attract liability. And the second relates to the offence for which participants in an unlawful criminal enterprise may be held liable
- [41] The persons to whom s. 21(2) extends liability are those whose participation in the offence actually committed would not be captured by s. 21(1). These persons have participated in a prior unlawful enterprise with others and either knew or, in most cases at least, should have known that one (or more) of the other participants in the original enterprise would likely commit the offence charged in pursuing their original purpose.
- [42] The offence to which s. 21(2) extends liability is not the original "unlawful purpose" to which the subsection refers. The "offence" of s. 21(2) is a different crime, one that a participant in the original "unlawful purpose" commits in carrying out that original purpose. And so it is that we sometimes say that s. 21(2) extends liability to those engaged in one unlawful purpose to incidental or collateral crimes: crimes committed by any participant (in the original purpose) in carrying out the original purpose that the other knew or should have known would likely be committed in pursuing the original purpose
- [Italics in original; internal references omitted.]
- [196] I am satisfied that the bases for liability against the appellants are discernable from the judge's reasons. Moreover, I am satisfied that the implied findings of fact set out at para. 31 provided ample bases from which he could find, consistent with the Crown's primary theory, that the appellants were culpable as principals, co-principals or aiders or abettors in the counts in which they were named: Code, ss. 21(1)(a)-(c).
- [197] I appreciate that para. 31 was crafted in the specific context of a discussion about the co-conspirator exception to the rule against hearsay evidence; however, this paragraph clearly sets out the judge's view of the evidence that was adduced by the Crown, including the nature of the appellants' "escort" operation; events that occurred during that joint venture; and the appellants' individual and collective degrees of responsibility. It is based on this evidence that the judge found beyond a reasonable doubt that the appellants were engaged in a conspiracy -- they had agreed on a common design to do something unlawful: Dynar at para. 86.
- [198] Paragraph 31 makes it clear that the judge found that the appellants were working together as co-principals or, at a minimum, aiding or abetting each other in a joint venture. Paragraphs 32, 33, 35, 44, 56, 114, 123, 124, 125, 130, 135, 204, 226, 232, 268, 270 and 276 are to the same effect.

- [199] With this context, I consider the judge's reference to s. 21(2) in para. 114 of his reasons (the only time he cited s. 21(2) as a basis for liability), to be a misspeak. When his reasons surrounding count 1 are read in their entirety, I am satisfied the judge convicted the appellants under count 1 relying on s. 21(1), with Mr. Albashir being the principal offender and Mr. Mohsenipour a co-principal, or, at the very least, an aider or abettor.
- [200] Count 1 charged both appellants with procuring or attempting to procure NV to become a prostitute between May 15, 2013 and July 1, 2013. The judge found, as a fact, that when NV first met the appellants, they asked her if she wanted to work as a prostitute: at para. 108. Mr. Albashir was "doing the talking", but Mr. Mohsenipour was present: at para. 108. NV was later contacted on Facebook by Mr. Albashir, who asked if she remained interested in working for the appellants. After she said she was, the "two men picked her up, driving in Mr. Albashir's black Infinity, and took her to a store where they bought her a cell phone": at para. 109, emphasis added. "They then dropped her off at her home and Mr. Albashir told her he would be in touch in a couple of weeks": at para. 109, emphasis added.
- [201] The judge identified procuring as a "process" (at para. 110), and found that in the circumstances of this case, the process included (but was not limited to): NV being asked if she would like to be an "escort" while Mr. Mohsenipour was in attendance; being taken by both appellants to purchase a cell phone; and, having photos taken for the appellants' online site: at para. 110. Mr. Mohsenipour was found to have been "active during [that] photoshoot, giving instructions on how to pose": at para. 113.
- [202] On the judge's findings, NV was plainly solicited to work for the appellants in their joint venture. He found that the joint venture included the "recruitment of girls for the sex trade": at para. 114. Mr. Mohsenipour was with Mr. Albashir when the latter directly engaged NV in the first discussion about working for them; he actively participated in the "process" that was found to constitute her procurement, including giving directions during the photo shoot; and, importantly, he was a "co-conspirator" in the "pimping business" for which NV was recruited and participated: at para. 114. At law, this rendered Mr. Mohsenipour a co-principal in the procurement within the meaning of s. 21(1)(a), or, at a minimum, an aider or abettor under ss. 21(b) and (c). There was no need in these circumstances to invoke s. 21(2) and the judge's reference to it was harmless.
- [203] I note that in *R. v. B. (A.D.)*, 1999 BCCA 105, this Court upheld a conviction for procurement based on party liability that was grounded in evidence of the appellant "giving assistance" in a "recruitment process": at para. 25. The same can be said here.
- [204] In support of this ground of appeal (as well as others), the appellants take issue with the way in which the Crown articulated legal principles at the trial and Crown counsel's submissions on how those principles should be applied by the judge. The appellants say that on more than one occasion, Crown counsel with conduct of the prosecution misstated the law or encouraged the judge to adopt an erroneous analytical approach. There is no doubt that in some circumstances, the positions taken by parties at a trial and the manner

in which they frame and articulate the substantive and procedural issues relevant to the case, can inform this Court's assessment and determination of error. For example, it may assist in understanding the context for an error that is found to have been committed by the judge, or, it may assist in assessing the prejudice that was perceived to have flowed from a position taken by one of the parties or an interlocutory ruling. However, an appeal is from the verdict and errors alleged to have been committed by the judge, not the positions taken or arguments made by counsel. In assessing whether the judge erred in his application of party liability in this case, it is the reasons for conviction that matter.

Did the Judge Err in His Credibility Assessments?

[205] The credibility of the complainants was a significant issue at the trial. The judge found each of NV, KC and SC to be credible witnesses. His specific conclusions in that regard are set out at paras. 61-62, 182-183, 191-195, and 237-238 of his reasons.

[206] With respect to all three women, the judge also noted (at para. 6):

[That their] decision to work with the authorities, provide statements, and appear as witnesses in this proceeding was a difficult choice for each. A support worker was involved. N.V. reached out to Mr. Albashir for advice on what to do about her desire not be involved in the prosecution, even though much time had passed since they had last had contact. K.C. has undergone turmoil in the actions she has taken in working with the authorities. S.C. displayed considerable distress when relating events as well as the impact her involvement in prostitution has had on her life. All three gave evidence of having had a belief or hope in romance with one of the three named accused. Though there is evidence of sexual conduct and gift giving; it appears the latter was largely from the women, and there is little evidence of romance being reciprocated by the men. In terms of the evidence of the complainants leaving and returning to the men, their statements of being in a partnership and their statements of wanting to be an escort, I have considered these in light of their circumstances, vulnerabilities, dependencies, economics and normalization. I have noted the testimony of the complainants and not being afraid of the men but also the violence they encountered, observed and or related to them. My sense of the testimony of being unafraid was more bravado, defiance and normalization. In this case, sadly, drugs and/or alcohol dependencies arose during the relevant period with each of the complainants. It seems they continue to struggle with this

[207] The appellants acknowledge that the judge took a cautious approach to the evidence of the complainants: at para. 238. They also accept that he considered the complainants' testimonial frailties before deciding to rely on what they had to say. However, the appellants say that notwithstanding these factors, the judge ultimately failed to conduct a proper analysis of how his concerns with their evidence were overcome. He gave too much weight to their demeanour, allowing it to overwhelm the credibility assessment. He also failed to provide sufficient reasons for why he accepted the complainants' evidence in light of his concerns.

- [208] In my view, there is no merit to this ground of appeal.
- [209] In addition to identifying specific frailties associated with each complainant's evidence, it is apparent from para. 6 of the judge's reasons that in assessing credibility, he considered the complainants' social context or lived realities, including: probable substance use disorders, economic desperation, exposure to violence as youth, and personal trauma arising from their involvement in sex work, an activity that is judicially-recognized to be inherently risk-laden. This he was entitled to do. It is wholly appropriate for a judge to consider relevant social context when assessing credibility: *R. v. Theriault*, 2021 ONCA 517 at para. 146, leave to appeal ref'd, 39768 (16 December 2021). In *Bedford*, the Supreme Court noted that "while some [sex workers] may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of [sex work], many [of them] have no meaningful choice but to do so": at para. 86.
- [210] Credibility findings "deserve particular deference": G.F. at para. 81. They will not be set aside on appeal in the absence of palpable and overriding error. The trial judge is "the fact finder and has the benefit of the intangible impact of conducting the trial": G.F. at para. 81. Assessing credibility "is not a science": *R. v. Gagnon*, 2006 SCC 17 at para. 20. Instead, it involves a "complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events": *Gagnon* at para. 20. For this reason, "appellate courts have been repeatedly cautioned against substituting their own assessment of credibility for that of the trial judge when there is a reasonable basis for the trial judge's conclusions on credibility: *R. v. M.D.*, 2021 BCCA 339 at para. 55, citing *Gagnon* at paras. 22-23; *R.E.M.* at para. 48.
- [211] The appellants have not established palpable and overriding error. They have not pointed to particular findings by the judge that reflect a misapprehension of the complainants' evidence; an error in principle or impermissible reasoning that resulted in a flawed and irreparably tainted assessment of credibility or reliability; or evidence that the judge either disregarded or failed to consider in his analysis and, if accepted, would render reliance on the complainants' testimony unreasonable and without support.
- [212] Instead, they simply assert that the judge overemphasized demeanour (a relevant factor for consideration in assessing credibility: *R. v. Ceal*, 2012 BCCA 19 at para. 24), and did not say enough about the reasons why he believed NV, KC and SC. In a case such as this, where the reasons demonstrate that the judge was alive to the fact that credibility was at issue, and he identified specific frailties and explained why they did not raise a reasonable doubt, generalized complaints about an overemphasis on demeanour and the judge not having said enough are insufficient to meet the onus on appellate review.

Is the Procurement Verdict Unreasonable?

[213] The appellants argue that the verdict on count 1 of the indictment is unreasonable within the meaning of s. 686(1)(a)(i) of the Code. As noted, count 1 charged the appellants with procuring NV to become a prostitute between May 15, 2013 and July 1, 2013.

[214] The appellants accept that the judge correctly instructed himself on the meaning of "procure" for the purpose of this offence. At para. 101 of his reasons, the judge cited *R. v. Deutsch*, [1986] 2 S.C.R. 2, in which Justice Le Dain agreed at para. 35 that to "procure" means to cause, induce or to have a persuasive effect on someone.

[215] However, the appellants say there was no evidence of causing, inducing or persuading NV to become a prostitute. As such, from their perspectives, the procurement verdict is not supported by the record and cannot stand.

[216] I appreciate that the appellants interpret the evidence surrounding the start of NV's involvement in their "escort" operation differently than the judge. They would not have assigned the weight to NV's testimony that he did. Nor would they have drawn the same inferences. However, that is not a proper basis for appellate intervention under s. 686(1)(a)(i). Instead, in order for a judge alone verdict to be set aside on the ground that it is unsupported by the evidence, the verdict must be one that:

28 a "properly instructed jury acting judicially, could [not] reasonably have rendered" (*R. v. Biniaris*, [2000] 1 S.C.R. 381, at para. 36, quoting *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185)

R. v. C.P., 2021 SCC 19.

[217] I would not accede to this ground of appeal. In finding the appellants guilty of procuring NV, the judge took several pieces of evidence into account, none of which is challenged by the appellants on appeal. Evidence at the trial included:

- NV was 15 years old, missing school, getting into trouble at home (she did not like her mother's "rules"), using heroin, and looking for a way out of her home situation at the time she was first asked to work for the appellants: at paras. 105-106;
- After that meeting, Mr. Albashir followed up by communicating with her through Facebook, again soliciting her interest in working for the appellants: at para. 109;
- Once NV confirmed her interest, the appellants picked her up, took her to a store and purchased a cell phone for her. She was without a cell phone at the time, as hers had broken. She was told that the purpose of the new phone was for the appellants to keep in touch with her: at para. 109;
- She understood that in working for the appellants, she was expected to perform sexual services;
- Arrangements were made to take photographs of NV for the appellants' online site. She was told that the place they took the photos was where she would be living and working: at para. 110;
- When the appellants picked up NV for the purpose of the photo shoot, she had her personal belongings with her because she was planning on leaving home and living with the appellants;

- She was provided with a place to live in downtown Vancouver: at para. 110;
- She started working for the appellants the same day as the photo shoot; and,
- NV testified that "at the beginning", she thought she was going to be in a relationship with Mr. Albashir. However, she later "learned that was not to be the case": at para. 66.

[218] In light of this foundation, the inferences drawn by the judge were reasonably open to him, not only in relation to the appellants' intent or purpose in soliciting NV's interest and in facilitating her involvement in their "escort" operation, but the effect of their conduct on NV. This included the inference that when NV first met the appellants, she was "looking for a way out of her mom's home" (at para. 106); the appellants' conduct would have implied to NV that she would be able to earn money if she worked for them (at para. 110); and NV testified she was initially under the impression that she and Mr. Albashir were going to be in a romantic relationship (at para. 110).

[219] The judge was entitled, in his words, to consider the evidence adduced in support of procuring "in context" (at para. 110), including NV's youth, her personal circumstances and vulnerability, and the way things may have appeared to her at the material time. He took the cumulative effect of the evidence into account: para. 110. It was not erroneous to do so. In deciding whether the Crown has proved an offence, evidence is considered as a whole, not piecemeal.

[220] To sustain a conviction for procuring, the Crown does not have to prove that the acts of persistence or persuasion said to constitute the actus reus of the offence overcame the victim's resistance or overpowered her will: *R. v. B. (K.)*, 2004 CarswellOnt 1105 (ONCA), 184 C.C.C. (3d) 290 at paras. 52-53. It is enough if they had a persuasive effect.

[221] I am not persuaded, on this record, that there was no evidence to support the judge's findings, thereby rendering the verdict on count 1 unreasonable. That is the onus borne by the appellants: *Deal* at para. 25.

Did the Judge Err in His Interpretation of Section 279.01(1)?

[222] Counts 10 and 17 of the indictment charged the appellants with human trafficking specific to KC and SC. Section 279.01(1) of the Code stipulates that:

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence

[Emphasis added.]

[223] What constitutes "exploitation" for the purpose of s. 279.01(1) is set out in s. 279.04(1):

279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused

- (a) used or threatened to use force or another form of coercion;
- (b) used deception; or
- (c) abused a position of trust, power or authority.

[Emphasis added.]

[224] The judge reviewed these sections and then described the "elements of the offence" established under s. 279.01(1) this way (at para. 220):

- 1) Conduct: Recruit, transport, transfer, receive, hold, conceal or harbour a person, or exercise control, direction or influence over a person's movements;
- 2) Purpose: For the purpose of exploiting that person or facilitating that person's exploitation.

[225] Citing various cases, including R. v. A. (A.), 2015 ONCA 558, the judge noted that to be found guilty of human trafficking, an accused "need not actually exploit the complainant; it is the accused's purpose that matters": at para. 224, emphasis added.

[226] A. (A.) offers helpful guidance on the mens rea for the offence. Writing for the Court, Justice Watt explained the fault requirement for human trafficking at para. 82. It consists of two components: (a) an intent to do anything that satisfies the conduct requirement; and (b) the objective of the conduct, the reason for which it is done, or the intended result must be to exploit someone or to facilitate that person's exploitation.

[227] The appellants take no issue with Justice Watt's articulation of the fault requirement. Section 279.01(1) is a specific intent offence.

Judge's Findings

[228] The judge found the appellants guilty of counts 10 and 17.

[229] Specific to KC, the judge found (at para. 226):

that both Mr. Albashir and Mr. Mohsenipour recruited K.C., harboured her by providing her a place to live, transported her to different locations, exercised direction and influence over her movements by telling her where to go, when she could leave, and setting rules about her working conditions such as how many days she had to work and her hours

This finding established the "conduct element" (or actus reus) of s. 279.01(1) for each of the appellants: at para. 226.

[230] In relation to mens rea, the judge found that Mr. Albashir's conduct "was designed to facilitate [KC]'s exploitation": at para. 227, emphasis added. Among other things, he used violence for the purpose of controlling her: at para. 228. KC testified that Mr. Albashir demanded that she respect him or "she would get taxed or beat up": at para. 228. Other forms of abusive conduct against KC involved: "using abusive language designed to undermine her self-esteem, slapping and punching her, and telling her daughter that he loved her more than her mother ": at para. 229.

[231] The judge found that Mr. Albashir harboured and exercised direction and influence over KC's movements "so that he could have easy access to her for the purpose of exploiting her": at para. 230, emphasis added. The judge then described this conduct as "at the very least facilitating exploitation": at para. 230.

[232] In terms of Mr. Mohsenipour, that judge found that in relation to KC, Mr. Mohsenipour was "most accurately viewed as acting for the purpose of facilitating Mr. Albashir's exploitation of [KC]": at para. 232, emphasis added. The appellants (at para. 232):

knew how the other operated, including by the use of violence. They were intimately involved with each other's businesses. It can be inferred from this that they knew that isolating the complainants and having easy access to them would make it easier to exploit them, and acted for the purpose of doing so.

[Emphasis added.]

[233] After reaching these conclusions, the judge moved to s. 279.02(1) of the Code (charged in counts 11 and 18), and found that the evidence was "abundantly clear" that the appellants received a financial benefit from trafficking KC. They were "invested in [KC]. They purchased supplies, rented her condos, drove her to Edmonton and transported her to outcalls": at para. 235. He found the appellants guilty under s. 279.02(1).

[234] Turning to SC, the judge found as a fact that the appellants "recruited, transported and harboured [SC], and exercised direction and influence over her movements": at para. 281. This met the actus reus requirement of s. 279.01(1) for each of them.

[235] He then found that the circumstances surrounding the appellants' interaction with SC could (at para. 283):

be seen as one of facilitating. The actions of placing S.C. in a location the men chose made it easier for Mr. Mohsenipour to exploit her. Having her work for them, knowing where she is and having easy access to her better enabled Mr. Mohsenipour to engage in violent and threatening conduct, including the gun-to-head incident. In addition, being informed that the accused had beat up Nebs [another sex worker] for stealing from them and, more importantly, trying to get K.C. to go independent could reasonably have led both to feel that they could face physical harm

if they themselves could tried to go independent, even though Nebs was beaten for trying to get someone else to go independent and not just for doing so herself. In my view the use of such violence, particularly in one of the apartments in which the complainants were harboured, can establish that the purpose of harbouring them there was in part to make it easier to exploit them. Certainly, if they lived in a location not controlled and accessible to the accused, it would be much more difficult to lure individuals over to beat them up in front of the complainants. Seen in the light of all of the evidence, it is apparent that facilitating exploitation was in fact the goal of the accused.

[Emphasis added.]

[236] Paragraph 283 reflects a finding that Mr. Mohsenipour personally exploited SC by placing a gun to her head. Mr. Albashir was found to have facilitated the exploitation by Mr. Mohsenipour: at para. 284. For both men, the judge found that "one of the purposes of influencing the movements of [SC] and harbouring her in locations they controlled and had access to was to make it easier to exploit her should they need to": at para. 285, emphasis added. They were each found guilty of having trafficked SC under s. 279.01(1).

[237] Turning to s. 279.02(1), the judge found the appellants guilty of receiving a financial or other material benefit in relation to SC, knowing that the benefit was obtained by or derived from the human trafficking offence. He did not set out the evidence he considered in relation to this offence; however, these findings of guilt immediately followed his analysis of the evidence involving SC specific to s. 279.01(1). On a functional reading of his reasons, he clearly saw the convictions under s. 279.02(1) to logically flow from his earlier findings of fact.

Parties' Positions on Section 279.01(1)

[238] The appellants argue that the judge convicted them of counts 10, 11, 17 and 18 applying a "legally incorrect route to liability". This contention raises a question of law. A trial judge's interpretation of a statutory provision delineating the essential elements of an offence is reviewed for correctness: *R. v. Johnson*, [1975] 2 S.C.R. 160, 40 D.L.R. (3d) 215 at 170; *Housen* at para. 8. So is a judge's assessment of evidence on the basis of an incorrect legal principle: *R. v. H. (J.M.)*, 2011 SCC 45 at paras. 29-30.

[239] The appellants say the judge did not find them guilty of the s. 279.01(1) offence on the basis that they knowingly committed one or more forms of the proscribed conduct for the purpose of exploiting KC and SC, or for the purpose of facilitating the exploitation of KC and SC by someone else.

- [240] Instead, the appellants say the judge entered convictions for human trafficking on the basis that the appellants facilitated their own exploitation of the complainants, or, facilitated each other's facilitation of their own exploitation. (The appellants describe the latter routes to liability as a "tertiary mode".) They submit that the judge's approach to s. 279.01(1) is confusing, inconsistent with case authority, unsupported by the modern principle of statutory interpretation, and legally incorrect.
- [241] The Crown responds by contending that the judge made no such error. His discussion of the fault requirement is admittedly confusing at times. However, when his reasons are read as a whole, and within the context of the record, it is apparent that the judge convicted the appellants under ss. 279.01(1) based on the fact that Mr. Albashir actually exploited KC; Mr. Mohsenipour actually exploited SC; and that in jointly participating in the recruitment, transport, harbouring and control of these women, the appellants intended to facilitate the exploitation of KC and SC by each other.
- [242] The Crown says that in light of these findings, only two routes to liability were applied by the judge, both of which are expressly contemplated by the plain wording of s. 279.01(1).

Analysis

- [243] The parties spent considerable time in their factums addressing the proper interpretation of s. 279.01(1); its legislative background; the meaning of "facilitation"; whether this provision is ambiguous; whether it should be interpreted with reference to Charter values; or, ultimately, whether it should be assessed for constitutional compliance.
- [244] I do not consider it necessary to conduct an in-depth analysis of the allowable reach of s. 279.01(1). This is because, in my view, the judge did not find the appellants guilty of ss. 279.01(1) and (2) on the bases alleged by the appellants. As such, the interpretation that they complain of, and which they say raises serious concerns about the wording of s. 279.01(1) and its application, does not arise. Those are questions best left for another day, in the context of a case in which the purported interpretive conundrum is realistically a live issue. (I note, parenthetically, that if an individual takes steps or puts a plan in action to facilitate their own exploitation of a particular individual, they are, functionally, conducting themselves for the "purpose of exploiting" that person.)
- [245] I agree with the Crown that on a fair reading of the reasons in this case, the judge found that Mr. Albashir personally exploited KC and that Mr. Mohsenipour personally exploited SC. In addition, he found that they both facilitated exploitation of these complainants by each other. Under either scenario, the appellants meet the fault requirement for s. 279.01(1). And, for the purpose of this appeal, the judge's findings accord with the interpretation of the provision that is advanced by the appellants in their written material, namely, that to sustain a conviction under s. 279.01(1) for having "facilitated" exploitation, the Crown must prove that an "accused knowingly committed the prohibited conduct (recruited, transported, etc.) for the specific purpose of facilitating that person's

exploitation by another" (*italics in original*).

- [246] The judge found that Mr. Albashir controlled KC through violence and other forms of abusive conduct: at paras. 228-230. He found that Mr. Mohsenipour controlled SC by engaging in "violent and threatening conduct" towards her, including putting a gun to her head: at para. 283. Actual or threatened force is a factor that supports a finding of exploitation within the meaning of s. 279.01(1). See s. 279.04(2)(a) of the Code.
- [247] The inferential effect of finding that KC and SC were controlled by the appellants through the use of actual or threatened violence, and thereby exploited, is that the appellants conducted themselves this way "for the purpose of exploitation". Justice Watt made this point in A. (A.): "In cases where exploitation, as defined in s. 279.04, arises from the facts, inferring that the accused's purpose was to exploit the victim will usually be a relatively straightforward task": at para. 87, *emphasis added*. See also R. v. Gallone, 2019 ONCA 663 at para. 54.
- [248] The judge also found that the appellants intended to facilitate exploitation by each other. Consistent with the Supreme Court's decision in R. v. Legare, 2009 SCC 56, in which the Court interpreted the Code's child luring provision, I consider the word "facilitate" in the context of s. 279.01(1) to mean helping to bring about and making easier or more probable.
- [249] The judge found that Mr. Mohsenipour facilitated Mr. Albashir's exploitation of KC. Mr. Mohsenipour knew how Mr. Albashir "operated, including by the use of violence": at para. 232. He was "intimately involved" with Mr. Albashir's "business": at para. 232. He knew that "isolating the complainants and having easy access to them would make it easier to exploit them [including by Mr. Albashir], and acted for the purpose of doing so": at para. 232, *emphasis added*.
- [250] The judge made these same findings in respect of Mr. Albashir. He knew how Mr. Mohsenipour "operated, including by the use of violence": at paras. 232, 284. Mr. Albashir was "intimately involved" with Mr. Mohsenipour's "business": at para. 232, 284. He knew that "isolating the complainants and having easy access to them would make it easier to exploit them [including by Mr. Mohsenipour], and acted for the purpose of doing so": at paras. 232, 284, *emphasis added*.
- [251] The judge's reasons explaining his application of s. 279.01(1) are not a model of clarity. I agree with the appellants that some aspects of the discussion are confusing. For example, at para. 230, the judge states that Mr. Albashir harboured KC and exercised direction and influence over her movements so that he could have "easy access to her for the purpose of exploiting her". On the face of it, this statement attributes to Mr. Albashir an intent to personally exploit. However, the judge immediately follows the sentence with: "This is at the very least facilitating exploitation": at para. 230, *emphasis added*. If Mr. Albashir intended to personally exploit KC and had that purpose in mind, then there was no need for the judge to consider the issue of facilitation in respect of him. And, who is the "exploiter" in the latter scenario? Mr. Albashir, or someone else? Standing alone, the second of these

two statements is confusing.

- [252] However, the judge's discussion of s. 279.01(1) cannot be read in isolation. Instead, it is to be considered in the context of the reasons as a whole. Those reasons include findings that the appellants were co-conspirators in a jointly-run "escort" operation in which both KC and SC were involved. Working together, the appellants arranged for rental premises in which the complainants would work; managed their website ads; paid for ads; provided supplies for the complainants' sex work; provided transportation for the purpose of "out calls"; responded to calls from prospective clients and arranged the meetings; provided security to the complainants when needed; collected the money from them; and paid the complainants after "deducting their take": at para. 56.
- [253] In the context of a joint venture, in which the appellants were not only personally interacting with KC and SC, but assisting and supporting each other in furtherance of a common enterprise, a determination that they conducted themselves for both the purpose of exploiting the complainants themselves, and to facilitate exploitation by each other, was reasonably open to the judge. The actus reus of the s. 279.01(1) offence, and the exploitation that informed the assessment and determination of specific intent, formed an integral part of the joint venture and was committed in furtherance of the appellants' common design.
- [254] The appellants complain that in his discussion of the trafficking offences, the judge did not "link" any of the proscribed acts found to have been committed by them to the conclusions reached about their intent. I do not read the discussion that way.
- [255] In my view, it is clear from the judge's delineation of the "elements of the offence" at para. 220 that he understood the necessity of the actus reus and the mens rea operating in tandem. At para. 226, he set out his proscribed conduct findings in relation to KC. In the very next paragraph, he moved to Mr. Albashir's intent in respect of that conduct, finding that it was "designed to facilitate [KC]'s exploitation". At para. 232, and within the context of this same discussion, the judge discussed Mr. Mohsenipour's intent. This same approach was taken in respect of the evidence involving SC. At para. 281, the judge found that the appellants "recruited, transported and harboured [SC], and exercised direction and influence over her movements". This is the proscribed conduct. He then immediately turned to the question of whether "any of this was done" (emphasis added), for the purpose of exploiting SC or facilitating her exploitation, and assessed the intent of both appellants: at paras. 282-285. It is apparent from the manner in which the judge structured these parts of his reasons that in convicting the appellants under s. 279.01(1), he identified the acts committed by the appellants that met the actus reus requirement, and then considered their intent with respect to those same acts. I see no error here.

Did the Trial Judge Err in His Application of Section 279.01(2)?

[256] Under s. 279.02(1), everyone who "receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under s. 279.01(1)", is also guilty of an offence.

[257] As noted, the appellants were charged with this offence in counts 11 and 18 of the indictment. KC and SC were the named complainants. The judge's findings specific to s. 279.02(1) have been set out earlier.

Parties' Positions on Section 279.01(2)

[258] The appellants say that even if the human trafficking convictions are sound (which I have found they are), the judge's application of s. 279.01(2) is "tainted by serious legal error" and inadequately explained. They contend that he appears to have found the appellants guilty of this offence on the understanding that once the Crown established an offence under s. 279.01(1), "proof of the offence of [a] material benefit [flows] as a matter of course". Instead, the judge should have asked himself, and separately analyzed, whether any of the financial or other material benefits received by the appellants "derived from actual exploitation". If the benefits "derived simply from prostitution", the offence has not been made out.

[259] The Crown disagrees with the appellants' interpretation. It contends that if s. 279.01(1) does not require proof of actual exploitation (which the appellants accept), it would be illogical to require for the purpose of s. 279.01(2) that the Crown link each and every received benefit to an act that had actual exploitive effect. To adopt the appellants' approach to s. 279.01(2) would mean that in the absence of actual exploitation crystallizing in a particular factual matrix, people who intentionally commit one or more of the proscribed acts in s. 279.01(1) with the purpose (or specific intent) of exploiting someone, or of facilitating the exploitation of that person, could collect financial or other material benefits for their participation with impunity. From the Crown's perspective, Parliament could not have intended this result.

Analysis

[260] As with the interpretive arguments raised in respect of s. 279.01(1), I do not consider it necessary in the particular circumstances of this case to address the question of whether a conviction may only be entered under s. 279.01(2) on proof that the benefits received by an accused were directly linked to, and therefore derived from, exploitive acts.

[261] This is because, contrary to what is suggested by the appellants, the judge found as a fact that each of the appellants personally exploited at least one of KC and SC, and that they did this as part of their joint venture.

[262] Moreover, he found that they each facilitated exploitive acts by each other. They recruited, transported, transferred, received, held, concealed or harboured KC and SC, or exercised control, direction or influence over their movement "[knowing] how the other operated, including by the use of violence": at para. 232, emphasis added. In other words, in running

their "escort" operation, each of the appellants knew that in furtherance of the common enterprise, the other would engage in conduct that could reasonably be expected to cause KC or SC to believe that their safety would be threatened if they failed to provide, or offer to provide, sex work: s. 279.04(1). They understood that the joint venture from which they were receiving benefits involved exploitive conduct. As such, even assuming without deciding that the appellants' interpretation of s. 279.01(2) is correct, the judge's findings amount to a conclusion that the appellants knowingly derived financial or other material benefits from actual exploitation.

- [263] I agree it would have been helpful if the judge had more clearly explained his pathway to conviction under s. 279.01(2). He did speak in conclusory terms on this issue (as well as some others), and in the context of a 38-day trial with a voluminous record, multiple counts and complex evidentiary and substantive issues, something more is generally required than to simply state that the Crown has established an offence beyond a reasonable doubt.
- [264] However, this was a 383-paragraph judgment that, in addition to the discussion surrounding s. 279.01(1), is replete with findings of exploitive conduct specific to KC and SC.
- [265] The judge accepted KC's evidence: at para. 195. KC described sustaining a black eye when struck by Mr. Albashir (confirmed by a photograph): at para. 168. She described Mr. Albashir grabbing her arm and cutting it with his fingernails: at para. 168. On another occasion, he grabbed her by the hair, placed his hands around her neck and pushed her up against a wall: at para. 168. One time, when she refused to attend an "outcall", Mr. Albashir grabbed KC by the throat, threw her to the ground and placed his knee on her face: at para. 169.
- [266] KC testified that she witnessed both appellants kicking and hitting another sex worker: at para. 171. The judge found that physical, emotional or financial "punishments" were imposed or threatened on KC for not adhering to the rules: at para. 203. Mr. Albashir had a "demanding personality" and KC would "fall in line in order not to be subjected to [his] anger": at para. 203. Assaults inflicted by Mr. Albashir were "related to [KC's] work": at para. 203. Watching the appellants berate and slap another sex worker signalled to KC, "if not directly, indirectly, the requirement to not violate rules": at para. 203.
- [267] The judge also accepted the evidence of SC: at para. 238. He concluded from her testimony that when she worked with the appellants, "there was an atmosphere of threatened violence if there were violation of rules": at para. 238. SC left the condominium in which she was working about three weeks after having started with the appellants, without telling them. She was contacted about a week later by the third co-conspirator, who threatened her by "telling her that he knew where her son resided": at para. 245. Mr. Albashir called shortly thereafter, telling SC that he wanted her to return to work. She testified that but for those calls, she would not have returned: at para. 245.

- [268] While in Edmonton with the appellants, SC was interviewed by the police. She was subsequently picked up by the appellants and they told her that she had better not say anything about them. SC testified that she was afraid of what they would do if she communicated with the police: at para. 248.
- [269] SC saw "many incidents of violence between [KC] and Mr. Albashir": at para 249. She saw Mr. Albashir on top of KC and heard "screaming and fighting": at para. 249. She saw KC with a black eye: at para. 249. She saw another sex worker being beaten by the appellants: at para. 253. SC testified that Mr. Mohsenipour pointed a gun at her and had threatened to kill her: at para. 249. Mr. Albashir told her that he would kill her son and her dog: at para. 254. The judge found there was "an atmosphere which carried the threat of violence, physical or psychological, against [SC]": at para. 249.
- [270] Respectfully, in light of these findings, which form part of the trial judgment, it cannot reasonably be said there was no established link between the financial or other material benefits received by the appellants and the exploitation of KC and SC, or that the verdicts on counts 11 and 18 are unreasonable.
- [271] Nor is there any force to the suggestion that the reasons "fail to provide sufficient information regarding why the appellants were convicted" under s. 279.01(2). I accept, as recently noted in *R. v. S.S.*, 2022 BCCA 392, that a trial judge will err in law if they "fail to provide an explanation of their decision that is sufficiently intelligible to permit appellate review": at para. 83, citing *R. v. Sheppard*, 2002 SCC 26. However, insufficient intelligibility has not been established here, applying the functional and contextual approach to appellate review that binds this Court.

Should the Appellants Be Allowed to Raise a Constitutional Issue?

- [272] Mr. Albashir filed notice of a constitutional question in July 2019, seeking a declaration that s. 279.01(1) of the Code contravenes ss. 7 and 11(d) of the Charter and cannot be saved by s. 1. The notice sought to have s. 279.01(1) declared unconstitutional to the extent that it allows for a conviction based on a finding that an accused has "facilitated" their own exploitation or someone else's "facilitation" of their own exploitive conduct.
- [273] The constitutional challenge was advanced as an alternative argument in support of Mr. Albashir's appeal and would only arise if this Court concluded that the judge convicted him of the s. 279.01(1) offence on the basis of facilitation rather than actual exploitation, and the facilitation was directed towards Mr. Albashir's exploitation of the complainants rather than someone else's. Mr. Albashir argues that if s. 279.01(1) is interpreted that way, it is overbroad, vague and grossly disproportionate.
- [274] This was not an argument advanced at the trial and, as a result, Mr. Albashir requires leave to pursue it. The Crown opposed leave, taking the position that, among other things, the evidentiary record is insufficient for this Court to properly determine the constitutional complaint.

- [275] As succinctly explained by Justice Dickson, writing for the Court in *R. v. Alfred*, 2020 BCCA 384:
- [8] Appellate courts are especially cautious about hearing a new issue in the absence of a complete evidentiary record if the new issue concerns the constitutional validity of legislation, given the far-reaching consequences of such determinations: *R. v. Lilgert*, 2014 BCCA 493 at paras. 15, 20. Although new arguments based on an evidentiary record laid out for the first time in the court of appeal are occasionally permitted, such occasions are rare. This is so because appellate courts are not the place to develop an evidentiary record given that "[t]he appellate forum and its procedures are not adapted to the weighing of evidence and the finding of facts": Roach at para. 8; *R. v. J.D.*, 2018 ONCA 947 at para. 6. That said, where an appellant's legitimate interest in advancing a new issue outweighs the problems associated with assembling an appropriate record, the interests of justice may favour granting leave to raise the new issue for the first time at the appellate level: *J.D.* at paras. 6-7. In all cases, the fundamental consideration is whether refusing to allow a new issue to be raised on appeal would risk an injustice: *R. v. Mian*, 2014 SCC 54 at para. 43; *R. v. Brown*, [1993] 2 S.C.R. 918.
- [276] We heard the parties' submissions on leave at the hearing of the appeal. They were content to rely on their factums for deciding the merits of the constitutional question. I would deny leave and not engage the constitutional issue.
- [277] As I have explained, the judge did not find guilt under s. 279.01(1) of the Code on the basis that the appellants "facilitated" their own exploitation of the complainants. Rather, the judge was satisfied, beyond a reasonable doubt, that both appellants committed the *actus reus* of the s. 279.01(1) offence for the purpose of their own exploitation of KC and SC and to facilitate exploitation by each other. That facilitation was done in furtherance of the joint venture. In the circumstances of this case, the constitutional issue raised by Mr. Albashir does not arise.

Did the Judge Err in Not Applying "Kienapple"?

- [278] After entering convictions against the appellants, the judge did not consider whether some of the convictions should be conditionally stayed on the basis of the Kienapple principle.
- [279] In his reasons for sentence, the judge found that although the counts involving NV reflected "separate and distinct periods of exploitation", the "underlying nature of the offences [were] the same" and they "constitut[ed] a linked series of acts within a single endeavour": 2019 BCSC 479 at para. 31.
- [280] He also found that the "prostitution offences" involving KC and SC reflected a "linked series of acts within a single endeavour", even with the legislative amendments that resulted in some of their charges being split in two: at para. 29.

[281] The appellants have raised the application of Kienapple on appeal. The Crown does not object to it being addressed here. The failure to apply Kienapple where properly engaged amounts to an error of law. As such, it is reviewed on a correctness standard: *R. v. Kennedy*, 2016 MBCA 5 at para. 23.

Kienapple Principle

[282] The Kienapple principle is a legal principle that reflects a long-standing recognition in Canadian criminal law that multiple convictions should not be entered for offences involving the same "delict" (cause or matter). When someone is charged with more than one offence that has the same or substantially the same elements, the Kienapple principle must be considered unless Parliament has clearly expressed its intention to displace the principle by providing for multiple convictions arising from the same matter: *R. v. Prince*, [1986] 2 S.C.R. 480, 1986 CanLII 40 (SCC) at paras. 13, 35. Canadian courts "have long been concerned to see that multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict": *Prince* at para. 17.

[283] Whether Kienapple applies is determined case-by-case and contextually informed: *Prince* at para. 24. The assessment will generally require that a trial judge consider the statutory provisions that create the relevant offences, and the application of those provisions to the circumstances of the case: *R. v. Kinnear*, 2005 CarswellOnt 2423 (O.N.C.A.), [2005] O.J. No. 2434 at para. 36.

[284] Where Parliament has not expressly displaced the Kienapple principle, there is an analytical framework to follow in deciding whether a conviction should be conditionally stayed. The Supreme Court established the framework in *Prince*. Trial judges must ask:

First, whether there is a "factual nexus" between the offences at issue. The answer to this question is generally determined by considering whether the same act grounds each of the charges: *Prince* at paras. 21, 24;

If a case involves continuing offences in which the offending behaviour occurred or subsisted over a period of time, or the act(s) that make up the offences are described only in general terms, determining whether a "factual nexus" exists may require a trial judge to consider factors such as the remoteness or proximity in time and place between offences, the presence or absence of relevant intervening events, and whether the acts underlying the offences were related to each other by a common objective: *Prince* at para. 24;

Second, once a trial judge is satisfied of a sufficient "factual nexus", they must then ask whether there is also an "adequate legal nexus" between the relevant offences. This is because a "single act of an accused can involve two or more delicts against society which bear little or no connection the one to the other": *Prince* at para. 28. In those circumstances, conditionally staying one of them would not be appropriate. There will only be an "adequate legal nexus" between offences if there is "no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded": *Prince* at para. 36;

When offences are factually and legally connected, but distinguishable because they are of "unequal gravity", it may be appropriate to conditionally stay the lesser offence if that offence does not include additional and distinct elements from the more serious offence: Prince at para. 37;

How does a trial judge determine whether the elements of an offence are (or are not) "additional and distinct"? There are at least three ways (Prince at paras. 39-42):

- a) an element of one offence may simply be a particularization of an element that forms the foundation for another offence;
- b) multiple offences may reflect the fact that there is more than one method to prove a single delict; or,
- c) Parliament may have deemed a particular element of an offence to be satisfied by proof of another "because of social policy or inherent difficulties of proof". Elements of an offence that "serve only as an evidentiary proxy for another element cannot be regarded as distinct or additional elements for the purposes of the rule against multiple convictions".

See also R. v. Andrew (1990) CarswellBC 120, 57 C.C.C. (3d) 301 (B.C.C.A.) at paras. 11, 14.

[285] In R. v. Heaney, 2013 BCCA 177, this Court identified three factors that, subject to Parliament's clear intention to the contrary, will generally "defeat a claim that different offences have the legal nexus to warrant the application of Kienapple": at para. 26. They are: (a) where the offences are designed to protect different societal interests; (b) where the offences involve violence against different victims; and (c) where the offences proscribe different consequences: at para. 26.

Arguments on Appeal

[286] The appellants contend that a number of their convictions should have been conditionally stayed.

[287] Specific to NV, the appellants were convicted of count 2 of the indictment for exercising control, direction or influence over the movements of NV for the purposes of gain, and in a manner that showed they were aiding, abetting or compelling NV to engage in prostitution. Mr. Albashir was also convicted, in count 4, of recruiting, holding, concealing or harbouring NV, or controlling her movements, for the purpose of facilitating the provision of sexual services for consideration. The appellants say the conviction for count 4 should be conditionally stayed. They contend that the elements of these two offences were substantially the same and the only difference between counts 2 and 4 was a "temporal gap".

[288] The appellants were also convicted of count 3 in respect of NV: living on the avails of the prostitution of NV while she was under 18 and, for the purpose of profit, aiding, abetting or compelling her to engage in prostitution while threatening or using violence against her. Mr. Albashir was additionally convicted, in count 5, of receiving a financial or other

material benefit in relation to NV, knowing that it was derived from the provision of sexual services for consideration. The appellants say count 5 should be conditionally stayed on the basis that these two offences were continuing offences, involved essentially the same elements, and the culpable acts captured by counts 3 and 5 were committed in support of a common objective.

- [289] In respect of the offences committed against KC, the appellants argue that counts 6, 8 and 11 each involved receiving a financial or other material benefit from sexual services provided by KC. Count 6 charged the appellants with living on the avails of prostitution. Count 8 charged them with receiving a benefit, knowing that it was derived from sexual services provided by KC. Count 11 charged the appellants with receiving a financial or other material benefit from trafficking KC.
- [290] The appellants argue that all three of these offences are properly characterized as continuing offences and two of them involve precisely the same timeframe (counts 8 and 11). Counts 6 and 8 are functionally mirror offences and the fact that there are two counts, rather than one, was necessitated solely by the legislative amendments that took effect on December 6, 2014. The appellants say the convictions entered for both counts 6 and 8 should be conditionally stayed.
- [291] Counts 7 and 9 are also at issue. Count 7 charged the appellants with exercising control, direction or influence over KC's movements for the purpose of gain, and in a manner that aided, abetted or compelled KC to engage in prostitution. Count 9 also focused on controlling KC's movements. The appellants say these too were continuing offences and separate counts were only necessary because of legislative change. As a result, one of them should be conditionally stayed.
- [292] Specific to SC, the appellants make the same arguments about counts 13, 15 and 18 that they do in relation to counts 6, 8 and 11. Each of these offences involved receiving a financial or other material benefit from sexual services provided by SC. They ask that the convictions entered for counts 13 and 15 be conditionally stayed.
- [293] Counts 14 and 16 charged the appellants with exercising control, direction or influence over SC's movement. Similar to the argument advanced in respect of KC, the appellants say these are continuing offences and separate counts were necessitated solely because of legislative change. Consequently, one of them should be conditionally stayed.
- [294] At sentencing, the Crown set out the Kienapple principle and said it had no application to this case. It takes the same position on appeal, submitting that Kienapple does not apply to offences that occur at different times, "as there is no factual nexus between an act committed today and the same type of act done in the future". As such, the counts in the indictment that represent either side of the December 2014 legislative amendments do not cancel each other out. They each capture periods of time in which the appellants were engaged in criminality on a daily basis by virtue of their ongoing "escort" operation. The fact that Parliament amended the relevant offence provisions in the midst of that operation

should not insulate them from liability for their multiple infractions. The Crown contends that the other convictions sought to be conditionally stayed by the appellants have distinct elements, are not duplicative or alternatives to one another, and none of them constitute lesser or included offences.

[295] From the Crown's perspective, this is not a case in which the Court "should be concerned that multiple convictions are being heaped on [the appellants] in respect of a single criminal act".

Analysis

[296] Applying the Prince framework, I have concluded that the convictions entered for counts 6, 7, 13 and 14 of the indictment should be conditionally stayed. I recognize that counts 6 and 13 involve convictions restored by this Court in 2020 BCCA 160; however, that appeal was focused on whether the judge had erroneously quashed counts 6 and 13 on constitutional grounds. The Court was not asked to consider or apply Kienapple in the context of the Crown's appeal.

[297] Counts 6, 7, 13 and 14 charged the appellants with offences under ss. 212(1)(j) and 212(1)(h) of the Code. KC and SC were the named victims:

212(1) Every one who

(j) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

212(1) Every one who

(h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[Emphasis added.]

[298] Counts 6, 7, 13 and 14 could only encompass criminal conduct alleged to have been committed up to and including December 5, 2014 because of Parliament's amendments to the Code's prostitution-related offences.

[299] Count 8, 9, 15 and 16 charged the appellants with offences under ss. 286.2(1) and 286.3(1). These counts could only encompass criminal conduct alleged to have been committed after December 5, 2014 because of Parliament's amendments to the Code's prostitution-related offences.

[300] KC and SC were also the named victims of these offences:

286.2 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1) [obtaining sexual services for consideration], is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) an offence punishable on summary conviction.

286.3 (1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[Emphasis added.]

[301] I consider there to be both a close factual and legal nexus between these two sets of counts. In the circumstances of this case, counts 6, 7, 13 and 14 (the first set) and counts 8, 9, 15 and 16 (the second set), address "single wrong(s) or delict(s)": *R. v. Meszaros*, 2013 ONCA 682 at para. 32.

[302] All of these counts were charged as global counts and continuing offences. By "continuing offences", I am referring to the fact that the factual matrix underlying each offence consisted of a number of acts committed over a period of time: *Heaney* at para. 31. The two sets of counts were intended to capture the whole of the appellants' offending conduct under ss. 212 and 286 of the Code, specific to KC and SC, as between March 2014 and April 2016, and in the context of the appellants' joint venture. It is for this reason, presumably, that the judge described the offences in his reasons for sentence as a "linked series of acts within a single endeavour": 2019 BCSC 479 at para. 29. In its factum, the Crown does not dispute that the acts that formed the basis for counts 6, 7, 8, 9, 13, 14, 15 and 16 were "linked in a scheme". In other words, they "were related to each other by a common objective": *Prince* at para. 24.

[303] But for the legislative changes that took effect on December 6, 2014, it would not have been necessary for the Crown to charge counts 8, 9, 15 and 16. Instead, the dates of the offences delineated in counts 6, 7, 13 and 14 would have been more expansive, extending beyond December 5, 2014 and capturing the entirety of the charged conduct. As noted in 2020 BCCA 160, s. 212 of the Code was repealed and, in its place, Parliament created the "material benefit offence" now found in s. 286.2. The latter provision attempts "to respond to the constitutional infirmities [found to exist under s. 212] relating to security of the person identified in *Bedford*": at para. 51. Sections 286.1, 286.2 and 286.3 address the same conduct that was previously captured by s. 212, but "[carve] out several exceptions for non-exploitive relations to persist despite one person receiving a material benefit from the commission of the purchasing offence in s. 286.1": at para. 51.

[304] I do not consider the December 6, 2014 amendments to be the type of "intervening event" contemplated by the Supreme Court in *Côté v. The Queen*, [1975] 1 S.C.R. 303, 49 D.L.R. (3d) 574, which would justify multiple convictions (see also *Prince* at para. 24). The changes to the offence provisions did not sever the factual continuum underlying the two sets of convictions.

[305] The Crown says that if this Court conditionally stays the convictions entered for counts 6, 7, 13 and 14, the appellants will be left unaccountable for proved criminal conduct that predated December 5, 2014, and their criminal records and punishment will not accurately reflect the duration of their offending or its gravity. The Crown contends that Kienapple never intended this kind of a result.

[306] Counsel did not refer us to any authorities in which legislative amendments have occurred in the midst of a continuing offence. However, in support of its position, the Crown points to the approach taken in cases such as *R. v. B. (F.F.)*, 1991 CarswellNS 27 (N.S.C.A.), 69 C.C.C. (3d) 193, rev'd on other grounds, [1993] 1 S.C.R. 697, 1993 CarswellNS 13. In that case, the appellant was charged with multiple sexual offences against the same victim extending over many years. On appeal, the Nova Scotia Supreme Court Appellate Division considered whether the circumstances properly engaged the Kienapple principle. The majority held that it did not:

89 The court also asked for submissions relating to the Kienapple principle. After reviewing the case and the submissions made by the Crown and the appellant, I am satisfied that the Kienapple principle does not come into play here simply due to the fact that all of the convictions relate to distinctive sets of fact

90 There were numerous assaults, sexual and otherwise, occurring over the 10-year period. The Crown chose to lay six charges which would be much less confusing than laying the multitude which the evidence could support. The Crown's approach in this way appears to me to be restrained and conservative and led to a simplification of the issues for the jury

91 I accept the Crown's submission that all of these charges related to separate incidents occurring at different times. Kienapple has no application. It was appropriate for the trial judge to sentence the appellant on each of the counts on which he was found guilty.

[Internal references omitted; emphasis added.]

[307] This case is qualitatively different than *B. (F.F.)*.

[308] Here, the Crown did not charge the appellants with individualized counts under ss. 212, 286.2 and 286.3 of the Code, with each count reflecting a "separate incident" that "occurred at [a] different [time]": *B. (F.F.)* at para. 91. Instead, the Crown charged the appellants globally, bundling their conduct, over time, into all encompassing counts. Then, because of the December 2014 amendments, what would have otherwise been one count each under ss. 212(1)(j) and (1)(h), became two counts. However, the "delict" sought to be addressed by the second set of counts remained the same, namely, receiving a financial or other material

benefit knowing that it was derived from the provision of sexual services for consideration (s. 286.2), and exercising control, direction or influence over the movements of a person who provided sexual services for consideration (s. 286.3). (See also 2020 BCCA 160 at para. 86.)

- [309] For these reasons, I consider it proper to conditionally stay the convictions entered for counts 6 and 7 (involving KC), and counts 13 and 14 (involving SC). The counterpart convictions in counts 8 and 9 (involving KC), and counts 15 and 16 (involving SC), should remain intact. The period of offending captured in the latter counts is longer than the stayed counts (thereby better reflecting the gravity of the appellants' conduct), and s. 286.3 of the Code carries a higher penalty range than the former s. 212(1)(h). In light of these factors, it is appropriate that the convictions be registered for the more serious offences: *R. v. Loyer*, [1978] 2 S.C.R. 631, 1978 CarswellQue 119.
- [310] I would not accede to the appellants' Kienapple arguments in respect of any other counts.
- [311] I will begin with counts 2 and 4 involving NV.
- [312] Both appellants were charged in count 2 with exercising control, direction or influence over NV's movements for the purpose of gain: Code, s. 212(1)(h). The offence dates were July 1, 2013 to July 1, 2014. Count 4 applied only to Mr. Albashir. He was charged with recruiting, holding, concealing, harbouring, or exercising control, direction or influence over NV's movements for the purpose of facilitating the provision of sexual services for consideration. The offence dates in count 4 were December 26, 2015 to January 23, 2016. This offence post-dates count 2 by more than one year.
- [313] Count 2 represented the period in which NV was first involved with the appellants. Count 4 captured a different period, and one that arose subsequent to intervening events, namely: NV stopped working for the appellants, resided elsewhere, and "worked independently": at para. 89.
- [314] Evidence at the trial established that in 2014, NV was told to leave the appellants' operation because she brought a boyfriend to the condominium where she was working, which was contrary to Mr. Albashir's wishes: at para. 88. NV began to work independently: at para. 89. She later moved in with a friend, Mr. Schafer: at para. 89. Mr. Albashir resumed contact with NV in the fall of 2015, and she agreed to return to work for the appellants in downtown Vancouver: at para. 90. Mr. Albashir picked up NV in January 2016 and moved her into a condominium on West Georgia Street in Vancouver. The "financial and working conditions were the same as before. Money was split between [NV] and [the appellants]": at para. 91.
- [315] In my view, count 4 represents a separate and distinct set of events and acts from those addressed in count 2. There is no factual nexus between these counts. The offences were separate in time and the acts that underlay these counts were severed by a cessation of the relationship between the parties and NV living and working elsewhere.

[316] The appellants also say that one of counts 3 and 5 should be stayed.

[317] Count 3 charged the appellants with an aggravated form of living on the avails arising out of the fact that NV was under the age of 18: Code, s. 212(2.1). The dates for this offence were July 1, 2013 to July 1, 2014. Count 5 applied only to Mr. Albashir. It charged him with receiving a financial or material benefit derived from sexual services provided for consideration: s. 286.2. The dates for this offence were December 26, 2015 to January 23, 2016.

[318] I would not apply the Kienapple principle to the convictions entered for counts 3 and 5 for substantially the same reasons that I say the principle is not engaged in relation to counts 2 and 4. Count 5 represents a separate and distinct set of events from count 3 and these events arose after an intervening event that severed the factual connection between NV and Mr. Albashir. Count 5 only arose once NV reconnected with Mr. Albashir in the fall of 2015. She began to work for them again in January 2016. There is no factual nexus between the counts.

[319] That brings me to KC.

[320] I have already found that the convictions on counts 6 and 7 should be conditionally stayed. The convictions on counts 8 and 9 should remain intact. The appellants also contend that a conditional stay is appropriate for count 11, which charged the appellants with an offence under s. 279.02(1) of the Code. The elements of this offence were set out earlier in these reasons. For convenience:

279.02 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 279.01(1), is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) an offence punishable on summary conviction.

[Emphasis added.]

The dates of the offences in count 11 were December 6, 2014 to April 16, 2016. They mirror the dates in count 8.

[321] Section 279.01(1), which is expressly referred to in s. 279.02(1), has also been set out earlier in these reasons. Again, for convenience:

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.

[322] I accept that there is a factual nexus between counts 8 and 11. The same acts underlie both counts, namely, deriving a financial or other material benefit from the provision of sexual services for consideration. However, the appellants have not persuaded me of a legal nexus between counts 8 and 11.

[323] Count 11 includes an "additional and distinguishing element": Prince at para. 36. Section 279.02(1) is aimed at financial or other material benefits derived from human trafficking, which requires proof of conduct that is purposefully exploitive or intended to facilitate exploitation. Sections 286.2(1) and 279.02(1) protect distinct societal interests: Heaney at para. 26. They are not interchangeable. An offence under s. 286.1(1) can be committed without also violating s. 279.02(1). In this case, the judge found that the appellants derived financial or other material benefits from KC's sex work, but, in addition to that, they profited from conduct that was itself exploitive, or designed to facilitate KC's exploitation.

[324] Finally, I turn to SC.

[325] I have already found that the convictions on counts 13 and 14 should be conditionally stayed. The convictions on counts 15 and 16 should remain intact. On the same basis that they seek a conditional stay of count 11, the appellants contend that count 18 should be "Kienappled". Like count 11, this offence charged the appellants under s. 279.02(1) of the Code, specific to SC. The offence dates in count 18, December 6, 2014 to August 31, 2015, mirror the offence dates in count 16.

[326] I would not accede to the appellants' arguments in respect of count 18, for the same reasons that I do not consider it appropriate to conditionally stay the conviction for count 11. Although there is a factual nexus between these counts, there is no legal nexus.

Disposition

[327] For the reasons provided, I would allow the appeals from conviction in CA45957 (Kasra Mohsenipour) and CA45961 (Tamim Albashir), but only to the extent that the convictions in counts 6, 7, 13 and 14 are conditionally stayed to give effect to the Kienapple principle.

[328] I would dismiss all other grounds of appeal.

[329] I would not admit the fresh evidence in support of the non-disclosure ground of appeal, to the extent that the fresh evidence includes materials that do not already form part of the trial record in the court below.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Grauer"

Appendix A

Count

Offence

Date

Sentence

1

Section 212(1)(d)

Procures someone to become a prostitute

May 15, 2013 - July 1, 2013

Mohsenipour

Albashir

3 years' imprisonment

3 years' imprisonment

2

Section 212(1)(h)

For gain, exercises control, direction or influence over movements to aid, abet or compel prostitution

July 1, 2013 - July 1, 2014

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

3

Section 212(2.1)

Living on the avails of prostitution of a person under 18

July 1, 2013 - July 1, 2014

Mohsenipour

Albashir

4 years' imprisonment

5 years' imprisonment

4

Section 286.3(1)

Recruits or exercises control over a person who provides sexual services for consideration

December 26, 2015 - January 23, 2016

Albashir

3 years' imprisonment

5

Section 286.2(1)

Receives a financial or other material benefit knowing it is obtained or derived from an offence under s. 286.1(1)

December 26, 2015 - January 23, 2016

Albashir

2 years' imprisonment

[Sentences on counts 1-5 to run concurrent with each other, but consecutive to counts 6-11.]

6

Section 212(1)(j)

Living on the avails of prostitution

March 15, 2014 - December 5, 2014

Mohsenipour

Albashir

2 years' imprisonment

2 years' imprisonment

7

Section 212(1)(h)

For gain, exercises control, direction or influence over movements to aid, abet or compel prostitution

March 15, 2014 - December 5, 2014

Mohsenipour

Albashir

2 years' imprisonment

2 years' imprisonment

8

Section 286.2(1)

Receives a financial or other material benefit knowing it is obtained or derived from an offence under s. 286.1(1)

December 6, 2014 - April 16, 2016

Mohsenipour

Albashir

2 years' imprisonment

2 years' imprisonment

9

Section 286.3(1)

Exercises control over a person who provides sexual services for consideration

December 6, 2014 - April 16, 2016

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

10

Section 279.01(1)

Exercises control, direction or influence over movements for the purpose of exploiting or facilitating exploitation

August 1, 2014 - April 16, 2016

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

11

Section 279.02(1)

Receives a financial or other material benefit knowing it is obtained or derived from an offence under s. 279.01(1)

December 6, 2014 - April 16, 2016

Mohsenipour

Albashir

2 years' imprisonment

30 months' imprisonment

[Sentences on counts 6-11 to run concurrent with each other, but consecutive to counts 12-18.]

12

Section 212(1)(d)

Procures someone to become a prostitute

April 15, 2014 - June 15, 2014

Albashir

2 years' imprisonment

13

Section 212(1)(j)

Living on the avails of prostitution

May 15, 2014 - December 5, 2014

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

14

Section 212(1)(h)

For gain, exercises control, direction or influence over movements to aid, abet or compel prostitution

May 5, 2014 - December 5, 2014

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

15

Section 286.2(1)

Receives a financial or other material benefit knowing it is obtained or derived from an offence under s. 286.1(1)

December 6, 2014 - August 31, 2015

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

16

Section 286.3(1)

Exercises control over a person who provides sexual services for consideration

December 6, 2014 - August 31, 2015

Mohsenipour

Albashir

30 months' imprisonment

3 years' imprisonment

17

Section 279.01(1)

Exercises control, direction or influence over movements for the purpose of exploiting or facilitating exploitation

May 15, 2014 - August 31, 2015

Mohsenipour

Albashir

30 months' imprisonment

30 months' imprisonment

18

Section 279.02(1)

Receives a financial or other material benefit knowing it is obtained or derived from an offence under s. 279.01(1)

December 6, 2014 - August 31, 2015

Mohsenipour

Albashir

2 years' imprisonment

2 years' imprisonment

[Sentences on counts 12-18 to run concurrent with each other.]

19

Section 139(2)

Attempts to obstruct, pervert or defeat the course of justice

April 23, 2016 - August 2, 2016

Mohsenipour

Albashir

12 months' prison, consecutive to all other counts.

15 months' prison, consecutive to all other counts.

Mohsenipour

Albashir

Cumulative sentences after totality analysis:

9 years' imprisonment, less 1,305 days' credit for pre-sentence custody.

10 years' imprisonment, less 1,544 days' credit for pre-sentence custody.

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