

CANADA / JUDGMENT

R. v. Murray

2020 BCCA 42

COURT

British Columbia Court of Appeal

DECIDED

4 February 2020

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

2020 BCCA 42 R. v. Murray

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Murray,

2020 BCCA 42

Date: 20200204

Docket: CA45205

Between:

Regina

Respondent

And

David Alan Murray

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant in this matter. This publication ban applies indefinitely unless otherwise ordered.

Pursuant to s. 16(4) of the Sex Offender Information and Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated
October 25, 2017 (conviction) (R. v. Murray, Port Coquitlam Docket 96773-1).

Counsel for the Appellant:

D. Ferguson

Counsel for the Respondent:

M.K. Brown

Place and Date of Hearing:

Vancouver, British Columbia

October 25, 2019

Written Submissions Received

November 15 & 21, 2019

December 2, 2019

Place and Date of Judgment:

Vancouver, British Columbia

February 4, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Abrioux

Summary:

Appeal from conviction for sexually assaulting a 14-year-old female employee in 1992. Held: Appeal dismissed. The judge did not err in her approach to the assessment of the appellant's credibility, nor did she misapprehend the evidence. Her reasons were sufficient to permit meaningful appellate review. The judge did not subject the appellant's evidence to a higher level of scrutiny than that which was applied to the evidence of the complainant. The judge did not discredit the appellant's testimony because he relied on disclosure made by the Crown. Finally, the Crown did not elicit the details of the complainant's prior statements to third parties about the offence. Consequently, there is no risk that the judge erred by relying on the supposed

consistency with which the complainant related her account over time as a circumstance bolstering her credibility.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant was convicted by a Provincial Court judge of sexually assaulting a 14-year-old female employee on one occasion in the office of his business premises. The offence likely occurred in the fall of 1992. It was not reported to the police until 2015.
- [2] The complainant testified that the appellant told her he was taking a sports injury massage course. He asked her to come one morning before the store opened so he could practice massaging her knee. She agreed to do so and complied with his request to wear loose clothing that day. She said that he began massaging her knee but proceeded to put his hands under her shorts and underwear and digitally penetrated her vagina. He asked her to turn over onto her stomach and continued to touch her vagina and massage her buttocks. She said that his body was moving into her in a "thrusting kind of way."
- [3] The appellant testified and denied ever massaging or sexually touching the complainant.
- [4] The complainant said she blamed herself for permitting the appellant to act flirtatiously with her in the days leading up to the offence. While she told her boyfriend and some friends what had happened at the time, she did not tell her parents until years later.
- [5] There was no independent evidence confirming the complainant's testimony. The case turned on the trial judge's application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, to the evidence before her. She rejected the appellant's evidence. She concluded that his evidence did not raise a reasonable doubt. She accepted the evidence of the complainant and concluded that the Crown had proven beyond a reasonable doubt that the appellant sexually assaulted her as alleged.
- [6] Against this background, the appellant argues that the judge erred by:
 - 1. Improperly devaluing his evidence on the basis of peripheral matters and shifting the burden of proof by requiring him to adduce corroborative evidence and comply with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), in relation to such matters;
 - 2. Misapprehending material evidence that played an essential role in the reasoning process leading to the conviction;
 - 3. Subjecting his evidence to a higher level of scrutiny than that which was applied to the evidence of the complainant;
 - 4. Failing to give reasons sufficient to permit meaningful appellate review;

5. Discrediting the appellant's testimony because he had referred to and relied on aspects of the Crown disclosure in giving his evidence; and
 6. Relying on prior consistent statements made by the complainant about the offence to bolster her credibility.
- [7] The fifth ground of appeal was raised by the appellant's counsel for the first time in oral argument. The sixth ground of appeal arose out of a question asked by the Court as to the use the judge made of the complainant's statements to her boyfriend about the circumstances of the offence. The parties were permitted to file supplementary written submissions addressing these two additional issues.

II. Overview of the Evidence and the Positions of Counsel at Trial

1. The Case for the Crown

- [8] The complainant testified that she quit school shortly after she started Grade 8 in the fall of 1991. She was 13 years of age. She said that she was dealing with personal issues at the time and started abusing alcohol, marihuana and her step-father's "wake-up pills". She acknowledged that her drug abuse and partying habits were factors that contributed to her withdrawal from school in Grade 8.
- [9] The complainant testified that the offence occurred in the warmer months of 1992, but was unable to say whether it happened in the late spring, summer or early fall. She turned 14 years of age in the summer of 1992. She returned to school in September 1992.
- [10] The complainant and her friends began hanging out in the appellant's sports memorabilia store to socialize and play video games. She soon began working in the store as a part-time casual employee. It was her first job. The complainant's family took a photograph of the complainant before she left for her first day of work. The complainant wore a skirt and jacket and curled her hair because she considered her first day of work to be a special day. As the trial judge put it, "for her this was a big deal." The complainant's mother testified that the complainant was "happy and excited" to have a part-time job.
- [11] The complainant's mother and her step-father went to the appellant's store and had a brief discussion with him in order to satisfy themselves that the work environment was a suitable one for a young woman.
- [12] The complainant testified that she liked being around the appellant because he treated her well and said nice things to her. She knew that he liked her and was flirting with her but she did not want the attention to stop. She was unwilling at the time to acknowledge that the attention he was giving her was inappropriate. She believed that he touched her long blond hair. He also bought her clothing she could not afford, including an expensive pair of jeans. In addition, she testified that the appellant took her out for a few dinners, including at a revolving restaurant located atop the Sears Tower in downtown Vancouver, British Columbia. She dressed up in clothing he had purchased for her for this dinner. She said the

appellant made her feel special and important and that she was flattered by the attention he gave her.

- [13] The complainant testified that she worked for the appellant for a few weeks. Her mother similarly testified that the complainant worked at the store for at least a week or two.
- [14] The complainant recalled working at one sports memorabilia auction hosted by the appellant inside a strip mall. She said that the appellant bought her a red skirt, blazer and a pair of high heels to wear at the auction.
- [15] The complainant's mother knew the appellant bought clothing for her daughter in advance of the auction. She remembered it being a red dress. She did not understand why her daughter needed a dress for the auction.
- [16] In cross-examination, the complainant testified that the offence did not occur at an auction.
- [17] When the offence occurred, the complainant testified that she felt it was her fault because she knew the attention she was receiving from the appellant was inappropriate, but allowed it to continue.
- [18] She testified that she never went back to work at the store after the day the offence was committed.
- [19] The complainant's mother asked the complainant why she stopped working at the store. The complainant simply told her mother she did not want to work there anymore.
- [20] The complainant was asked in examination-in-chief whether she told anyone what happened to her. She said that she told her boyfriend, J.K., and some other friends. The Crown asked, "Did you give them the details of what you've told the court today?" The complainant responded, "I don't recall what details I gave them but I told them that he had touched me." She testified that she told her mother what had happened years later before she reported the incident to the police.
- [21] Around 2014, the complainant became aware that the appellant had been elected to municipal council. He was running for office again and she noticed his campaign signs all over the city. She said that he started going to her gym, so she quit.
- [22] In 2015, the complainant attended a public forum. The mayor of the city and the appellant were in attendance. She spoke at the forum to oppose the approval of a quarry. She did not speak to the appellant.
- [23] After the public forum, the complainant decided to report to the police what had happened to her. In addressing her motivation for doing so, the complainant said she was upset and angry about running into the appellant and being reminded of what he did to her. She also testified that she was unnecessarily carrying around a "secret to be ashamed of."

- [24] The complainant was not cross-examined on the offence itself, nor did defence counsel seek to impeach her credibility by cross-examining her on the statement she gave to the police.
- [25] In cross-examination, the complainant denied asking the appellant for work again in 1993.
- [26] In re-examination, the complainant testified that she only worked for the appellant for one brief period of time and never saw him again after the offence -- except on those occasions in 2014 and 2015 that preceded the police report.
- [27] J.K. testified that he thought he began dating the complainant after she quit working for the appellant. He testified that she told him why she left her job and the information upset him. J.K. did not do anything with that information. He also vaguely recalled the complainant saying something about the appellant purchasing a dress for her.
- [28] J.K. testified that he never went to the appellant's store and never met the appellant.

2. The Appellant's Evidence

- [29] The appellant testified that he put video games in his store in early September 1992 to boost revenues.
- [30] The appellant testified that the complainant was part of a group of adolescents who came into the store every day to socialize and play video games.
- [31] He testified that he first met the complainant on September 8, 1992. He asked the complainant and another girl if they would be interested in helping him out with a sports collectibles auction he was planning for September 26, 1992. They agreed to do so. He testified that he trained the two young women on how to run the cash register on their first day of work, which was Thursday, September 24, 1992. As the auction was "kind of a formal event", he took both girls to the Coquitlam Centre on Friday, September 25, 1992, and bought them dresses.
- [32] The appellant asked the complainant and the other girl he employed to assist with the auction to meet him at the store at 10:00 a.m. on September 26, 1992, to help with the setup for the auction that was taking place later that day. The store was open from 11:00 a.m. until 5:00 p.m. The auction took place that day between 5:00 p.m. and 9:00 p.m. in a public area of the plaza in which the appellant's business was located.
- [33] The appellant testified that the complainant and the other young woman only worked for him for three days commencing on September 24, 1992.
- [34] The appellant said he saw nothing in the complainant's behaviour that would lead him to believe she was abusing drugs when he hired her.
- [35] On Monday, September 28, 1992, the appellant testified that two older boys, one of whom he understood to be the complainant's boyfriend, attended at his store and confronted him about buying the complainant a dress.

- [36] On October 1, 1992, the appellant testified that his store was robbed at gunpoint. He said the offence led to a high-speed chase and that one of the robbers was killed. He testified that the incident garnered a great deal of media attention.
- [37] The appellant said the traumatic events of October 1, 1992, assisted him in establishing the dates upon which he hired the complainant and held the auction.
- [38] The appellant testified that the complainant came to the store on October 2, 1992, to ask how he was doing. It was not put to the complainant in cross-examination that she attended the appellant's store to inquire about his welfare shortly after the robbery was committed.
- [39] On the appellant's evidence, the opportunity he had to commit the offence was confined to the three days commencing on September 24, 1992.
- [40] The appellant testified that about six months later, the complainant came into the store and asked him for a job. This was put to the complainant in cross-examination and she denied it. The appellant said the complainant told him she had experienced some difficulties and needed a job. He testified that the complainant confided in him about a lot of personal issues in her life. The appellant did not offer her a job.
- [41] The appellant also testified that the following day, the complainant's step-father came into his store and the two men had some sort of discussion. It was never put to the complainant's step-father in cross-examination that he attended the appellant's store on a second occasion about six months after the alleged offence.
- [42] The appellant said it was not the case that the complainant worked two or three weeks for him. He denied asking her to come into the store early one day to practice giving massages. He denied taking the complainant to dinner at the Sears Tower. He denied sexually touching the complainant.
- [43] The appellant was cross-examined on a statement he gave to the police on August 22, 2015. He agreed describing the complainant as being tall and very attractive with long blond hair.
- [44] The appellant remembered buying the complainant an outfit before the auction, but said he did not remember the colour of the outfit nor did he remember whether he bought her a pair of high heels. He noted that the complainant's mother, in her statement, also said she only remembered the dress and made no mention of shoes.
- [45] The appellant was cross-examined on why he told the police he did not know the complainant that well when he employed her for a short time, recognized her when she introduced herself before speaking at the public forum in 2015 and, by his own admission, was a person who confided in him about her personal struggles. The appellant testified that he could barely remember what her name was. Despite this, he testified in cross-examination that he knew she worked at a nail salon in the community in which they lived and that they would wave to one another when he had lunch outside in a community square. He also testified that he knew his daughter had cut the complainant's hair on two

occasions.

- [46] The appellant was asked in his interview with the police whether he shopped with the complainant for a dress. The appellant replied, "You know what? I'm not a hundred percent sure but I think I did." In his examination-in-chief, the appellant testified that he took the complainant and the other young woman he hired to the Coquitlam Centre to buy dresses for both of them. The appellant explained that he knew he drove the two young women to a mall to buy dresses, but was only ninety percent sure that it was the Coquitlam Centre. He denied attempting to distance himself from the complainant when being questioned by the police.
- [47] The appellant also acknowledged that he never told the police the complainant dropped by his store to inquire about his welfare the day after the robbery.
- [48] It was never put to the complainant in cross-examination that she would exchange waves with the appellant when they saw one another out in the community. Further, the appellant never mentioned this in his statement to the police.
- [49] The appellant acknowledged in cross-examination that he knew the complainant operated a business in the community and testified that "[s]he was all over the internet with it." He insisted, however, that he did not know the exact spelling of her last name.
- [50] The appellant testified that he warned his adult daughter about being around the complainant because of things the complainant disclosed to him 22 years earlier when she was 14 years old. Despite this, the appellant testified that after the public forum in which the complainant spoke, he considered reaching out to the complainant to see if he could assist her in marketing her business through an online newspaper he edited. He offered no comprehensible explanation about why he would reach out to the complainant to help her with her business in circumstances where he was terrified about the complainant having any involvement with his daughter.

3. The Closing Submissions of Counsel

- [51] The theory of the defence was that the complainant was not a credible witness. She was using drugs at the time of the alleged offence. Additionally, the defence argued that the appellant's timeline is such that the opportunity to commit the offence could only have presented itself on Saturday morning, the day of the auction. For reasons I have difficulty understanding, the appellant's trial counsel (not counsel on appeal) argued that the offence could not reasonably have occurred the morning of the auction.
- [52] In her closing submissions, Crown counsel acknowledged that one of the challenges in historical sexual assault trials is that memories fade over time. Nevertheless, the Crown argued that the evidence established the appellant groomed the complainant to facilitate commission of the offence. The Crown submitted that the appellant's credibility was negatively affected by the evasiveness he demonstrated while giving evidence and providing his statement to the police, his unconvincing efforts to distance himself from the

complainant in circumstances where he clearly knew who she was, and his failure to tell the police either that the complainant initiated contact with him after the robbery or that they would exchange waves years later when they saw one another in the community. The Crown noted the appellant never put to the complainant in cross-examination that she exchanged friendly waves with the appellant on the street. The Crown submitted that the appellant's version of events was unbelievable. By contrast, the complainant was said to have given a consistent and candid account which was not shaken in cross-examination.

III. Reasons for Judgment

- [53] In oral reasons for judgment, the judge began by framing the issue that arose in this case and the analysis she was required to follow:
- [2] At issue with respect to this allegation of sexual assault is simply whether or not the Crown has proven beyond a reasonable doubt that a sexual assault occurred. The defence denies the allegation and ultimately the decision that I must make is one based on findings of credibility and what has indeed been proven. As I have indicated, the Crown must prove the case beyond a reasonable doubt and because the accused has testified, I need to also go through an analysis that is referred to typically as a W.(D.) analysis to determine whether or not he has raised a doubt. This is not one of those cases where there is an issue with regard to consent. The issue is simply it did not happen from the accused's perspective.
- [3] According to W.(D.), the analysis that I must undertake is to first consider the evidence given by the accused because he has testified. I have to determine whether I believe it. If I do accept what he has said then he is acquitted, he is found not guilty. If I do not necessarily believe it but I find that it might reasonably be true, then that is also defined as a doubt and I must then also find him not guilty. It is only if I do not believe his evidence and I do not find that it raises a doubt, that I must then consider the evidence provided by the Crown and in particular, the evidence provided by the complainant in this matter. I must still go through all of the elements of the offence to be satisfied that the Crown has indeed proven the case beyond a reasonable doubt. That is the analysis that I will be following in this decision.
- [54] The appellant takes no issue with this self-direction. While the "might reasonably be true" test is best left to cases involving the doctrine of recent possession, or similar presumptions, it is not reversible error for a trial judge to make use of it in deciding whether evidence that he or she is not prepared to accept nonetheless raises a reasonable doubt: *R. v. K. (V.)* (1991), 68 C.C.C. (3d) 18 at 31-34 (B.C.C.A.); *R. v. Dubas* (1995), 60 B.C.A.C. 202 at paras. 11-12; *R. v. Reddy*, 2010 BCCA 11 at para. 40; *R. v. Mann*, 2010 BCCA 569 at para. 30.
- [55] The judge recognized that the passage of time between the alleged offence and when it was reported to the police gave rise to a "barrier to precise memory on the part of all the witnesses" (emphasis added). Later in her reasons, the judge noted that "everybody's evidence is marked by the passage of time" (emphasis added).

- [56] With reference to the appellant's testimony that he would exchange waves with the complainant in the community long after the offence, the judge noted that "none of that was put to [the complainant] in cross-examination", and that "[i]t sounds unlikely, to put it mildly."
- [57] The judge said the appellant's evidence that he wanted to help the complainant to market her business seemed to be "somewhat inconsistent" given his abiding worry about the complainant having any sort of contact with his daughter.
- [58] The judge referred to the cross-examination of the appellant on his statement to the police that he did not know the complainant very well and juxtaposed that with the appellant's evidence that she confided in him and that he continued to have some contact with her after the alleged offence.
- [59] The judge also noted that the appellant "was vague and waffled somewhat about where they went shopping for the dress."
- [60] After reviewing the evidence and the positions of counsel in relation to it, the judge said this:
- [71] In reviewing the evidence then with the analysis as I have already described in R. v. W.(D.), I do need to review the evidence of Mr. Murray first.
- [72] I am struck by the inconsistencies. One of the things in assessing and evaluating evidence is what are called internal consistencies and external consistencies. By that I mean are the things that he said consistent throughout? Are they inconsistent in contrast with other evidence? One also applies a certain degree of common sense to evidence in terms of what is stated. Certain observations that I made of his evidence include that for each time that the evidence -- or he -- was directed both in direct examination and cross-examination he was directed to particular areas of questioning, he would take the evidence and his testimony where he wanted to go. He would not answer the questions. I did, several times, admonish him to simply answer the questions that were being asked and he made it very clear he had other things he wanted to talk about. That included the robbery. But within the context of his evidence, it appeared that he was making a fairly determined effort to deflect the questioning away from where the questioners were trying to take him.
- [73] In terms of looking at some of the content of the evidence, everything that relates to his daughter, frankly, makes no sense. It was not suggested to [the complainant] that she had been exchanging waves across Leigh Square with Mr. Murray and in the context of the evidence given by [the complainant] that she was separating herself and her mind and her thoughts from these incidents back from 1992 and that she had not seen Mr. Murray, to think that she is casually waving to him across a courtyard in Port Coquitlam is, frankly, absurd. I do not accept that.

- [74] But it then gets into this whole issue, at least in Mr. Murray's mind, about his daughter and trying to keep his daughter away from [the complainant]. I heard nothing that would explain how he would know -- if it is true anyway -- that his daughter ever came across her but, for whatever reason, that seemed to set up a very substantial, negative reaction from him and a determination to ensure that there was a separation there. It is not for me to speculate why that is the case. It may be that there is something going on, I do not know what, that could have reasonably accounted for that. Another explanation might be that he did not want his daughter hearing anything from [the complainant] about him. He suggests that [the complainant] said things to him in the past that he did not want his daughter to be a part of but it could equally flow the other way.
- [75] Crown counsel, in her submissions described that the way that [the complainant] described her response to Mr. Murray and Mr. Murray's activities, that that was grooming behaviour. I agree that those are behaviours that are completely consistent with grooming behaviours and those are behaviours that, sadly, can and do lead to unwanted sexual activity.
- [77] In terms of evaluating the evidence as a whole, I am left without any doubt in this matter. I do not believe the evidence of Mr. Murray. It does not raise a doubt and I am rejecting his evidence. I do find that the evidence provided by the Crown does prove beyond a reasonable doubt that there was a sexual assault one morning at this business in Port Coquitlam sometime in 1992. Stand up, sir.
- [78] With those findings, sir, I am finding you guilty of Count 1. [Count 2, a charge of sexual interference, was stayed by the Crown at the outset of the trial as the Crown conceded it could not prove the complainant was under the age of 14 when the alleged offence was committed.]
- [Emphasis added.]
- [61] At this point, the trial judge took a brief adjournment. When the proceedings resumed, the judge said she wanted to add another paragraph to her reasons because she was "thinking I probably should've said a few more things." She then delivered the following additional reasons explaining why she accepted the complainant's evidence:
- [79] When I commented that I accept the evidence as provided by the Crown witnesses, I should have specifically addressed the evidence of [the complainant] in terms of why I accept her evidence.
- [80] In terms of her evidence as a whole, there were unquestionably some areas about which she is uncertain, for example, dates. It is clear those are amongst the issues that we have had all the way along, addressing dates and times. The evidence, however, was consistent within itself. Her behaviour and her comments about steps she took afterwards and ultimately how this matter even came to the attention of the police are all consistent with her description of what occurred at that time.

- [81] She described herself as a young woman, a teenager, who was excited about this job. She went there and worked hard. She enjoyed the attention she was getting and was prepared to keep working there and then she quit very suddenly. That is corroborated by the evidence of, in part, [J.K.], also certainly her mother, to the point that they were surprised because they all knew, as is evidenced by this photograph, how much she was looking forward to this. It was a job she was apparently pretty good at, being as bright as she is and as capable as she was, but she did not hold back in describing how she had felt about it. It is clear she did not consent to this assault occurring. That was evidenced as well by her leaving the job at the end of the day.
- [82] She was a young woman who had just been coming through a difficult time, having been out of school for a period of the larger part of a school year and was trying to find her own way in the world. Those steps also are consistent with something having gone very wrong.
- [83] Her carrying on her life and her reasons for ultimately reporting these events are also consistent with the way she approached incidents that had occurred to her in the past. She was not being histrionic or prone to exaggerate about anything in her evidence. She was measured in what she said and she admitted that there were things she was not clear of but what she was clear of is what happened to her on that day and as I have said, I accept her evidence in that regard.

IV. Analysis of the Grounds of Appeal

1. Relying on Peripheral Matters to Assess the Appellant's Credibility

- [62] The appellant submits that in assessing his credibility, the judge inappropriately emphasized inconsistencies in relation to peripheral evidentiary matters. To compound the problem, the appellant asserts that the judge required him to: (1) corroborate non-material facts with independent evidence; and (2) comply with the rule in *Browne v. Dunn* in relation to non-material issues.
- [63] The appellant considered it to be important to establish, by reference to the date of the robbery, the date upon which the auction occurred. His position at trial was that Saturday, September 26, 1992, was the only morning upon which he could have had an opportunity to commit the offence. For reasons I do not fully appreciate, he argued that it was unreasonable to suppose that he could have committed the offence on the morning of the auction. It was the appellant who made this timeline a key component of his defence.
- [64] In addressing the appellant's evidence that the robbery occurred on October 1, 1992, the trial judge simply observed that there was no confirmatory evidence establishing that this well-publicized robbery occurred that day, and that she considered the appellant's evidence respecting the precise dates and times he provided as part of his timeline to be subject to the same frailties as the evidence given by the other witnesses. She also observed that the complainant was not asked about the robbery or the temporal relationship between the date of the robbery and the date of the alleged offence.

- [65] In my view, what the judge said about this matter falls well short of shifting the burden of proof by requiring the appellant to corroborate his timeline of events. Nothing in the reasons for judgment suggests to me that the judge discounted the appellant's evidence on any material matter due to his failure to lead independent evidence confirming the date of the robbery.
- [66] Further, I do not agree with the appellant that the judge erred in principle by relying on peripheral matters to assess his credibility. It was open to the judge to consider internal inconsistencies in the appellant's evidence and inconsistencies between his trial evidence and the statement he gave to the police in assessing his credibility. While I would hesitate to characterize all of the inconsistencies relied on by the Crown and noted by the trial judge as being material to a fair assessment of the appellant's credibility, most clearly were.
- [67] For example, the appellant's evidence that the complainant came to the store to inquire about his well-being the day after the robbery was obviously designed to undermine the credibility of her claim of sexual abuse. Similarly, the appellant's evidence that they would wave to one another years after the alleged offence was calculated to undermine the complainant's testimony that he had sexually violated her in the past. These were not peripheral matters.
- [68] The fact that the appellant said nothing about either of these supposed events in his statement to the police, and nothing about the friendly exchange of waves until he was under cross-examination, could properly be considered by the trial judge as matters negatively impacting her assessment of his credibility. In addition, the appellant's claim in his statement to the police that he did not know the complainant very well could reasonably be regarded as being internally inconsistent with his testimony. His evidence that he was prepared to reach out to the complainant and offer his assistance in marketing her business in circumstances where he warned his daughter to have no contact with her is perplexing. In my view, it was open to the trial judge to conclude that his evidence on this point "makes no sense." I say the same about the appellant's evidence that he warned his daughter to stay away from the complainant based on things she said to him more than two decades ago when she was 14 years of age.
- [69] Neither the Crown nor the judge expressly invoked the rule in *Browne v. Dunn*. In rejecting the appellant's evidence that he exchanged friendly waves with the complainant years after the alleged offence, the judge, on two occasions, noted that the complainant had not been cross-examined on this point. Against this background, I consider it to be appropriate to proceed on the footing that the judge at least implicitly relied on *Browne v. Dunn* as one reason to reject the appellant's evidence on this issue.
- [70] The principle of confrontation is fundamentally a question of trial fairness. Enforcing it in appropriate circumstances promotes fairness to the witness and enhances the truth-seeking function of the trial: *R. v. Podolski*, 2018 BCCA 96 at para. 174. The principle is only triggered when the potential contradiction relates to a matter of substance: *R. v. Drydgen*, 2013 BCCA

253 at paras. 14, 26; R. v. Quansah, 2015 ONCA 237 at para. 81; R. v. Willis, 2019 NSCA 64 at para. 27. Whether the rule in Browne v. Dunn applies is a question of law: Drydgen at para. 22.

- [71] Assuming that the judge applied the rule in Browne v. Dunn to her assessment of the credibility of the appellant's evidence that he exchanged friendly waves with the complainant in the years following the alleged offence, I am of the view that she did not err in law in doing so.
- [72] Whether the complainant maintained friendly relations with the appellant after the offence was alleged to have been committed was a matter of substance. By giving evidence that the complainant maintained friendly relations with him, the appellant sought to undermine the credibility of the complainant's account.
- [73] The complainant made it clear in her evidence that she had no contact with the appellant between the day of the offence and 2014 or 2015. She was not challenged on this version of events. Her evidence on this point was then contradicted by evidence given by the appellant. By conducting his defence in this way, the appellant ran the risk that his failure to cross-examine the complainant on these matters could have a negative impact on the judge's assessment of the credibility of his evidence on this issue: R. v. Paris (2000), 150 C.C.C. (3d) 162 at para. 23 (Ont. C.A.). That is what occurred here. In my view, the appellant has no cause for complaint.
- [74] I also wish to emphasize that failure to observe the confrontation principle was not the only basis upon which the appellant's evidence on this issue was subject to attack. As noted earlier, the appellant said nothing in his police statement about the friendly waves he said he exchanged with the complainant and, remarkably, nothing about this in his examination-in-chief. I take the judge's remark that she was "struck by the inconsistencies" in the appellant's evidence, including internal inconsistencies, to be inclusive of his failure to make any mention of the exchange of waves until he was under cross-examination.
- [75] In addition, the judge's assessment of the appellant's credibility turned on her evaluation of the way in which he gave evidence and the extent to which he was evasive in his response to questions. These are findings rooted in the advantaged position of the trial judge. They are entitled to substantial deference on appellate review.
- [76] Finally, the appellant submits that the judge's rejection of the appellant's evidence about the waves he says he exchanged with the complainant demonstrates that she "had already accepted [the complainant] was truthful about not wanting to see Mr. Murray in the community." If the appellant is suggesting that this remark is evidence the judge abandoned the W.(D.) framework in her reasons, I do not agree. The judge made clear throughout that her analysis would follow the W.(D.) formula. Further, reasons for judgment must be read as a whole. The sequence in which a judge addresses the evidence and makes findings of fact and credibility, particularly when oral reasons for judgment are being delivered, is not necessarily determinative of the analysis employed in reaching a verdict.

[77] In short, I see no reversible error in any of this and would not give effect to this ground of appeal.

2. Misapprehension of the Evidence

[78] The appellant asserts that the reasons for judgment disclose a material misapprehension of the evidence by the judge. Specifically, the appellant argues that the judge's remarks at paras. 82-83 of her reasons for judgment (reproduced herein at paragraph 61) demonstrate that she misunderstood the evidence about when the complainant left and returned to school.

[79] As will be recalled, the complainant dropped out of school in the fall of 1991 -- before the offence is alleged to have been committed -- and returned to her studies in 1992. The appellant submits that the judge misunderstood this timeline of events and wrongly considered the difficulties the complainant was having in 1991 as circumstantial evidence consistent with a sexual assault having occurred in 1992.

[80] I am not persuaded that the judge misapprehended the evidence on this issue. In summarizing the complainant's evidence, the judge correctly noted that the complainant left school shortly after starting Grade 8 in 1991 and did not return to school until September 1992. The judge was clearly not suggesting that the complainant's difficulties at the beginning of Grade 8 were somehow relevant to an alleged assault that had not yet occurred. Read in context, what the judge meant in the impugned paragraphs is this: that the complainant suddenly and without explanation quit a job she was very excited to have is consistent with something having gone very wrong. The appellant does not take issue with the trial judge's inferential reasoning. Rather, he suggests that it flows from a fundamental misapprehension of the evidence. As I have rejected the appellant's position on this point, I would not give effect to this ground of appeal.

3. Applying Different Levels of Scrutiny to the Evidence of the Complainant and the Appellant

[81] The appellant advances two related arguments in support of this ground of appeal. First, he submits that the granular level at which the judge scrutinized his evidence is not reflected in her approach to the complainant's evidence. Second, he argues that the different approaches the judge took to the assessment of his credibility and the credibility of the complainant manifests itself in her decision to supplement her reasons with an additional explanation about why she accepted the complainant's evidence. The appellant characterizes these further brief reasons as "an afterthought" delivered after the finding of guilt had already been made.

[82] It is an error of law for a trial judge to use a higher degree of scrutiny in assessing the credibility of defence evidence than Crown evidence. But this is a notoriously difficult ground of appeal to successfully advance. It is difficult because credibility findings are the province of the trial judge and attract a very high degree of deference on appeal. In addition, appellate courts tend to view this argument with scepticism, as it may constitute a

thinly-veiled invitation to reassess on appeal credibility determinations made at trial. Where the imbalance is significant enough, the deference normally owed to the trial judge's credibility assessment is generally displaced: *R. v. Kiss*, 2018 ONCA 184 at paras. 82-83; *R. v. Chanmany*, 2016 ONCA 576 at para. 26.

- [83] I am not persuaded that the alleged error has been made out in this case. The judge emphasized that the passage of time had an understandable impact on the memories of all of the witnesses. While it is true that, on at least two occasions in her general review of the evidence, the judge appeared to question the appellant's veracity on the basis of what I consider to be little more than an ill-chosen word or infelicitous phrase, she did not rest her credibility findings on these points.
- [84] In addition, the evidence of the complainant and appellant did not stand on the same footing. The appellant's evidence was found to be internally inconsistent on significant points. In addition, it was found to be inconsistent with portions of the statement he gave to the police. By contrast, the complainant's evidence betrayed no internal inconsistency. She was not cross-examined on the substance of the allegations and not cross-examined on her statement to the police. The most that could be said about the complainant's evidence is that she was uncertain about dates.
- [85] This is not a case where the judge failed to consider factual matters that could have had a significant impact on her assessment of the complainant's credibility. Nor is it a case where the appellant's evidence was rejected due to inconsistencies on peripheral matters. When the judge turned to apply W.(D.) to the evidence of the appellant, she said she was struck by the inconsistencies in the appellant's evidence and highlighted those that caused her the greatest difficulty. She made no mention of inconsistencies relating to peripheral matters in this critical portion of her analysis (see paras. 72-75 and 77 of the reasons for judgment, reproduced herein at paragraph 60).
- [86] I do not consider this case to be factually similar to either *Kiss* or *Willis*. Accordingly, I would not give effect to the appellant's submissions on this issue.
- [87] Further, I am unable to accept the appellant's position that the judge's decision to supplement her oral reasons immediately after the brief adjournment in the proceedings is evidence that she brought an unbalanced approach to her assessment of credibility. Before the adjournment, the judge had thoroughly reviewed the complainant's evidence. She concluded that the complainant's evidence established beyond a reasonable doubt that the appellant committed the offence (see para. 77 of the reasons for judgment, reproduced herein at paragraph 60). In my view, the brief supplementary reasons given by the judge explaining why she accepted the complainant's testimony do not support a conclusion that the verdict was rendered without critically assessing the evidence led by the Crown.
- [88] I have also (independent of the submissions made by the appellant's counsel) considered whether a miscarriage of justice occurred in this case because the manner in which the reasons for judgment were delivered resulted in a trial that was unfair in appearance: *R. v.*

Khan, 2001 SCC 86 at paras. 72-73. I conclude that a well-informed, reasonable person considering the whole of the circumstances would not perceive that the trial was unfair in appearance because the judge determined to supplement her reasons for judgment in the way she did.

4. Inadequate Reasons

- [89] The essence of the appellant's argument on this issue is that the judge did not explain why she accepted the evidence of the complainant. Relying on *R. v. R.E.M.*, 2008 SCC 51, he submits that the reasons for judgment are insufficient to permit meaningful appellate review.
- [90] I do not agree. The judge found that the complainant was not prone to exaggeration. The complainant admitted that her ability to say when the offence was committed was compromised by the passage of time. The judge found her to be measured in her testimony and clear about what happened to her. As I have already noted, the complainant's version of events was not challenged in any significant way in cross-examination. The judge appears to have accepted that the appellant's pre-offence conduct, as described by the complainant, was consistent with the type of grooming behaviour that commonly leads to unwanted sexual contact. The judge also considered that the complainant's sudden decision to quit a job she was delighted to secure was consistent "with something having gone very wrong." The judge ultimately accepted the complainant's testimony that the appellant sexually touched her in the way she described.
- [91] Considering the reasons for judgment in the context of the evidence as a whole and the submissions of counsel, I am of the view that they are more than sufficient to explain the decision to the parties and permit meaningful appellate review. I would not give effect to this ground of appeal.

5. Using Disclosure to Discredit the Appellant's Testimony

- [92] The appellant submits that the judge erred in discrediting his evidence because he received and acknowledged relying on Crown disclosure. The appellant submits that the judge's approach to this issue made a trap of his constitutional right to disclosure: *R. v. Peavoy* (1997), 34 O.R. (3d) 620 at 625 (C.A.); *R. v. Schell* (2000), 148 C.C.C. (3d) 219 at paras. 56-57 (Ont. C.A.); *R. v. White* (1999), 42 O.R. (3d) 760 at 767-768 (C.A.).
- [93] The background relevant to this ground of appeal may be briefly stated. In cross-examination, the appellant testified that he did not remember buying the complainant a pair of high-heeled shoes to wear at the auction. Without further inquiry by Crown counsel, the appellant volunteered that his evidence on this point -- that he, in fact, did not buy the complainant a pair of high-heeled shoes -- was consistent with an out-of-court statement given by the complainant's mother. The issue was not pursued in cross-examination. The Crown did not put to the appellant that he was tailoring his evidence with the disclosure in mind, nor did the Crown suggest in its closing submissions that the

appellant's credibility was negatively affected by his reliance on the disclosure.

- [94] In her reasons for judgment, the judge noted that the appellant's testimony on whether he bought the complainant a pair of high-heeled shoes made clear that he was relying on documents disclosed to him by the Crown -- a statement that is factually correct. Later, in assessing the reliability of the appellant's timeline of events, the judge noted that his recollection of dates was not confirmed by independent evidence and that the appellant was relying on his own memory and "what he has read in other people's statements, to a small degree."
- [95] I need not address in this case the circumstances in which the Crown may properly cross-examine an accused on the disclosure they reviewed before testifying. I agree with the submission of the Crown that this case is devoid of the prejudicial cross-examination on disclosure that occurred in Schell. I also agree with the Crown that the judge did not infer that the appellant concocted his testimony after receiving disclosure as occurred in *R. v. Thain*, 2009 ONCA 223 at paras. 18, 25-29. In my view, the reasons cannot reasonably be read as supporting the proposition that the judge used the fact of disclosure to discredit the appellant's testimony. I note that the judge made no reference at all to this issue in explaining why she rejected the appellant's testimony. I would not give effect to this ground of appeal.
6. Using the Complainant's Prior Consistent Statements to Bolster Her Credibility
- [96] As noted earlier, the complainant gave evidence about when she disclosed to others what the appellant had done to her. She said she told J.K. and some other friends at the time. The Crown asked, "Did you give them the details of what you've told the court today?" She replied, "I don't recall what details I gave them but I told them that he had touched me." She told her mother what happened before going to the police in 2015. J.K. said the complainant told him why she no longer worked at the appellant's store and that the information upset him. Neither J.K. nor the complainant's mother gave any evidence as to the substance of the disclosure made to them. The only evidence elicited from the complainant on this issue was that she told J.K. the appellant had touched her. The judge reviewed all of this evidence.
- [97] Crown counsel did not invite the judge to conclude that the complainant's evidence was consistent with what she told others about the circumstances of the offence. Further, the Crown did not invite the judge to conclude that consistency in the way in which the complainant described the offence to others over time could be relied on to bolster her credibility.

- [98] In addressing the credibility of the complainant in her supplementary reasons, the judge noted that the complainant's "behaviour and her comments about steps she took afterwards and ultimately how this matter even came to the attention of the police are all consistent with her description of what occurred at that time." The judge noted that the complainant quit suddenly, leaving her job the day of the alleged offence. The judge's comments relevant to this ground of appeal are reproduced in full herein at paragraph 61.
- [99] The appellant submits that the judge's remarks demonstrate that she improperly used the complainant's prior consistent statements to bolster her credibility. I do not agree.
- [100] First, the complainant's evidence about the steps she took after the alleged assault to bring the incident to the attention of others and, eventually, to the police, was admissible as part of the narrative of events. The fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters that are relevant and admissible to establish the conduct of the complainant. This evidence may assist the trier of fact in assessing the credibility of the complainant's evidence: *R. v. Dinardo*, 2008 SCC 24 at paras. 37-38; *R. v. Ay* (1994), 93 C.C.C. (3d) 456 at paras. 44-45, 53 (B.C.C.A.); *R. v. Hughes*, 2001 BCCA 424 at para. 46.
- [101] Second, and apart from the fact that the complainant told J.K. the appellant touched her, the details of her prior complaints were not adduced in evidence. Having heard virtually nothing about the content of any of the complainant's prior disclosures, there was no real risk that the judge could engage in the impermissible reasoning suggested by the appellant: *R. v. M.R.H.*, 2019 SCC 46 at para. 4; *R. v. L.S.*, 2017 ONCA 685 at paras. 30-31. This is not a case like *R. v. Stirling*, 2008 SCC 10, where there was considerable evidence about the substance of the prior statements. In such a case, there is a genuine risk that a trier of fact might infer credibility from consistency.
- [102] In my view, the judge was not addressing the substance of the complainant's prior statements in the impugned paragraphs. Rather, she was addressing the complainant's comments about the steps she took -- in other words, her conduct -- immediately after the assault as part of her credibility assessment. She was entitled to have regard to the evidence for this limited purpose.
- [103] Finally, I do not see that Willis assists the appellant on this issue. In that case, the substance of the complainant's prior statements were tendered in evidence and improperly used by the trial judge to bolster her testimony: *Willis* at paras. 19-24.
- [104] For the foregoing reasons, I would not give effect to this ground of appeal.

V. Conclusion

- [105] In the result, I would dismiss the appeal from conviction.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/00/2020BCCA0042.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-murray-2020>

Prepared on 29 October 2026 · Esheria