

CANADA / JUDGMENT

R. v. Patrick

2020 BCCA 259

COURT

British Columbia Court of Appeal

DECIDED

23 September 2020

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2020 BCCA 259 R. v. Patrick

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Patrick,

2020 BCCA 259

Date: 20200923

Docket: CA46206

Between:

Regina

Respondent

And

Randy Edward Patrick

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information that could identify the complainant.

This publication ban applies indefinitely unless otherwise ordered.

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Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated
September 25, 2017 (R. v. Patrick, 2017 BCSC 2691, Smithers Docket 24362-2).

Counsel for the Appellant

(via videoconference on July 21, 2020, only):

B.R. Anderson

S.E. Hiscock Saleh

Counsel for the Respondent:

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S.E. Elliott

L.A. Chu

Place and Dates of Hearing:

Vancouver, British Columbia

July 21 and 30, 2020

Place and Date of Judgment with Written Reasons to Follow:

Vancouver, British Columbia

July 30, 2020

Place and Date of Written Reasons:

Vancouver, British Columbia

September 23, 2020

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

Summary:

The appellant challenges his convictions of sexual assault and unlawful confinement on the basis that the trial judge misapprehended the complainant's evidence, resulting in a miscarriage of justice. Held: Appeal allowed, new trial ordered. The trial judge misapprehended the substance of the complainant's evidence identifying the appellant as one of her assailants. The misapprehensions went to the core of the judge's reasoning process and were essential to her findings. The judge also failed to consider material evidence and important gaps in the evidence that were relevant to assessing the complainant's identification of the appellant, including her evidence that the names of her assailants had been supplied to her after the assault occurred. The application to cross-examine the complainant on appeal is dismissed.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] The appellant is seeking to overturn his convictions for sexual assault causing bodily harm and unlawful confinement of a young woman. At the close of submissions on the hearing of this appeal, the appeal was allowed, the conviction set aside, and a new trial ordered, with reasons to follow. These are my reasons.
- [2] The facts surrounding the offences are as follows. The complainant, then 18 years old, was drinking with a number of people at a home. Just after waking up from sleeping on the couch, she was taken forcibly to the basement and sexually assaulted. She was very intoxicated at the time, and the basement was in total darkness. Her identification of the appellant as one of two assailants was the key issue at trial.
- [3] There were several men in the house that day who were also intoxicated. Other than the complainant and the appellant, there was only one witness at trial to give evidence regarding the identity of the assailants, and his evidence was inconsistent and rejected by the judge as wholly unreliable. Two other people who were drinking at the house that day also testified, the complainant's aunt "M", and the aunt's friend Floyd Lowley. They had been drinking heavily and testified that they did not remember anything other than sleeping at the time of the events. They did not provide any useful evidence as to who committed the assault.
- [4] A key witness, Chris Belanger, who according to the complainant's evidence pulled her attackers off her, did not testify at trial. There was also no forensic evidence identifying the appellant as having had any sexual interaction with the complainant.
- [5] The trial therefore turned on the judge's assessment of the competing evidence of the complainant and appellant.
- [6] The Crown's case was that there were two assailants, Adam Tibbetts and the appellant. However, the Crown stayed the charges against Mr. Tibbetts partway through trial because of the uncertainty of the identification of him. The complainant did not know Mr. Tibbetts previously, but she did know the appellant.

- [7] One ground of appeal is that the judge misapprehended critical evidence related to the complainant's identification of the appellant, and that this played an essential role in the reasoning process. I agree.
- [8] Due to the circumstances, the complainant's evidence identifying the appellant was thin and internally inconsistent on material points. The judge's misapprehension of the complainant's evidence had the effect of bolstering that evidence and meant that important inconsistencies were not addressed. These misapprehensions were essential to the judge's conclusion that the appellant was one of the men who had sexually assaulted the complainant.
- [9] The misapprehensions of evidence at trial have led me to conclude that the appellant's conviction is on shaky ground and that the conviction must be set aside and a new trial ordered. It is therefore unnecessary to consider the other grounds of appeal. I will address the appellant's application to cross-examine the complainant in support of his appeal at the close of these reasons.

Judge's Reasons

- [10] The judge set out the background of the events that day and then analyzed the evidence of the complainant and the evidence of the appellant.
- [11] The judge's key findings regarding the complainant's evidence were as follows:
- [21] She woke up some time later when it was dark out and saw that there were a number of people partying in the house. At this time, she says she was at a stage of inebriation of about seven on a 10-point scale, 10 being blackout stage. She recalls being pulled up from the couch by someone who she was unable to identify. There were many partiers in the house and she tried to resist, but she was sleepy, sick, and drunk, and was being forcefully dragged to the stairwell to the basement. No one came to her assistance.
- [22] One man was pushing her and one was following. As she resisted, they began pushing her. Once they had succeeded in getting her into the empty basement, she began yelling and crying for her aunt to come and help her. She knew that her aunt was asleep upstairs and was trying to wake her by calling for help. The two assailants pushed her towards a pile of laundry beside the washing machine. Once there, she was pushed down onto it. She tried to evade her attackers, but when she tried to stand up, she was pushed down again. One held her down while the other pulled her pants off.
- [23] She recognized one of them as the accused, Mr. Patrick. She had gotten a glimpse of his face in the light from the kitchen when she was on the stairs. However, it was his voice that confirmed her recognition, since she had known him for years as a resident of the same reservation and had considered him as one of her friends.

- [24] It is interesting to note that Mr. Patrick in Exhibit 3, his statement to Constable Pocock, said that the complainant probably recognized his voice in the basement. She did not know the second assailant and the basement was sufficiently dark that his face was obscured, hence the decision by the Crown to stay the charges against Mr. Tibbetts.
- [25] The unidentified assailant went first and took about five to 10 minutes trying to insert his penis into her vagina. He achieved partial penetration only, although his penis was erect. Mr. Patrick was holding her down by the shoulders at this point. She was yelling for help from her Aunt [M] and from her friend Chris Belanger 2.
- [26] The first man then held her down while Mr. Patrick tried to penetrate her, but he was not successful in getting an erection, did not penetrate her, and did not ejaculate inside her.
- [27] The second assault took about five minutes, as she continued to yell for help. She does not believe either man was using a condom. She believes that her fear sobered her up somewhat as she was being pulled downstairs. By the time of the assault, she estimates that she was about five on a 10-point scale of drunkenness.
- [28] Finally, Chris Belanger 2 heard her cries, came downstairs, turned on the light, and pulled Mr. Patrick off her. She saw Mr. Patrick even more clearly at that point.

[Emphasis added.]

[12] In the analysis section of her reasons, the judge held as follows:

- [58] The complainant, as I have noted, gave evidence that remained consistent throughout and she did not equivocate about stating that she could not see the face of the first man who assaulted her and could not be certain who he was. She was also honest that she had been drinking for some time; however, the fear that she felt while being pulled down the stairs by two men helped to sober her up. I find that reasonable.
- [59] That she would remember Mr. Patrick's voice is also reasonable, since they had known one another for many years as both resided in the same small community. He would have been close to her face if he committed the sexual assault, giving her a clear opportunity to hear him speaking. In fact, in Exhibit 3, Mr. Patrick says a number of times that he has known the complainant all his life, so for her to have confidence that she knew who he was is persuasive.

[Emphasis added.]

Alleged Misapprehensions of Evidence

- [13] The appellant submits that the judge misapprehended the complainant's evidence in three important ways:

- a) in finding that the complainant identified the appellant as the man who held her shoulders down while the first man assaulted her, and who then was the second person who assaulted her;
- b) in finding that the complainant saw the appellant's face "even more clearly" when Chris Belanger pulled the accused off her; and,
- c) in finding that the appellant would have been speaking near the complainant's face when he sexually assaulted her and that the complainant had enough familiarity with the appellant to be able to recognize him by voice alone, as the complainant and appellant were friends.

Discussion

- [14] It is necessary to put the judge's findings in the context of the evidence at trial in order to analyze the appellant's argument that the judge misapprehended the evidence in such a way as to give rise to a miscarriage of justice.
- [15] The evidence was that on November 4, 2016, the complainant joined her aunt M and her aunt's friends in drinking alcohol. The complainant had been staying with her aunt for about a week and a half, at Floyd Lowley's home. During that time, she had been regularly drinking alcohol with her aunt and an older friend, Chris Belanger. She had not eaten for a couple of days.
- [16] Although Chris Belanger has a father and son of the same name, when I refer in these reasons to Chris Belanger or Mr. Belanger, I am referring to the complainant's friend, who at the time was middle-aged.
- [17] According to the complainant, in the evening of the day in question, she was sleeping on the couch. She was awakened by others coming into the home, but it was dark in the room she was in. On a scale of intoxication, from zero as sober to ten as almost passing out, she estimated that she woke up at about a seven. She described herself as feeling sick and hungover, with hot and cold sweats.
- [18] The complainant testified that after she woke up, someone pulled her by the arm downstairs. She tried to resist but was pushed down the stairs. In her evidence, there was one person pushing her and a second one following. She said that she was scared and that this sobered her up, so she went from a seven to a four or five out of ten on the scale of estimated intoxication.
- [19] I pause to note that referring to the complainant's level of intoxication is not meant to suggest that she was in any way to blame. Being intoxicated is not an invitation to be abused. Rather, the complainant's state of intoxication is relevant only to assess her ability to see, hear, and remember who it was that was assaulting her.

- [20] There were additional circumstances impacting the complainant's ability to identify the assailants, including the darkness, her grogginess upon waking up, and the presence of several people. On this last point, the number of men in the home at the relevant time was not consistently established by the witnesses. However, it appears that there were several men drinking there, and certainly more than the two accused.
- [21] Once in the basement, the complainant was pushed to a pile of laundry on the floor and sexually assaulted. She remembered two men being involved, with one man assaulting her and the other holding her, and then the men switching positions. She tried unsuccessfully to push them off. She also yelled for her aunt, but her aunt did not hear her. Eventually, Mr. Belanger came down. He pulled the men off, took them outside, and told them to leave.
- [22] The complainant's evidence was that she did not see her assailants during the assault itself. She did not know which man was first and which was second in assaulting her.
- [23] In direct evidence, the complainant described the basement as "pitch dark, no lights on". When asked about the number of people involved, she responded "I'm pretty sure it was two at first" and "I felt like there was two". She qualified her response by explaining that she was "half asleep".
- [24] When asked why she thought that one of the assailants was the appellant, the complainant said "because I recognized their voices". Unfortunately, Crown counsel did not ask any follow-up questions about the voice recognition. I return to this below.
- [25] As to whether she saw the appellant's face, the complainant testified as follows:
- Q Did you ever see Randy's face during any of this?
- A I think in the basement, when there was lights.
- Q Pardon me?
- A When we passed, like, the lights going down.
- Q So, when you were passing the lights on the way down you recognized Randy's face?
- A Yeah. I just got a glimpse at it.
- Q Did you get a glimpse of the other person's face?
- A Yes, I did.
- [26] The difficulty with the above evidence is that she also said that only one of the two men was pushing her down the stairs while the other man followed and that they were not all going down the stairs together. Further, she did not know who was pulling her down the stairs, i.e., whether it was the appellant or the other man. She said the second individual did not "come in" until they got close to the bottom of the stairs.

[27] Thus, the complainant's evidence of catching a glimpse of the appellant on the stairs was difficult to square with her evidence that she did not know which man was pulling her down the stairs and which man followed.

[28] It was suggested to the complainant in cross-examination that the appellant was not present with her in the basement. She denied that suggestion, not by asserting that she saw him, but by returning to her assertion that she heard his voice. Her evidence was:

Q Okay. Now, I'm going to suggest to you that Mr. Randy Patrick was not present with you at all downstairs, what do you say to that?

A Oh, I -- I heard his voice, so that'd be incorrect too.

Q Could you repeat the last of what you said, ma'am?

A I said if what you said is incorrect because I heard his voice.

Q So you are telling us that through a Level 5 intoxication, you can recognize his voice?

A No, that wouldn't be my first time hearing his voice.

Q But again, I will ask my question again, ma'am. You -- you are telling us you are able to recognize his voice to the level of intoxication you had?

A Yes.

Q And this -- this may seem silly, but I'm going to ask you -- I am going to suggest to you that you couldn't recognize his voice through the level of intoxication that you had, what do you say to that suggestion?

A I'd say that's incorrect because I know what I heard.

[29] It is unclear from the whole of her evidence when it was that the complainant heard the appellant's voice: was it during the assault, or did she make assumptions based on someone she heard while descending the stairs to the basement? The complainant was never asked what the person, whose voice she recognized, actually said or when he said it. She also was not asked about how often she and the appellant spoke to each other in the past, or what, if anything, was unique about his voice.

[30] The fact that the complainant relied on voice recognition to identify the appellant suggests that she did not see him in the basement. This was consistent with her evidence that she did not know which man was which as the two assaulted her. Again, she described the basement as "pitch dark", with no lights on.

[31] There was one other piece of evidence to consider on the question of whether or not the complainant saw her assailants and specifically saw the appellant assaulting her:

Q When your friend Chris came down, did he turn the lights on? Do you recall?

A I think he turned on the stair lights.

Q Were you able to see the faces of the men who did this, when the lights were on?

A Sort of. I just grabbed my pants and ran back upstairs.

[Emphasis added.]

- [32] It is a delicate and difficult job for Crown counsel to ask shy witnesses to describe traumatic events, without leading the witness and all the while being mindful that the experience of testifying can be an additional trauma. However, as cases have to be decided on evidence, bearing the above exchange in mind, it would have been of assistance for Crown counsel to have asked the complainant to explain what she meant by "sort of". The fact that her answer was so vague and not directly responsive to the question, in referring to getting dressed, could suggest an almost apologetic attempt to explain why she did not really see the faces-- that is, because she was focussed on getting dressed and leaving. The evidence "sort of", on its own, was meaningless.
- [33] The above review establishes that the judge misapprehended the complainant's evidence in finding that the complainant identified the appellant as the man who held her shoulders down while the first man assaulted her, and then was the second man who assaulted her (paras. 25-26). The complainant did not know who was the first and who was the second man assaulting her.
- [34] Perhaps influenced by this mistaken understanding of the evidence, the judge erroneously found that after Mr. Belanger came downstairs and turned on the light, he pulled the appellant off the complainant and the complainant "saw [the appellant] even more clearly at that point" (para. 28). This significantly misapprehended the complainant's evidence.
- [35] The complainant's precise evidence was that Mr. Belanger turned on the stair lights, not the basement lights. She never said that she saw Mr. Belanger pull the appellant off her. She said that Mr. Belanger told her that he pulled off the appellant and the co-accused, Mr. Tibbetts.
- [36] It is possible that if the complainant actually saw the men when Mr. Belanger turned on the stair lights, she might be able to say who was the second man assaulting her, based on his position at the time. But again, she did not know.
- [37] It is at this point appropriate to revisit the basis on which the charges against Mr. Tibbetts were stayed, that being the concern that his name may have been supplied to the complainant by someone else. Specifically, the complainant gave evidence at trial under cross-examination that Mr. Belanger told her who had committed the assault and that she did not know who it was "at first".

[38] The judge interpreted this aspect of the complainant's evidence as applying to only Mr. Tibbetts, observing as a badge of the complainant's honesty as a witness that the complainant "did not equivocate about stating that she could not see the face of the first man who assaulted her and could not be certain who he was" (para. 58). But again, respectfully, the complainant's evidence was that she did not see the face of either assailant while she was being assaulted.

[39] It is useful to set out the relevant part of the complainant's evidence on identification that led to the stay of charges in respect of Mr. Tibbetts:

Q Okay. All right. Let us -- let us go down then to line 16 on the same page. The officer says [as read in]:

Q Okay. Okay. So did you know Adam or Randy before this happened?

And your answer at line 17 is:

Um I know Randy, but I never met Adam.

A That's correct.

Q And let us continue, the officer says:

So this was your first interaction with Adam?

And your answer is:

Yeah.

Is that correct?

A Yes, I was.

Q So how do you know it was Adam?

A Because Chris told me.

Q Okay. Chris --

A I --

Q -- Chris your drinking friend?

A Yes. I was wondering who they were at first, and he said that Adam Tibbetts and [the Appellant] took advantage of you.

Q Okay. And when was it that Chris, your drinking friend, told you that?

A It was like probably a couple hours after it happened.

Q And then till Chris told you that, it sounds like you didn't know who -- who had done this?

A I didn't know who it was at first.

Q Okay. But you were able to get . . .

A Well, I heard their voices, but I didn't recognize. Like -- like I said, I didn't recognize Adam's voice.

Q Okay. But you were -- as you told us, you're able to see these two rings, right?

A I felt them.

[Emphasis added.]

[40] As is set out above, the complainant gave evidence that Mr. Belanger told her what he had seen, who he pulled off her, and who he took outside to punch. She testified that Mr. Belanger told her the names of both men who "took advantage" of her.

[41] Further, the complainant testified in cross-examination that when she gave her police statement, she had "figured out" what had happened that night, in part because of information supplied to her by others:

Q It's -- it has already been my experience, I remember things better close to when they happen, is that the -- the same case with you that it's easier to remember shortly after things happen?

A Yeah.

Q Okay. So it's likely the statement --

A When -- when --

THE COURT: Sorry, she is still speaking, Mr. Murphey.

A When -- when I took this statement, I've figured out on what happened that night and who -- who did this stuff. And they gave me names and who they kicked out and all that. So I was just saying what -- some of them I was saying what I remembered and what people told me that what happened.

MR. MURPHEY:

Q So not all of this is just your memory then?

A Yeah. Because -- well, no, it is my memory. It's just what my auntie and them been saying what they heard.

[Emphasis added.]

[42] The above evidence was indeed very forthright. The witness is not to blame for being unable to see the perpetrators and relying on what others told her. Further, she might not know the importance of the distinction between hearsay evidence and first-hand observations.

[43] As it was, the complainant's evidence raised a question of whether she pieced together who assaulted her not based on seeing the persons themselves, but on what she had been told.

- [44] The respondent points out that the complainant, in further cross-examination, denied that Mr. Belanger told her who should be blamed or that he asked her to name Mr. Tibbetts and the appellant as her assailants. It is true that she did make these denials, but she did so to counter the suggestion that Mr. Belanger and another man had assaulted her and instructed her to blame someone else. The complainant did not retract her evidence that it was Mr. Belanger who told her what he had seen when he pulled the men off her. While denying that Mr. Belanger "asked" her to name the appellant as one of the assailants, she agreed with the suggestion that she adopted what she was told by Mr. Belanger and her aunt.
- [45] In my view, the complainant's evidence was unclear as to whether she actually saw who assaulted her, whether she relied on what others told her as to who the assailants were, and whether she caught a glimpse of the appellant when he was at the top of the stairs and made assumptions based on this glimpse and hearing his voice or a voice like his at some point. The judge's misapprehension of the complainant's identification evidence as being much stronger than it actually was meant that the judge mistakenly did not address the weaknesses in the identification evidence in her reasons.
- [46] The complainant's evidence was most certain when she testified as to relying on voice recognition as her means of identifying the appellant. The judge dealt with this very briefly, but supported the voice recognition evidence with the mistaken assumption that the appellant spoke during the assault itself (para. 59). The evidence did not go this far. The complainant's evidence was that she recognized the appellant's voice; she did not say what he said or when he said it, nor did she identify any reason why she would recognize his voice in the first place.
- [47] The complainant did not say she and the appellant were friends, but that he was the uncle of one of her friends on the same reserve and so they knew each other for "probably years".
- [48] The possibility of a wrongful conviction based on visual identification evidence is well-known. A witness may be honest, credible and certain, but mistaken in their visual identification. Even more vulnerable is evidence based on voice identification, as noted in *R. v. Adam et al.*, 2006 BCSC 1884 at para. 138, citing *R. v. Chan*, 2001 BCSC 1180 at paras. 26-32.
- [49] To be sure, greater weight may be given to voice identification evidence where the witness is previously familiar with the voice: see *Adam* at para. 139. This is much the same as attaching more weight to visual identification by a witness who is familiar with and recognizes the person, as discussed in *R. v. Field*, 2018 BCCA 253 at para. 42. However, even taking into account the distinction between identification evidence of a stranger and identification evidence by someone who recognizes the accused based on prior familiarity, the latter of which may be entitled to more weight, there is still a risk that the witness could be mistaken. Careful scrutiny of the evidence is required.

- [50] The judge found the complainant to be credible and honest. Indeed, she did not embellish and was very forthright as to what she could not see. Her evidence identifying the appellant only appeared confident when she said that she recognized his voice.
- [51] The problem here is that there was no detail in the voice recognition evidence to reveal, for example, if the appellant said one word or several sentences, whether he said something during the assault itself to place him there, and whether he had a similar or dissimilar voice and cadence as other men at the house that night. As noted, the judge misapprehended that the appellant spoke while in the course of sexually assaulting the complainant; there was no evidence to this effect.
- [52] In my view, voice recognition in this context, without further details, made for a fragile basis to ground a conviction.
- [53] As for the appellant, he denied that he took part in the assault at all, but the judge concluded that his evidence was so unreliable that she could not accept any of it (para. 41). Nevertheless, the judge found that because the appellant had described in his police statement "the geography of the basement" where the assault took place, he was likely present during its commission (para. 60).
- [54] It is true, as noted by the judge, that the appellant's police statement was rife with inconsistencies. He at first denied going into the basement, then suggested he did go into the basement and was trying to help the complainant by telling the other man to get off her, before finally stating to the police that he watched another person have sex with the complainant while he masturbated. But it is also worth noting that the appellant's evidence in his police statement seemed to change as the police officer made suggestions to him. Counsel for the appellant contends that this is because the appellant has a below-average intellectual capacity and is easily led and that the possibility must be considered that he invented a story in his police statement to try to explain all of the things the officer was telling him.
- [55] Turning back to the judge's comment about the basement, the appellant did not provide an extensive description of the space in his statement to police. Rather, it was only after being told by the police officer that there was a pile of laundry that the appellant mentioned a pile of laundry, its location beside the washing machine, that there was a dryer there, and that the basement has "all the woods and everything there".
- [56] Photographs of the basement show a laundry pile next to the washing machine, but that location is logical and something a child might guess. Although photographs indicate that some of the finishing in the basement is bare wood without drywall, there was no evidence at trial as to whether having an unfinished basement was unique among houses in the community, or whether the basement was visible from the top of the stairs. We also do not know if this was what the appellant meant by describing the "woods" or if he was envisioning something else, such as a firewood pile.

- [57] Further, the judge appeared to put some weight on the fact that when the appellant gave his police statement, he said that the complainant probably recognized his voice in the basement (para. 24). The appellant did not, however, state that he said anything to the complainant in the course of assaulting her. While his story as to what happened that night changed, he consistently maintained that he did not assault or have any sexual contact with her. In my view, in accepting part of the appellant's statement, that he was in the basement, the judge ought to have considered whether the appellant could have said something while observing sexual assault but not participating in it.
- [58] The judge was entitled to give some weight to what the appellant said about being in the basement. However, in the circumstances of this case such evidence on its own would not be sufficient to establish beyond a reasonable doubt that the appellant was involved in the assault. What tipped the balance to cause the judge to have no reasonable doubt was the complainant's identification evidence, which was misapprehended.
- [59] All that said, the test for appellate intervention based on a misapprehension of evidence giving rise to a miscarriage of justice under s. 686(1)(a)(iii) of the Criminal Code requires the misapprehension to go to the substance of material parts of the evidence that play an essential role in the judge's reasoning. A misapprehension of evidence includes a mistake as to the substance of the evidence, a failure to give proper effect to the evidence, or a failure to consider evidence relevant to a material issue: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 218 (Ont. C.A.).
- [60] A misapprehension of a detail of the evidence that is peripheral to the judge's reasoning is not sufficient to justify appellate review on the basis of a miscarriage of justice pursuant to s. 686(1)(a)(iii): *R. v. Lohrer*, 2004 SCC 80 at para. 2.
- [61] The justice system in Canada recognizes the danger of wrongfully convicting an innocent person on another person's identification evidence alone. The judge was faced with two opposite versions of events provided by the two key witnesses, the complainant and the appellant.
- [62] The judge misapprehended the substance of the complainant's evidence in three material respects, erroneously finding that:
- a) the complainant was able to identify the appellant as the second man who assaulted her;
 - b) the complainant saw the appellant clearly when Mr. Belanger intervened and pulled the men off her; and
 - c) the appellant was speaking near the complainant's face while sexually assaulting her, which would have enabled her to recognize his voice during the assault.

- [63] At the same time, the judge failed to consider material evidence and important gaps in the evidence that were relevant to assessing the complainant's identification of the appellant. In this regard, the judge overlooked not only the complainant's inability to determine who was dragging her down the stairs or who was assaulting her during the act, but also the complainant's evidence that Mr. Belanger and others told her who was involved afterwards because she did not know who it was when it was happening.
- [64] The misapprehensions of evidence might also explain why the judge did not scrutinize the complainant's voice recognition evidence, as ought to have been done. On its own, and as described above, the voice recognition evidence was merely conclusory and was unsupported by sufficient detail to be accorded significant weight.
- [65] Here, the cumulative effect of the misapprehensions of evidence went to the core of the judge's reasoning process and were essential to the judge's finding that the complainant was credible in her identification of the appellant as one of the men who sexually assaulted her. I do not question that the complainant was an honest and credible witness. She is not to blame for the frailties in her evidence or for the fact that she was not asked sufficient questions to explain or fill the gaps or inconsistencies in her evidence. However, the reliability of her evidence, such as it was, called for a more critical assessment.
- [66] For these reasons, I am satisfied that the appellant has shown that the misapprehensions of evidence gave rise to a miscarriage of justice justifying appellate intervention pursuant to s. 686(1)(a)(iii).

Additional Matters

- [67] Based on my above analysis, there is no need to consider the other grounds of appeal.

Application to Cross-Examine the Complainant

- [68] For completeness, I will briefly address a preliminary application by the appellant to allow the cross-examination of the complainant on appeal. This application was denied, with reasons for the denial to be provided at the same time as the reasons for the appeal proper.
- [69] One of the grounds of appeal was based on an application by the appellant to introduce fresh evidence of a witness, Brenda Lolly. The appellant says that Ms. Lolly's evidence is that the complainant told her that she wrongly named the appellant as one of her assailants. Ms. Lolly will purportedly say that the complainant informed her of this the day after the assault and later after the trial.
- [70] To respond to this evidence, the police recently interviewed the complainant. The complainant's statement was to the effect that Ms. Lolly has repeatedly pressed her to recant on her identification of the appellant as one of her assailants, and that the complainant has refused to do so.

[71] I should add that the Crown opposed the introduction of the proposed fresh evidence and argued that it was not credible. According to the appellant's statement to police after the assault, he indicated that he had been staying with Ms. Lolly, who is his relative. The Crown suggests it defies credibility that Ms. Lolly would not have told him this story at the time or soon thereafter to try to help him.

[72] The appellant counters this with the point that he was taken into custody and so was not staying with Ms. Lolly after the complainant's assault.

[73] With this background, the appellant brought a motion pursuant to s. 683(1)(b)(i) of the Criminal Code seeking an order compelling the attendance of the complainant before this Court to be examined for the purposes of his appeal. That section provides:

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

(b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,

(i) to attend to be examined before the court of appeal ...

[74] It is clear that before making such an order, the Court must be satisfied that it is in the interests of justice to do so.

[75] The appellant relied on *R. v. Mehl*, 2019 BCCA 438 at para. 14, and *R. v. Sihota*, 2009 ONCA 770 at para. 14. In *Mehl*, this Court noted the extraordinary nature of the remedy and that it requires a sufficient foundation and a reasonable possibility that the cross-examination will produce meaningful evidence to assist in determining the issues on appeal:

[12] First with respect to the applications to cross-examine the witnesses, Mr. Mills, Mr. Karaszkiwicz, and Ms. Mehl, our authority for doing so is found in s. 683(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46. That section provides that such an order may be made where the court considers that it is in the interests of justice to do so. It is an extraordinary remedy. There must be a sufficient basis or foundation to support such an order. A key consideration is whether there is a reasonable possibility that the proposed cross-examination will produce meaningful evidence to assist the court in fulfilling its role in determining the issues raised by the appeal: *R. v. Au-Yeung*, 2010 BCCA 367; *R. v. Atzenberger*, 2018 BCCA 224.

[Emphasis added.]

- [76] A key ground of appeal in Mehl was ineffective assistance of counsel, and all parties agreed that it was appropriate that there be cross-examination of trial counsel as well as the appellant on this ground. The cases cited in the above passage also dealt with the appeal court allowing cross-examination of trial counsel. This is very different than putting a trial witness through cross-examination on appeal and challenging the very evidence the witness gave at trial where that witness was the victim of the alleged crime.
- [77] Trial lawyers are part of the justice system and will likely not be traumatized by having to testify on appeal as to the circumstances giving rise to an appellant's allegation of ineffective assistance of counsel, although there are other good reasons for not allowing cross-examination of trial counsel on a regular basis.
- [78] However, where, as here, the witness is the victim of a sexual assault who already testified at trial and was challenged on her credibility, having to testify on appeal is likely to cause her considerable additional trauma. One must keep in mind that the sexual assault victim has likely been required to repeat the traumatic story of the assault several times already (for example, to the police and at trial), and if a new trial is ordered, will have to do so again. It should therefore only be in exceptional circumstances that such an order will be made on appeal, as noted in Sihota at para. 14.
- [79] Indeed, the Crown submits that the test in circumstances such as this should require the appellant to establish more than a "reasonable possibility" that the proposed cross-examination will assist in determining the issues on appeal. The Crown submits that the appellant must establish on a balance of probabilities that he will be prevented or unfairly hindered in the prosecution of his appeal rights before the remedy is considered to be in the interests of justice. In this regard, the Crown relies on *R. v. Hobbs*, 2010 NSCA 32 at paras. 40, 45.
- [80] I note that in *Hobbs* the court did not decide whether the test was "reasonable possibility" or "reasonable probability". What was sought was an order compelling the trial Crown attorney to be examined as to background information obtained and used by the Crown during the jury selection process. The court held:
- [40] Here, the appellant and respondent agree fresh evidence should be admitted to inform the court what happened and, at least to some extent, why data was requested and assembled with respect to prospective jurors. In our view, to obtain the extraordinary remedy of an examination of a witness during the appeal process, the applicant must satisfy the court that there is at least a reasonable possibility, if not probability, that the proposed examination will produce meaningful evidence to assist the court in fulfilling its role in determining the issues raised by the appeal. Paramount in making this determination will be the court's views as to the extent to which the applicant will be able to produce the intended fresh evidence with respect to the alleged miscarriage of justice, with or without the proposed examination. In other words, absent an examination, will the applicant be unfairly hindered in being able to meaningfully exercise the appeal rights set out in the Criminal Code?

...

- [43] The applicant was asked as to what additional information he hoped to gain by an examination of Mr. Whiting. He replied that there were "a lot of unanswered questions". When pressed, he identified these unanswered questions as being, when Whiting was requesting criminal records checks, was he aware of: the provisions of the Juries Act that set the parameters for disqualification to serve as a juror due to having a criminal conviction; the Criminal Code section that creates the ability to challenge for cause based on a criminal conviction; the Supreme Court of Canada's decision in *R. v. Latimer*, [1997] 1 S.C.R. 217 that referred to the impropriety of Crown counsel utilizing the police to poll prospective jurors about their attitudes in a number of areas relevant to the trial issues.
- [44] The respondent's answer is that Mr. Whiting is presumed to know the law, and having him questioned about these issues would add nothing to the appellant's ability to argue the import of the fresh evidence. We agree.
- [45] The request to examine a witness in anticipation of an application to admit fresh evidence on appeal is an extraordinary remedy. It is to be exercised by the court where it considers it to be in the "interests of justice". While the discretion is broad, it must be tied to the purpose created for its exercise - to permit an appellant to be able to meaningfully prosecute the broad appeal rights granted by Part XXI of the Criminal Code. The court must be convinced on a balance of probabilities that the appellant will be prevented or unfairly hindered in his or her prosecution of those rights before the requested remedy should be considered to be in the "interests of justice". We need not choose whether the more stringent test of 'reasonable probability' as opposed to 'reasonable possibility' is the appropriate test to assist in that assessment. In our view the application fails on either.

[Emphasis added.]

- [81] Further, the interests of justice test requires considering not just the appellant's interests, but also the administration of justice itself. This may mean that the appellant will have a more difficult burden to meet to justify such a remedy where what is sought is a re-examination of a key witness at trial (here, the victim of the crime). It is to be remembered that the context of this issue arises after the appellant has been convicted at trial. The victim is no longer "alleged".
- [82] I do not find it necessary to resolve the debate as to which threshold, a reasonable possibility or a reasonable probability, applies in this case. On either approach, the appellant did not lay a sufficient foundation to show that the cross-examination of the complainant could produce meaningful evidence to assist the Court in determining the grounds of appeal. The ground of appeal said to be impacted by the application, relying on the proposed new evidence of Ms. Lolly, could be quite fairly determined without the need to put the complainant through cross-examination.

- [83] In my view, the Crown correctly described the proposed cross-examination as an attempt to gather evidence to impeach the complainant for the purposes of a new trial, should one be ordered. The grounds of appeal will not be determined by our own assessment of the complainant's credibility after cross-examination on appeal. There would simply be nothing to gain.
- [84] On the basis of the foregoing, it was not in the interests of justice to grant the order sought.
- [85] Further, as I have concluded the appeal ought to be allowed on other grounds, it is unnecessary to decide the admissibility of Ms. Lolly's evidence.

Conclusion

- [86] A case like the present one is very disturbing and weighs heavily on the people involved, as well as on the justice system. The assault on the complainant was outrageous. The perpetrators sexually assaulted an 18-year-old woman who had just woken up in the home of people she trusted.
- [87] I am aware of and concerned about the disproportionate degree of violence suffered by Indigenous women and girls in our society.
- [88] I am also mindful of the over-representation of Indigenous persons in Canada's prisons. In working to establish a relationship of trust between Indigenous peoples and the justice system, it is important to remind ourselves of the requirement that no person be convicted unless it is based on evidence that establishes guilt beyond a reasonable doubt. This requirement must be fiercely guarded by the courts, for the benefit of all society. Jurisdictions that do not respect the requirement of proof beyond a reasonable doubt have wrongly convicted and imprisoned minorities, dissidents and political opponents. Indeed, we have our own history of wrongful convictions in this country.
- [89] The appellant is an Indigenous man with his own tragic history, who has maintained his innocence throughout.
- [90] For the reasons above, due to material misapprehensions of evidence, I have concluded that the conviction must be set aside and a new trial ordered.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Hunter"

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