

CANADA / JUDGMENT

R. v. Prins

2023 BCCA 4

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 4 R. v. Prins

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Prins,

2023 BCCA 4

Date: 20230110

Docket: CA45219

Between:

Rex

Respondent

And

Thomas Bert Prins

Appellant

Restrictions on Publication: Section 486.5(1) Criminal Code: An order under s. 485.5(1) bans the publication, broadcasting, or transmission in any way of evidence that could identify a victim or witness referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

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Before:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated September 8, 2017 (R. v. Prins, 2017 BCSC 1722,

New Westminster Docket X077157).

The Appellant appearing in person:

T.B. Prins

Counsel for the Respondent:

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 10, 2023

Written Reasons of the Court

Summary:

The appellant was convicted of seven offences. He appealed his convictions, alleging that the trial judge misapprehended evidence. He also sought to have his case remitted to the trial court so that he could seek a constitutional remedy based on time spent in administrative segregation while awaiting his trial. HELD: the appellant's application to adjourn the appeal is denied and the appeal is dismissed. The judge made mistakes about some of the evidence; however, those mistakes were not central to his reasoning process in finding the appellant guilty. The appellant is denied leave to advance a constitutional issue for the first time on appeal. This issue was not raised at his trial and the evidentiary record before the Court is insufficient to address it.

Written Reasons for Judgment of the Court:

Introduction

[1] After a trial by judge alone in the Supreme Court, Thomas Bert Prins was convicted of seven offences. The convictions were entered on September 8, 2017.

- [2] Five of the convictions arose from three incidents that occurred over ten days in May and June 2012.
- [3] In the first incident, Mr. Prins was found to have robbed a BC Ferries employee of \$20 cash at the Horseshoe Bay terminal. He used a firearm during the robbery and wore a balaclava.
- [4] The second incident involved breaking through the front glass door of a gas station in Squamish using a sledgehammer and stealing various items.
- [5] In the third incident, Mr. Prins was found guilty of robbing someone who was leaving their work at a golf centre in Surrey. He also used a firearm in this robbery and wore a balaclava. Mr. Prins took the victim's keys, vehicle, wallet and mobile device.
- [6] As part of their investigation, the police conducted an undercover "Mr. Big" operation. Mr. Prins talked to the undercover officers about one or more of the offences. The details he provided to them became evidence at the trial following an admissibility voir dire.
- [7] The police also gathered forensic evidence in the investigation, including DNA evidence and video surveillance, and they took one or more statements from an acquaintance of Mr. Prins who told the police that Mr. Prins had described the offences to him ("SW").
- [8] In the context of the Mr. Big operation, Mr. Prins led police to the firearm that he said was used in the Surrey robbery (a handgun). It was buried in Stanley Park. Mr. Prins was not legally entitled to possess the firearm and this fact formed the basis for a sixth conviction. Mr. Prins was also convicted of uttering threats against SW (count 7 on the indictment). Among other things, he told the undercover officers that he wanted to have SW killed for implicating him in the crimes.
- [9] Prior to sentencing, Mr. Prins applied for a stay of proceedings based on unreasonable delay under s. 11(b) of the Canadian Charter of Rights and Freedoms [Charter]. That application was summarily dismissed on the basis that it had no prospect of success. The trial judge found that the delay in getting to trial lay predominantly with the defence. Mr. Prins was represented by a lawyer at his trial.
- [10] For his seven offences, Mr. Prins was sentenced to a cumulative seven days' imprisonment and one year of probation after receiving credit for the equivalent of seven years and 11 months' pre-sentence custody. The sentences were imposed in March 2018.
- [11] Mr. Prins challenges the guilty verdicts for all seven offences.

Adjournment Request

- [12] It has taken considerable time for this appeal to be heard. The appeal has been scheduled for hearing three times. Mr. Prins obtained adjournments of the first two hearings. With the assistance of case management, a third hearing date was set for December 13, 2022.

- [13] On December 13, Mr. Prins attended the hearing. He is self-represented. He sought another adjournment, saying he was not ready to proceed. He told the Court that he needs additional information before he will be in a position to fully advance his arguments. This includes information he wants to obtain from the Royal Canadian Mounted Police ("RCMP") under the Access to Information Act, R.S.C. 1985, c. A-1, or by way of a production order pursuant to s. 683(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Prins also said he wants to subpoena a lawyer that had been appointed to represent him in the appeal. The precise nature of the sought-after information or the reason for the subpoena is unclear, but it appears to relate to allegations of corruption or otherwise unfair treatment by the RCMP and prosecutors.
- [14] The Crown opposed the adjournment in light of the history of the appeal and the fact that Mr. Prins has had ample time since filing his notice of appeal to seek further information.
- [15] It is our view that the appeal should not be adjourned and, instead, determined on its merits.
- [16] Mr. Prins filed his notice of appeal in April 2018. In December 2019, a lawyer was appointed to represent him in the appeal. A transcript and an appeal book were filed in July 2020. Mr. Prins' then-appointed lawyer filed a factum in May 2021. The appeal was scheduled for a hearing in November 2021; however, Mr. Prins discharged his appointed lawyer in October 2021. The appeal was adjourned and rescheduled for March 2022.
- [17] New lawyers were appointed for Mr. Prins. As we understand it, the March 2022 hearing was adjourned to accommodate their involvement; however, in June 2022, they also withdrew from the case because they had been discharged by Mr. Prins. A third hearing was then set for December 13, 2022. In preparation for the third hearing, Mr. Prins filed a "replacement" factum on August 31, 2022, as well as a letter with various complaints about the justice system and the manner in which he has been treated. At no point since filing his notice of appeal has Mr. Prins made an application for the production of documents in this Court, or filed a fresh evidence application attaching information that he considers relevant to the appeal.
- [18] This appeal has been outstanding for more than four and one-half years. The record shows that Mr. Prins has had substantial time and opportunity to prepare for the appeal. He has received the assistance of legal counsel, but has declined to avail himself of their services. The reasons he has provided for a third adjournment are vague and, on their face, appear to relate to matters that fall outside the scope of the appeal. Importantly, given the history of this matter, we have no confidence that if the appeal is re-scheduled, Mr. Prins will be prepared to proceed at the next hearing date.
- [19] At the December 13 hearing, Mr. Prins had opportunity to make submissions about the merits of his appeal. As noted, one of his previously-appointed lawyers filed a factum in May 2021, identifying and addressing specific grounds of appeal. This too was before the Court. Prior to December 13, Mr. Prins filed a duplicate copy of this same factum, with added

commentary, as well as a letter raising additional complaints. This material also forms part of the record before us. The Crown filed response material, setting out its position on the grounds raised by Mr. Prins' previous lawyer. The appeal file includes the reasons for conviction from the court below, admissibility rulings made at the trial, and a copy of the transcript.

- [20] On the whole of this, we are satisfied the Court can properly determine the appeal and we have proceeded accordingly.

The Trial Judgment

- [21] The reasons for conviction are indexed as 2017 BCSC 1722.
- [22] The trial judge began his analysis of the case by setting out the charges against Mr. Prins. He identified two "fundamental issues" for him to decide: (a) the application of *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 (S.C.C.); and (b) the credibility and reliability of SW: at paras. 3-6.
- [23] The trial judge then reviewed the evidence relevant to each of the charged offences: at paras. 7-51. This included (but was not limited to): video evidence showing the robbery at the Horseshoe Bay ferry terminal; video evidence showing the break-in at the Squamish gas station; Mr. Prins' DNA found in a balaclava near the gas station; admissions made by Mr. Prins' during the Mr. Big operation; the firearm located in Stanley Park; and testimony from SW.
- [24] Mr. Prins and SW knew each other. Mr. Prins stayed with SW in May or early June 2012. While there, Mr. Prins told SW about things that caused SW concern and eventually led him to contact the police. The information included details of the Horseshoe Bay robbery, the Squamish break-in and the Surrey robbery. Mr. Prins had a firearm in his possession for part of the time that he was with SW.
- [25] Mr. Prins urged the trial judge to reject the evidence of SW: at para. 54.
- [26] The trial judge did not do so. He found that "many of the details" provided by SW were corroborated by various witnesses who testified about the offences. The evidence of these witnesses was "quite independent of anything" said by SW: at para. 52.
- [27] The trial judge found that SW's evidence of what Mr. Prins told him specific to the Horseshoe Bay robbery was independently corroborated by evidence from BC Ferries staff, video surveillance and police testimony: at para. 61. SW's evidence about the information he received in relation to the Squamish break-in was supported by the DNA evidence on the balaclava: at para. 63. His testimony about the Surrey robbery was corroborated by police evidence, the victim of the offence, and Mr. Prins' discussion with the Mr. Big operators: at para. 67. SW testified that the firearm Mr. Prins said was used in one or more of the offences was "embossed with a circle with a star inside", was buried in Stanley Park, and required a specific type of ammunition. These details proved to be accurate when the firearm was

located: at paras. 55-56.

- [28] The trial judge found that SW's evidence was credible and reliable: at para. 68. It was "supported by other sources and detail": at paras. 68, 73. The trial judge also found that SW presented as a credible witness when he testified at the trial. When confronted with "errors, negative aspects of his character, or other aspects of his relationship with [Mr. Prins], he was quick to acknowledge or admit them": at para. 69. He acknowledged substance abuse and stealing: at para. 70. He was "responsive and direct" in his evidence: at para. 72.
- [29] The trial judge found that SW's testimony was "internally and externally consistent" (at para. 72), and that he was not "shaken" in cross-examination: at paras. 70-73.
- [30] A different result ensued from the trial judge's assessment of Mr. Prins' testimony. The relevant credibility findings are set out at paras. 74-85 of his reasons. Among other things, Mr. Prins' evidence was found to be: internally and externally inconsistent; evasive; selective; confusing; and non-sensical.
- [31] Mr. Prins urged the trial judge to place no weight on any of the details he provided to the Mr. Big operators in relation to the charged crimes. He repeatedly said that those details came from an interview he had with the police prior to the Mr. Big operation (in August 2012), at which time the police shared details of the offences with him: at paras. 46, 54, 64, 65 and 78. In other words, he said the information he relayed to the police did not reflect his personal knowledge. He was simply parroting back to them what he had been told.
- [32] However, Mr. Prins told the undercover officers that he left a sledgehammer in the Squamish gas station after the break-in and this detail was not discussed during the evidence presentation by the police: at para. 78. For this reason, and others, the trial judge did not believe Mr. Prins. Nor did his evidence raise a reasonable doubt about his guilt: at para. 85.
- [33] After considering the evidence in its entirety, the trial judge found that the Crown had proved the essential elements of the charged offences, including that Mr. Prins was the perpetrator: at paras. 86-91.

On Appeal

- [34] In his notice of appeal, Mr. Prins alleged a number of errors by the trial judge. He said the trial judge: (a) failed to consider the totality of the evidence in assessing his credibility; (b) failed to appreciate the context of Mr. Prins' dealings with the undercover officers and its impact on the reliability of what he said to them; (c) misapprehended evidence; (d) erred in summarily dismissing the application for a stay of proceedings based on unreasonable delay; and (e) erred in admitting the evidence of the Mr. Big operation.
- [35] The factum filed in May 2021, and relied upon by Mr. Prins for the purpose of the appeal, narrowed the grounds of appeal. The factum: (a) alleges misapprehensions of the evidence in finding corroboration for SW's testimony; (b) alleges misapprehensions of the evidence in finding that some of the details provided to the undercover officers by Mr. Prins could only

have come from his personal knowledge; and (c) requests a new trial so that Mr. Prins can seek a Charter remedy based on time spent in administrative segregation. The factum does not allege unfairness in the trial process or challenge the trial judge's assessment of credibility and reliability on bases other than the alleged misapprehensions of evidence.

- [36] As noted, in addition to the May 2021 and duplicate factums, Mr. Prins filed a letter with the Court raising various other matters. The letter is wide-ranging and alleges corruption in the investigating police force, the prosecution system and the courts. The letter is difficult to follow. The allegations are unsubstantiated (Mr. Prins has not filed a fresh evidence application), and, as such, we have considered the letter only to the extent that anything mentioned in it finds a foundation in the trial record.
- [37] Mr. Prins' oral submissions on December 13 were also wide-ranging and they repeated allegations of corruption against the police, the Crown and the courts. As with the letter, the submissions were disjointed and difficult to follow. Some of the submissions touched on the facts of the case, the Mr. Big evidence and the reliability of the DNA evidence. Others related to ongoing difficulty that Mr. Prins says he is experiencing with the RCMP, the death of his mother while he was in custody awaiting his trial, alleged police harassment of his sister, and the purported suppression of his personal freedoms by the state.
- [38] Ultimately, we consider it appropriate to state the grounds of appeal that have been articulated, advanced and developed on behalf of Mr. Prins as follows:
- a) whether the trial judge misapprehended evidence and, if so, whether the misapprehensions were essential to his reasoning process in either admitting evidence at the trial, or in finding guilt; and,
 - b) whether Mr. Prins should be granted leave to raise a new issue on appeal, namely, the availability of a Charter remedy arising from in-custody segregation while awaiting trial.

Discussion

[39] We will address each of the grounds of appeal in turn.

- a) Did the Trial Judge Misapprehend Evidence?

[40] Under s. 686(1)(a)(iii) of the Criminal Code, a misapprehension of evidence can result in a miscarriage of justice and require a new trial. The test to meet was helpfully explained in *R. v. Osinde*, 2021 BCCA 124:

- [17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes "as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence": *Morrissey* at 218.

- [18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge's reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.
- [19] Although a trial judge is uniquely positioned to make credibility assessments, where those assessments are based on misapprehensions of evidence and played a critical role in reaching a conviction, the assessments and the verdict will be insupportable: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. This is so even when the evidence adduced at the trial was capable of supporting a conviction: *Lohrer* at para. 1.
- [20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: "[t]he plain language or the thrust of the reasons must disclose an actual mistake": *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56-57, 59, 61-62. If so, then the reasoning that led to a conviction is based on "unsteady ground": *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge's reasoning process.
- [41] Mr. Prins says the trial judge misapprehended three parts of the evidence.
- [42] First, the evidence gathered during the Mr. Big operation included evidence of inculpatory statements made by Mr. Prins in relation to one or more of the charged offences. SW's evidence was considered by the trial judge in assessing the admissibility of these statements: 2016 BCSC 2239. When summarizing SW's testimony in his reasons on the Mr. Big voir dire, the trial judge stated that Mr. Prins told SW that the BC Ferries worker who was the victim of the Horseshoe Bay robbery injured his knees (a fact testified to by the victim). The Crown accepts that SW did not include this detail in his evidence.
- [43] In our view, this mistake was neither material nor central to the admissibility ruling.
- [44] The trial judge noted in his reasons on the voir dire that various other details provided by SW specific to the Horseshoe Bay robbery were independently and objectively confirmed by surveillance videos that captured the relevant events. It is also clear from a reading of the reasons, as a whole, that the evidence of SW was not the only evidence that led the trial judge to conclude the inculpatory statements should form part of the trial proper. The determination that the Crown met its onus to establish that the probative value of the Mr. Big statements outweighed their prejudicial effect on a balance of probabilities properly rested on an assessment of the evidence in its totality, not just the evidence of SW: *R. v. Hart*, 2014 SCC 52 at paras. 10, 85 and 89.

- [45] The trial judge delivered comprehensive reasons on the Mr. Big voir dire. The May 2021 and duplicate factums do not suggest that he applied an incorrect legal framework in assessing the admissibility of the Mr. Big evidence, or that he made errors other than the alleged misapprehension of evidence. In his reasons, the trial judge noted that in challenging the admissibility of the Mr. Big evidence, Mr. Prins was represented by "very able counsel with strong advocacy skills and [the trial judge received] clear final submissions including both oral and detailed written submissions": at para. 13. The evidence was closely scrutinized. We do not see reversible error here.
- [46] We note that in his reasons for conviction, the trial judge did not make the same mistake about SW's evidence. Consequently, even if the misapprehension that manifested itself on the voir dire could properly be characterized as material, there is no indication that it played an essential role in the reasoning process underlying Mr. Prins' convictions and thereby resulted in a miscarriage of justice.
- [47] The second alleged misapprehension of evidence also relates to SW.
- [48] The Crown acknowledged at the trial that SW was an important Crown witness whose credibility and reliability was a live issue. Indeed, the trial judge described SW's credibility as a "significant" issue for him to resolve: 2017 BCSC 1722 at para. 52. SW's evidence was vigorously challenged by the defence. Ultimately, the trial judge accepted what SW had to say.
- [49] At para. 62 of his reasons for conviction, the trial judge stated that in his testimony about the Squamish break-in, SW said Mr. Prins told him that a "sledgehammer was used to break the door". The Crown accepts that SW did not mention a "sledgehammer" as a tool used by Mr. Prins. Instead, in direct examination, he was asked by Crown counsel whether Mr. Prins told him about things he may have used to assist with the offence. Among other things, SW said he was told Mr. Prins used "[a] hammer, from what [he] understood".
- [50] We would not characterize the trial judge's reference to a "sledgehammer" in para. 62 as a mistake of any substance. SW did not use the word "sledgehammer" in describing what Mr. Prins told him; however, he did say that Mr. Prins told him he used a hammer to assist with the Squamish break-in and, objectively, this is what actually occurred. Video surveillance showed the glass door to the gas station being broken with a sledgehammer. When the police entered the store after-the-fact, they found that a sledgehammer had been left there by the perpetrator.
- [51] We are also of the view that even if the trial judge's misstatement could be characterized as material, it was not essential to his reasoning process in convicting Mr. Prins of the Squamish break-in. Removing this factor from the foundation underlying the verdict would not leave it on "unsteady ground": R. v. Sinclair, 2011 SCC 40 at para. 56.

[52] As noted, the trial judge found that many details provided by SW were corroborated by other evidence and that this enhanced his overall credibility and reliability as a witness. He also found that the identification of Mr. Prins as the perpetrator of the Squamish break-in was supported by the admissions he made to the undercover officers. There was also DNA evidence directly linking him to a balaclava found near the scene. The conviction for breaking and entering the gas station was not dependent on SW having identified a sledgehammer (as opposed to a "hammer"), as the tool used by Mr. Prins. This was simply one piece in a much larger puzzle.

[53] The third alleged misapprehension of evidence relates to the testimony of Mr. Prins.

[54] Mr. Prins told the Mr. Big operators about the Squamish break-in. He said he tried to break into the gas station a night earlier using a rock. Then, on the evening in question, he used a sledgehammer and left it inside the store.

[55] At the trial, Mr. Prins urged the trial judge to find that all of the details of the crimes he provided to the undercover operators came from an interview that he had with the police in August 2012, or from something he read in a local newspaper. In response to the latter submission, the trial judge said this in his reasons for conviction:

[65] In the circumstances of this case, that proposition does not explain the reference by the accused to the use of a sledgehammer and the fact that the sledgehammer was left inside the Shell station. None of this was referred to at any time, during the evidence presentation conducted during the initial police interview of the accused. Also, there was no reference to the sledgehammer in the Squamish newspaper article. Only the perpetrator of the break-in at the Shell station could know about the abandoned sledgehammer or be able to tell S.W. that a hammer was used to gain entry to the Shell station. Shortly put, the explanation given by the accused that he learned the details of these crimes as a result of the evidence presentation by the police is simply untenable and is not credible.

[Emphasis added.]

[56] The trial judge was only partially correct. The police did not mention a sledgehammer when they interviewed Mr. Prins prior to the Mr. Big operation. However, there was a newspaper article that referenced a sledgehammer in relation to the Squamish break-in. The article was published before the Mr. Big operation and stated as follows:

A Squamish gas station had its glass front door smashed not once but twice in the past week in separate break, enter and theft attempts.

RCMP Sgt. Wayne Pride said in a statement. A sledgehammer was used to break through the front door. Stolen were chips, pop and chocolate bars, and an unsuccessful attempt was made to steal cigarettes.

A police services dog was brought to the scene and a number of items were seized for evidence

[Emphasis added.]

- [57] The article did not make mention of a sledgehammer having been left in the store. Mr. Prins acknowledged this fact in his testimony at the trial.
- [58] As with the other alleged misapprehensions, we do not see this misstatement by the trial judge as being material or, more importantly, critical to his rejection of Mr. Prins' testimony that he did not have personal knowledge of the details he provided to the undercover officers.
- [59] The fact of the sledgehammer being left in the store was not mentioned by the police to Mr. Prins, or referred to in the newspaper article. As such, it was open to the trial judge to find that contrary to Mr. Prins' testimony, this was something that must have been within his personal knowledge. On a fair reading of the reasons for conviction, it was this aspect of Mr. Prins' statements about the sledgehammer that carried the most significance with the trial judge in rejecting the suggestion that everything Mr. Prins knew about the Squamish break-in came from the police or from a newspaper article: at para. 78.
- [60] Moreover, the trial judge had a number of other reasons for rejecting Mr. Prins' evidence, including: internal and external inconsistencies; evasiveness; selective responses; and a conclusion that, overall, "his evidence simply did not make sense": at para. 74. In this context, it cannot reasonably be said that if the trial judge properly understood that the newspaper article included a reference to a sledgehammer, there is a realistic possibility he would have believed Mr. Prins or found that his evidence raised a reasonable doubt. Again, the evidence about Mr. Prins' knowledge of a sledgehammer having been used in the break and enter, whether derived from the testimony of SW or from admissions made during the Mr. Big operation, formed only one part of a large body of evidence connecting Mr. Prins, directly and circumstantially, to the Squamish break-in.
- [61] As recently noted by this Court in *R. v. S.S.*, 2022 BCCA 392, appellants who seek a new trial based on one or more misapprehensions of the evidence face a "high standard": at para. 51. They must show that their conviction(s) "depend[ed] on a misapprehension of the evidence and the misapprehension [went] to the substance rather than the detail of the trial judge's reasons": at para. 53, italics in the original. In our view, Mr. Prins has not met this test.
- b) Should Mr. Prins be Granted Leave to Raise a New Issue?
- [62] Mr. Prins spent time in administrative segregation while in custody awaiting his trial. In his oral submissions before us, he indicated that he may have spent as many as 18 months in a unit for the "mentally disordered". He said doing so has had a significant detrimental impact on him. He did not raise this issue before the trial judge as a basis for seeking a remedy under s. 24(1) of the Charter, including a stay of proceedings.

- [63] We understand from the May 2021 factum that since his release from custody, Mr. Prins has filed a civil action against the Attorney General of British Columbia claiming damages arising from his segregation. On appeal, he asks that we order a new trial pursuant to s. 686(2)(b) of the Criminal Code, so that he can also seek a remedy in respect of the seven convictions.
- [64] Although this issue was not raised at the trial, Mr. Prins says the law on administrative segregation has evolved since then and there is now greater clarity on the individual effects of segregation, the circumstances in which it may constitute a Charter violation, and the availability of a remedy under s. 24(1) or otherwise.
- [65] Relying upon cases such as *R. v. Lilgert*, 2014 BCCA 493 and *R. v. Anderson*, 2021 BCCA 101, the Crown says Mr. Prins requires leave to raise this issue for the first time on appeal and he has not met the requisite test.
- [66] Mr. Prins has not filed a notice under the Constitutional Question Act, R.S.B.C. 1996, c. 68, seeking a s. 24(1) remedy, which is a necessary pre-requisite to this Court considering the matter. Nor is there an evidentiary record from which to properly assess the Charter claim, or even whether it has an air of reality to it. There was passing reference to Mr. Prins' segregation at the trial and he mentioned it in his testimony. (He testified that he was in segregation, had been there for a considerable period of time, and he described the unit as one "for troublemakers and people that do not have the mental capacity to stay on a unit".) However, Mr. Prins did not adduce evidence of the details surrounding that segregation at his trial, how it came about, the underlying reasons, or its effects on him. The Crown says the law as it existed at the time of the trial would have enabled Mr. Prins to raise the issue and, even if there were no relevant legal authorities on point (which the Crown disputes), he was not precluded from doing so.
- [67] In the circumstances of this case, we are of the view that Mr. Prins should not be granted leave to raise an alleged Charter violation for the first time on appeal and to seek an appellate remedy on that basis.
- [68] As explained by Justice Dickson in *R. v. Alfred*, 2020 BCCA 384, there are "rare occasions" in which appellate courts will grant leave to raise a new issue on appeal, including in relation to constitutional issues. However:
- [7] Before doing so the court carefully scrutinizes the new issue and considers all of the circumstances, including the state of the record, fairness to all parties, the importance of resolving the issue, its suitability for decision and the broader interests of the administration of justice: *Guindon v. Canada*, 2015 SCC 41 at para. 20. Taking into account all relevant factors, the court may decide to hear the new issue, but that discretion will be exercised "sparingly and only where the interests of justice require it": *R. v. Trieu*, 2010 BCCA 540 at para. 56. As Justice Doherty stated in *R. v. Roach*, 2009 ONCA 156, an appellate court "must be satisfied that the new issue raised on appeal can be fully, effectively and fairly addressed on appeal even though it was not raised at trial": at para. 7.

[Emphasis added.]

- [69] To obtain a new trial under the Criminal Code, Mr. Prins must establish: (i) an unreasonable verdict; (ii) an error of law; or (iii) a miscarriage of justice: s. 686(1)(a). A "miscarriage of justice" arises where a proved irregularity at the trial is "severe enough to [have rendered] the trial unfair or to [have created] the appearance of unfairness": *R. v. Khan*, 2001 SCC 86 at para. 69, LeBel J., concurring in the result.
- [70] This Court does not have a general power to remit criminal cases back to the trial court to pursue a constitutional argument not made there. The case cited in the May 2021 factum, *R. v. Brown*, [1993] 2 S.C.R. 918, 1993 CanLII 114, does not stand for that proposition. In *R. v. Johnston*, 2021 BCCA 34, the Court remitted a case to the Supreme Court for the sole purpose of hearing and determining a constitutional application, but that was a situation in which the application had been made in the trial court, was decided after findings of guilt, and this Court determined that the trial judge legally erred in resolving it: at paras. 6-7 and 430-432. The case before us is not the same.
- [71] Instead, Mr. Prins requires leave to raise a new issue and, to grant him an appellate remedy, we would have to assess the merits of the Charter claim.
- [72] In our view, the administrative segregation issue cannot be "fully, effectively and fairly addressed on appeal": *R. v. Roach*, 2009 ONCA 156 at para. 7. Whether there has been a Charter infringement and whether Mr. Prins is entitled to a remedy requires a fact-intensive analysis grounded in evidence that is missing from the record, including a likely need for expert opinion evidence on the effects of the segregation on Mr. Prins' physical and mental well-being. None of that is before us. We do not intend, in any way, to be dismissive of Mr. Prins' concerns about the use of administrative segregation in his circumstances. However, on the record in this appeal, it would not be appropriate for the Court to engage in the sought-after analysis, effectively standing as a court of first instance in relation to a matter that could have been raised before the trial judge, but was not.
- [73] On the face of it, this issue appears to have been something that was either not considered by Mr. Prins or his counsel at the trial, or, the decision to not apply for a remedy was a tactical or strategic choice. It is clear from the trial transcript that Mr. Prins' lawyer was aware of the fact of Mr. Prins' segregation, its duration and the possible underlying rationale, at one point mentioning that Mr. Prins had been assaulted while in custody and was segregated for that reason.
- [74] Mr. Prins has not alleged that his trial counsel was ineffective within the meaning of *R. v. G.D.B.*, 2000 SCC 22. There is no evidence to suggest that Mr. Prins gave instructions to his counsel to raise the issue of segregation for the purpose of a Charter application, but it was not pursued. In his reasons for admitting the Mr. Big evidence, the trial judge noted that Mr. Prins testified on the admissibility voir dire and, while he "espoused political and racial beliefs which would not have wide popularity", he did not display "unusual vulnerabilities": 2016 BCSC 2239 at para. 119. The trial record does not reveal a link between the

administrative segregation and Mr. Prins' ability to make full answer and defence, or some other form of trial unfairness.

[75] In the circumstances, we would not grant leave to pursue this issue for the first time on appeal.

Disposition

[76] The application for an adjournment is denied and the appeal from conviction is dismissed.

[77] Mr. Prins has not established misapprehensions of evidence at his trial that warrant appellate intervention under s. 686(1)(a)(iii) of the Criminal Code.

[78] Nor is this a case in which it would be proper for the Court to consider an issue raised for the first time on appeal in support of a finding that there has been a miscarriage of justice.

"The Honourable Madam Justice Fenlon"

"The Honourable Madam Justice DeWitt-Van Oosten"

"The Honourable Madam Justice Horsman"

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