

CANADA / JUDGMENT

R. v. Mostowy

2025 BCSC 2121

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2121 R. v. Mostowy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mostowy,

2025 BCSC 2121

Date: 20251017

Docket: 172060-4

Registry: Victoria

Rex

v.

Kyle Christopher Mostowy, also known as

Kyle Christopher Motowy

Restriction on Publication: Pursuant to s. 486.4(2) of

the Criminal Code of Canada

Before: The Honourable Justice Ormiston

Oral Reasons for Judgment

(s. 724 Factual Findings for Sentencing)

Counsel for the Crown,

appearing via videoconference:

J.A. Gillings

Counsel for the Accused,
appearing via videoconference:

S. Wright

Place and Dates of Hearing:

Victoria, B.C.

September 4, 2025

October 14, 2025

Place and Date of Judgment:

Victoria, B.C.

October 17, 2025

- [1] THE COURT (by videoconference): Kyle Mostowy was convicted by a jury on one count of sexually assaulting Ms. B.F. at or near Langford and Victoria between the April 1 and the June 30, 2014. Jury deliberations began on June 10, 2025, and Mr. Mostowy was found guilty that same day.
- [2] The only witness to the offence itself was the victim, Ms. B.F. In direct examination, she testified about five different occasions on which sexual assaults took place. Ms. B.F. said all of the incidents occurred in the course of her employment as a drywaller for Mr. Mostowy's construction company. In general terms, the assaults described by Ms. B.F. are all incidents of Mr. Mostowy briefly but intentionally touching her breasts, crotch, or buttocks over her clothing. In cross-examination, Ms. B.F. was admittedly confused about the number of incidents and the type of touching that happened during each one.
- [3] Crown counsel submits Mr. Mostowy should be sentenced on the basis of the five incidents Ms. B.F. recounted in direct examination. Defence counsel disputes the fact that Mr. Mostowy touched her more than once. Given that it was open to the jury to convict Mr. Mostowy based on just one of the multiple sexual assaults described by Ms. B.F., there is an ambiguity in the verdict that must be resolved by this Court for the purposes of sentencing.
- [4] Section 724 of the Criminal Code, R.S.C. 1985, c. C-46, governs fact finding by the trial judge after a jury delivers a guilty verdict. Subsection (2) states:
- (2) Where the court is composed of a judge and jury, the court
- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

- (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
- (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
 - (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
 - (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.
- [5] The prevailing authority regarding the interpretation and application of s. 724 is *R. v. Ferguson*, 2008 SCC 6. At paras. 17-18 of that decision, the Court writes:
- [17] Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (Criminal Code, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
- [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.
- [6] While the Court in *Ferguson* recognizes the sentencing judge's duty to determine relevant facts, it also confines the judge's role to making only those factual findings that are necessary to decide the appropriate sentence in the case at hand: *Ferguson* at para. 16. The Nova Scotia Court of Appeal in *R. v. Landry*, 2016 NSCA 53 at paras. 48-49, distills the rules for a sentencing judge to the following list:
1. The sentencing judge shall accept as proven all facts, express or implied, that are essential for the jury's guilty verdict.

2. When the jury finding is ambiguous, the sentencing judge should not attempt to follow the logic of the jury. Instead, he or she must make their own independent determination as to the relevant facts.
 3. The sentencing judge should only find those facts necessary to permit the proper sentence to be imposed.
 4. The sentencing judge may not find as fact things that were rejected by the jury's verdict.
 5. For any aggravating fact, the sentencing judge must be satisfied that the evidence is sufficiently cogent to enable her to find it proved beyond a reasonable doubt.
- [7] The factual dispute raised by Mr. Mostowy relates to whether there was one single or multiple instances of sexual assault committed within the range of dates set out in the indictment. Crown counsel seeks to rely on Mr. Mostowy's pattern of conduct as an aggravating factor at sentencing. In order to do so, the Crown must establish Ms. B.F.'s evidence about multiple instances of sexual touching is sufficiently cogent to be proven beyond a reasonable doubt.
- [8] Defence counsel's submissions draw heavily on the reasoning in *R. v. 32992*, 2024 BCSC 2073, and the detailed review of authorities therein. He submits that the case at bar is indistinguishable from the analysis conducted in 32992 where the victim, on a single count of sexual assault, alleged multiple discrete instances of offending over a range of dates. As in the case at bar, the finding of guilt depended on the reliability and credibility of the victim's evidence. In 32992, the court could not find beyond a reasonable doubt that any one of the alleged incidents of sexual assault had been established, given significant frailties in the evidence of the victim.
- [9] Unable to find any disputed facts in relation to the offence had been proven, the court conducted the sentencing based on the minimum facts necessary to align with the verdict: That the offender intentionally sexually touched the victim without consent at some point during the period alleged. Counsel for Mr. Mostowy urges the same approach and submits that, given the issues with the credibility and reliability of Ms. B.F.'s evidence, the Court cannot safely make any definitive finding about which instance of assault founded the conviction and should find that the Crown has not proven the aggravating fact of multiple instances of sexual touching. The defence submits that, as in 32992, Mr. Mostowy should be sentenced based on the minimum legal requirements for a sexual assault on the lowest end of the scale.
- [10] The court in 32992 did not have the benefit of the Supreme Court of Canada's very recent decision in *R. v. Sheppard*, 2025 SCC 29. The Alberta Court of Appeal decision that was overturned in Sheppard follows the same approach as 32992. The SCC adopted the reasoning of the dissent of the Court of Appeal in confirming that "on a sentence appeal, the factual findings and basic credibility determinations that are implied by the verdict are not up for debate", at para. 49.

[11] The context in which the jury found Mr. Sheppard guilty are not unlike the case at bar. As the Supreme Court of Canada explains at para. 53:

The trial in this case turned on credibility and reliability. The complainant testified to a pattern of conduct by the respondent that constituted sexual interference and invitation to sexual touching, and the respondent denied each allegation. No other witnesses were called. The jury returned a verdict of guilty on each count, necessarily implying that it found the complainant credible and reliable at least to some extent.

[12] The Court continues at para. 56:

There was no evidence at trial that contradicted or undermined specific allegations made by the complainant other than the respondent's blanket denial of the allegations. The jury had already rejected the respondent's denial and accepted that the complainant was, at least to some extent, credible and reliable. With that premise as a starting point, and in light of the Crown's argument that the complainant's evidence on the 10 to 12 instances should be accepted, the evidentiary basis of the sentencing judge's reasons is sufficiently clear.

[13] Counsel for Mr. Mostowy submits that Sheppard is limited in its application to the case at bar because it was determined based on deference owed to the trial judge's finding of fact. While this is indeed an aspect of the Supreme Court's decision, I find that the Court gives broader direction on the proper approach to s. 724, particularly in the context of a case such as this where the jury's verdict requires them to have unanimously found, at least to some extent, that the victim's evidence was credible and reliable. Specifically, the Supreme Court of Canada found error in the Alberta Court of Appeal's making general findings about the complainant's reliability that were at odds with the jury's ultimate verdict.

[14] At paras. 58 through 59, the Court writes:

[58] Wakeling J.A. concluded that "it would be very dangerous to rely on any other evidence than that the jury must have accepted to find the accused guilty on the three counts" In essence, Wakeling J.A. determined that the complainant's testimony was not reliable, full stop, and that the sentencing judge should have declined to make any factual findings over and above those that she was bound to accept because they were essential to the jury's verdict.

[59] I reject this line of reasoning. The reliability concerns that Wakeling J.A. identified served only to challenge the complainant's reliability generally and could not logically form a basis for distinguishing between various aspects of their testimony. In my view, Wakeling J.A.'s conclusion amounts to an indirect rejection of the jury's guilty verdict, which was not up for debate on sentencing. [Emphasis added.]

- [15] Given the nature of the evidence tendered in the case at bar, and the instructions given to the jury, Mr. Mostowy could not have been convicted without accepting that Ms. B.F. was capable of providing sufficiently reliable and credible evidence to discharge the burden of proof beyond a reasonable doubt. Sheppard makes clear that it is not an error in cases such as this for a sentencing judge to start from the premise that a jury's finding about general credibility and reliability cannot be revisited at sentencing.
- [16] While the sentencing judge cannot attempt to reconstruct the jury's logic or try to discern the path they must have taken to arrive at the conviction, in cases where findings of credibility and reliability are necessary to the verdict delivered, there is an obligation on the sentencing judge to harmonize the jury's decision with their own findings of fact.
- [17] In his capable closing address to the jury, as well as in submissions regarding the facts, counsel for Mr. Mostowy has enumerated aspects of Ms. B.F.'s evidence that raise legitimate concerns with respect to both her reliability and credibility as a witness. For example, cross-examination elicited many inconsistencies between Ms. B.F.'s evidence at trial and previous statements she has given regarding this charge. The jury was instructed that such inconsistencies must be treated with the utmost caution.
- [18] Ms. B.F. was hostile to counsel, has a conviction for fraud, was initially confident about evidence she later resiled from, gave some implausible explanations when confronted with inconsistencies in her evidence, and conceded that her memory of events that occurred more than a decade ago has been compromised.
- [19] However, just as the sentencing judge found in Sheppard, the credibility findings of the jury that found Mr. Mostowy guilty is not up for review at sentencing. Based on the reasoning in Sheppard and the nature of the evidence tendered in the case at bar, I can confidently refrain from theorizing about the jury's decision-making process, while still accepting that the jury confronted the issue of Ms. B.F.'s credibility and reliability and must have concluded that she was believable, at least in part. Nevertheless, this Court must grapple with the undeniable challenges to Ms. B.F.'s reliability as a witness when determining the facts for sentencing. I instructed the jury that if they were satisfied beyond a reasonable doubt about even one instance of non-consensual sexual touching that they must convict.
- [20] The only facts essential to the jury's verdict are that Mr. Mostowy intentionally touched Ms. B.F. sexually without her consent at some time within the dates alleged in the indictment. It is impossible to discern and impermissible for the Court to speculate about which of the alleged incidents the jury found reliable enough to found a conviction. Accordingly, this Court then must embark on its own assessment of the evidence in order to resolve the factual dispute regarding the number of incidents.
- [21] The cumulative impact of the issues with the reliability of Ms. B.F.'s evidence is such that I cannot find each of the five incidents she initially described have been established beyond a reasonable doubt. Ms. B.F. eventually acknowledged in cross-examination that she has become unclear about the number and sequence of events, and which touching happened

on which occasion. This specific frailty in her evidence frustrates the process of making any definitive findings about how many times Mr. Mostowy touched Ms. B.F. or exactly when he did so.

- [22] However, unlike the evidence in 32992, where the court had reason to be concerned about the victim's perceptions of reality, Ms. B.F. was entirely firm on the fact that she was wronged. I agree with Crown counsel that there is a core consistency to Ms. B.F.'s allegation that on more than one occasion, Mr. Mostowy approached her at work and propositioned her sexually, grabbing at her breasts and crotch area without her consent. The inconsistencies in Ms. B.F.'s evidence did not encroach on this essential nature of the sexual touching and importantly, with respect to the dispute at issue here, Ms. B.F.'s evidence never wavered with respect to the fact that she was assaulted at two different worksites, one in Victoria and one in Langford.
- [23] The fact that Ms. B.F. worked at these two specific worksites at the relevant time was corroborated by another Crown witness, Mr. Lansdowne, who was also employed by Mr. Mostowy. There were minor inconsistencies between Mr. Lansdowne's evidence and Ms. B.F.'s, but none of which are fatal to the credibility and reliability of her evidence on any one specific incident. Finally, there is an internal consistency to Ms. B.F.'s evidence about putting up with Mr. Mostowy's misconduct for a time to keep her job until the final incident when she packed up her tools and never returned.
- [24] When the necessary implications of the jury's finding of guilt are brought to bear on my assessment of Ms. B.F.'s credibility and reliability, I find that the Crown evidence is sufficiently cogent to establish, beyond a reasonable doubt, that Mr. Mostowy sexually assaulted Ms. B.F. on more than one occasion. However, the evidence lacks the clarity to find this occurred more than once at each worksite.
- [25] I further find that the nature of the sexual touching has been established by the general descriptions Ms. B.F. has given, and that these should not be displaced by a theoretical, least serious sexual assault. In my view, this Court can properly sentence Mr. Mostowy based on my finding that on two occasions he grabbed Ms. B.F.'s breasts and touched the area of her crotch or buttocks.
- [26] I will hear counsel on whether anything further is required then, before fixing a date for sentencing submissions.
- [27] CNSL J. GILLINGS: Justice, I would still be seeking to ask for a pre-sentence report and with a psychological component, but I think - I'm not sure if my friend needs time to consider that?
- [28] CNSL S. WRIGHT: I do, Justice, and since it is - obviously having your decision informs that process and whether any opposition to such orders would be - would be made or advanced, and so I am going to ask for time and ask that we adjourn to a fix-date so that I can seek some instructions on that step in the process.

- [29] THE COURT: Very well. I just would like that interval to not be particularly lengthy, Mr. Wright, so can we come back on a fix-date list -
- [30] CNSL S. WRIGHT: I understand.
- [31] THE COURT: - just next week and get that -
- [32] CNSL S. WRIGHT: Yes.
- [33] THE COURT: - process started.
- [34] CNSL S. WRIGHT: Yes. I should recall -
- [35] THE COURT: And I take it -
- [36] CNSL S. WRIGHT: - I think it's Wednesdays there.
- [37] THE COURT: - any judge - I will defer to Ms. Gillings on that.
- [38] CNSL S. WRIGHT: I'm sorry, I didn't mean to interrupt.
- [39] CNSL J. GILLINGS: Sorry, I missed what Mr. Wright said.
- [40] CNSL S. WRIGHT: I was just asking or confirming whether it's Wednesdays as the -
- [41] CNSL J. GILLINGS: It is.
- [42] CNSL S. WRIGHT: - fix-dates there in Victoria.
- [43] CNSL J. GILLINGS: It is Wednesdays at 2:00 p.m.
- [44] CNSL S. WRIGHT: All right. Next Wednesday is fine. That certainly gives me time to get the instructions necessary.
- [45] THE COURT: So I take it, if this is a situation where counsel are in agreement, that reports can be ordered, any judge can do that and, in my view, if that is the position you have reached, that should be done at the fix-date appearance in order to start that process, because I need not be the one who makes the order. Only if counsel are in disagreement about the ordering of the reports should it come back before me. And again, just to prevent further delay, I will invite counsel to set, you know, the most efficient - the most expedient date they can before me to make brief argument regarding the order of the reports.
- [46] CNSL J. GILLINGS: Justice, the only other thing I would ask is if you could order an expedited transcript of your decision from today?
- [47] THE COURT: Yes, of course.
- [48] CNSL S. WRIGHT: And I take it, Justice, in the spirit of trying to move it along quickly, if there is an appearance required in front of you, again convening by Teams is acceptable?
- [49] THE COURT: Certainly.

[50] CNSL S. WRIGHT: Thank you.

[51] CNSL J. GILLINGS: Thank you, Justice.

[52] THE COURT: So is that October the 22nd, then?

[53] CNSL S. WRIGHT: Yes, please.

[54] THE COURT: Adjourned to October 22nd at 2:00 p.m. to fix a date.

[55] CNSL J. GILLINGS: Thank you.

[56] CNSL S. WRIGHT: Thank you.

[57] THE COURT: Thank you.

[58] THE ACCUSED: Thank you.

"Ormiston J."

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