
CANADA / JUDGMENT

R. v. Stover

2020 BCCA 368

COURT

British Columbia Court of Appeal

DECIDED

21 December 2020

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

2020 BCCA 368 R. v. Stover

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Stover,

2020 BCCA 368

Date: 20201221

Docket: CA46714

Between:

Regina

Respondent

And

Anthony Jay Stover

Appellant

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

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated
October 16, 2019 (R. v. Stover, Chilliwack Docket 66973).

Counsel for the Appellant:

R.A. McConchie

C.L. Senini

Counsel for the Respondent:

L.Y. Bantourakis

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 21, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

Summary:

The appellant was convicted of sexual assault by a judge sitting with a jury. He challenges his conviction on four grounds: (1) that the indictment improperly joined two allegations under a single count, for which he presented separate defences at trial; (2) that the judge erred by admitting evidence of a prior allegation of sexual assault made by the complainant and failing to give a limited instruction on its use; (3) that the judge erred in permitting the Crown to adduce evidence of the complainant's prior sexual activity absent an admissibility voir dire; and (4) that the judge's admonitions of the appellant over the course of the trial resulted in a miscarriage of justice. Held: Appeal dismissed. The indictment complied with the single transaction rule and did not prejudice the appellant's defence. The evidence of a prior allegation was introduced and relied upon by the defence, and was properly admitted by the judge. The judge's jury instruction was adequate and if he erred in respect of his instructions on the prior allegation, the error was harmless. The evidence of the complainant's prior sexual history elicited by the Crown during

cross-examination did not target the twin myths and did not harm the integrity of the trial. The judge's interventions during the trial were appropriate.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] This appeal arises from the appellant's conviction of sexual assault by a judge sitting with a jury.
- [2] Mr. Stover was originally charged on an indictment containing five counts, three of which were severed in advance of the trial: 2019 BCSC 2399. The two counts proceeding to trial were:

Count 1: sexual assault contrary to s. 271 of the Criminal Code [Code]; and

Count 5: uttering a threat contrary to s. 264.1(1) of the Code.

The appellant was acquitted of the count relating to uttering a threat.

- [3] He challenges his conviction on four grounds: (1) that the indictment improperly joined two distinct alleged sexual assaults under one count; (2) that the trial judge erred by admitting evidence of a prior allegation of sexual assault made by the complainant against the appellant and failing to give a limiting instruction to the jury respecting its use; (3) that the judge erred by permitting the Crown to adduce evidence of the complainant's prior sexual activity without conducting an admissibility voir dire; and (4) that the judge's admonitions of the appellant resulted in a miscarriage of justice. He asks that his conviction be overturned and a new trial ordered.
- [4] For the reasons that follow I would dismiss the appeal.

Background and the Trial Proceedings

- [5] The complainant on the sexual assault count was Mr. Stover's non-marital partner of 20 years. She testified that Mr. Stover had sexually assaulted her on two occasions, being March 16, 2016 and August 19, 2017. She stated that on both occasions the appellant asked her if she wanted to have sex. She said "no" on each occasion but he proceeded to have intercourse with her in any event.
- [6] Mr. Stover testified at the trial and presented different defences to the allegations. With respect to the March 16, 2016 incident, he denied that the incident had occurred. With regard to the August 19, 2017 incident, he acknowledged that sexual intercourse had taken place but advanced a defence of honest but mistaken belief in consent. He testified that the encounter had initially been consensual and that he had ceased the activity once he noticed that the complainant was crying.

- [7] Of significance on this appeal is what occurred during Mr. Stover's evidence. He testified that for some time prior to the first alleged incident he and the complainant would often indicate their consent to sexual activity in a non-verbal manner. During his examination in chief he stated that at some point within the timeframe of the first incident, the complainant had sent him a text message accusing him of "taking sex" from her. He testified that as a result of receiving this text and having a subsequent conversation with the complainant he began acting more cautiously with respect to their sexual activity. He noted, however, that they continued to communicate consent through non-verbal cues. In cross-examination he acknowledged that "taking sex" was akin to having sex with someone without their consent.
- [8] Mr. Stover did not request a limiting instruction on this evidence and both he and the Crown relied on the "taking sex" evidence in their closing submissions seeking to draw opposing conclusions from it. The text message itself was never produced. On appeal the parties disagree about whether the evidence established that the text message was sent prior to the March 16, 2016 incident.
- [9] Another aspect of the defence case rested on evidence about the manner in which the complainant and the appellant communicated consent to sexual activity during their relationship. In a voir dire ruling, indexed at 2019 BCSC 2400, the judge acceded in part to an application by the defence to lead evidence of the complainant's sexual history, pursuant to s. 276 of the Criminal Code. He permitted the defence to "conduct a limited cross-examination of the complainant with respect to her previous sexual activity with [the] defendant" (para. 23), but required the defence to submit to him its intended questions in advance. During the trial, the judge permitted some of the questions to be asked and disallowed others. The Crown cross-examined Mr. Stover on this evidence without a separate voir dire being conducted and without objection from the defence.
- [10] Mr. Stover also applied for a declaration of mistrial at the conclusion of the calling of evidence, on the basis that the judge's interventions during his testimony had potentially irreparably prejudiced the jury. The Crown opposed the application, arguing that the judge's interventions were necessary and gave no reasonable apprehension of bias. The judge dismissed the application, (the "Mistrial Application") stating in reasons indexed at 2019 BCSC 1902:
- [10] There is no question that the defendant repeatedly failed to provide responsive answers to the questions put to him in cross-examination. He sparred and argued with Crown counsel and several times launched into lengthy speeches which had virtually no relevance to the question asked.
- [11] The judge explained that his interactions with the defendant had been "firm but polite" and that he saw "no reaction from any of the jurors to suggest they found the interchange to be upsetting or distressing": at paras: 12-13.

[12] In his ruling the judge referred to the fact that a draft of his jury instructions, which specifically referred to his interaction with the accused, had not been objected to by defence counsel: at para. 15. In his view, his jury instruction on this point provided an appropriate remedy for any harm that might have occurred: at para. 16.

Issues on Appeal

[13] As framed by the appellant in his factum these are:

- i. The indictment improperly joined two distinct alleged sexual assaults under one count;
- ii. The trial judge erred by admitting evidence of a prior allegation of sexual assault made by the complainant against the appellant and failing to give a limiting instruction to the jury respecting its use;
- iii. The trial judge erred by permitting the Crown to adduce evidence of the complainant's prior sexual activity without conducting an admissibility voir dire; and
- iv. The trial judge's admonitions of the appellant resulted in a miscarriage of justice.

Analysis

[14] In my view, the second ground of appeal, which relates to the "'taking sex' evidence", requires the most detailed consideration. Accordingly I shall first consider the other grounds advanced on appeal.

Did the indictment improperly join two distinct alleged sexual assaults under one count?

(1) Introduction

[15] The count in question provided:

Count 1

Anthony Jay STOVER, from the 16th day of March, 2016 to the 19th day of August 2017, at or near Chilliwack, in the Province of British Columbia, did sexually assault [the complainant], contrary to Section 271 of the Criminal Code.

[16] The essence of this ground of appeal is that joining the two sexual assault allegations under a single count--in tandem with the judge's instruction that the jury could convict even if they were not unanimous with respect to any specific delict--prejudiced the appellant's defence and undermined the jury unanimity rule.

(2) Background

[17] The background to what occurred is summarized this way in the appellant's factum:

48. Before the trial began, it was unclear that the Crown would be limiting the sexual assault allegations to the March 2016 allegation and the August 2017 allegation. At the preliminary inquiry, the complainant had testified that there had been other incidents of non-consensual sex during the indictment period, but could not recall them as clearly as the March 2016 and August 2017 allegations. At the appellant's s. 276 application two months before the trial proper began, the Crown took the position that all sexual activity between the appellant and complainant during the indictment period was non-consensual. In that context, it was unclear whether the defence would be raising different defences to alleged incidents.
49. By the time of trial, the Crown case had been narrowed to the March 2016 and the August 2017 allegations. In his opening to the jury, Crown counsel made this clear, saying, "We are here to determine whether, in fact, Mr. Stover sexually assaulted [the complainant] on these two particular occasions".
50. By the end of the complainant's testimony, it would have been clear to the trial judge that the appellant intended to raise different defences to the two alleged sexual assaults. Defence counsel's questions made clear that the appellant was denying any sexual contact on March 16, 2016, but admitting to consensual contact - or contact he honestly believed was consensual - on August 19, 2017.
51. During the pre-charge conference, the Crown noted that "because of the way the evidence came out, we're talking about two distinct" sexual assault allegations, and that it was "awkward the way that this charge is laid in that circumstance". The trial judge agreed, finding that "Count 1 [the sexual assault charge] in fact encompasses two separate delicts". The judge noted that there was "an issue as to whether there has to be unanimity with respect to any specific delict or whether it's open to the jury to return a verdict of guilty if some find the first delict proven and some find the second proven". The Crown submitted that the jury only needed to be unanimous that there was a sexual assault. The defence did not provide submissions on this point.
52. In his instructions to the jury, the trial judge noted that Count 1 comprised "two separate and distinct acts" but that it was "not necessary for all of the jurors to agree that either one, or the other, or both of the events are proven. Additionally, it is not necessary that all of the jury members agree as to which of those allegations is proven". Instead, he said if each juror was satisfied that at least one of the sexual assaults was proven, then Count 1 would require a guilty verdict.
53. After the trial judge charged the jury, defence counsel submitted that having multiple incidents under one count of sexual assault might undermine the jury system. The trial judge said that was an issue to raise "with some other court".

- [18] Section 581(1) of the Code requires that each count in an indictment must apply to a single transaction. The leading authority in this province on this issue is *R. v. G.L.M.*, 1999 BCCA 467 which, at para. 11 [G.L.M.] held that a "single transaction" may validly encompass several occurrences if they relate to similar acts or a similar course of conduct.
- [19] Nonetheless, the interests of justice may require dividing the count. As Justice Ryan explained in *G.L.M.*:
- [13] Although it is not improper to charge a continuing offence as one count in an indictment, it is open to the Court to divide the count where the "ends of justice require it". Section 590(3) of the Code provides:

The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

- [14] The interests of justice would require such an amendment where the count so framed would embarrass the accused in his defence, for example where he has different defences for different incidents (eg. *R. v. Lilly*, [1983] 1 S.C.R. 794).

See also: *R. v. Sharpe*, 2007 BCCA 191 at para. 26; *R. v. Cadman*, 2017 BCCA 204 at paras. 23-24, leave to appeal ref'd [2017] S.C.C.A. No. 321 [Cadman].

(3) Position of the parties

- [20] The appellant submits that the ends of justice required the Court to divide the sexual assault count because the charge presented the jury with two separate delicts for which the appellant presented separate defences.
- [21] The appellant's defence to the first incident was that no such incident had taken place. The defence to the second incident was, in part, honest but mistaken belief regarding the complainant's consent. Accordingly, the appellant submits that the Crown was required to establish an additional "ingredient" in order to establish his guilt on the second incident.
- [22] In these circumstances, the appellant submits, this Court cannot be satisfied that the jury reached a unanimous verdict on a single set of ingredients. Indeed, the trial judge's charge to the jury made clear that they did not need to be unanimous as to which offence--and therefore which essential ingredients--they found the Crown had proved beyond a reasonable doubt.
- [23] The Crown's position is that the sexual assaults were sufficiently connected to fall within what the authorities have considered a single transaction. The core of the allegations was that the appellant had sexually assaulted the complainant in the context of an ongoing relationship.

[24] Furthermore, the appellant did not apply to divide the count at trial, nor apply for particulars pursuant to s. 587 of the Code, nor did he object to the admission of any evidence on the basis that it was prejudicial given the count as framed. This is "a telling indicator that the accused was not prejudiced by the indictment as drafted": *R. v. Sandhu*, 2009 ONCA 102 at para. 25; *R. v. P.E.L.*, 2017 BCCA 47 at para. 43; and *Cadman* at para. 24.

(4) Analysis

[25] Essentially for the reasons submitted by the Crown, I am of the view that Count 1 falls within the parameters of the single transaction principle as applied in the authorities to which I have referred.

[26] I also do not accept the appellant's argument that the defence of honest but mistaken belief was an additional legal ingredient which would militate in favour of the incidents being divided into separate counts. This defence amounted to a denial of mens rea. It was an assertion of facts that, if accepted or sufficient to raise a reasonable doubt, would undermine the required element of knowledge, recklessness or wilful blindness as to consent, which was an essential element that applied equally in respect of both incidents encompassed by the count: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 43-44.

[27] Finally, I do not agree that the failure to separate the incidents into different counts undermined the unanimity rule. The appellant does not challenge the judge's instruction on this issue which, in my view, was consistent with the authorities on this point including *G.L.M.* at para. 24 and *Sandhu* at paras. 28 and 31.

[28] Accordingly, the interests of justice did not require the judge to divide Count 1.

Did the trial judge err by permitting the Crown to adduce evidence of the complainant's prior sexual activity without conducting an admissibility voir dire?

(1) Introduction

[29] This ground of appeal is based on the argument that the judge permitted the Crown to adduce evidence regarding prior sexual activity evidence without an admissibility voir dire, contrary to the Supreme Court's direction in *R. v. Barton*, 2019 SCC 33 [Barton]. The appellant argues this was an error that led to inadmissible evidence going before the jury.

(2) Background

[30] Some context is required to consider this ground of appeal.

[31] In advance of the trial, the appellant applied for an order pursuant to s. 276 of the Code permitting him to adduce evidence of the complainant's prior sexual activity. His submissions included that "the behaviours used by [the complainant] to affirmatively communicate consent in the past were virtually indistinguishable from her behaviours before and during the alleged [sexual assaults]" and he "was led to the honest but mistaken belief that the complainant was consenting at the relevant times." He also sought leave to

adduce evidence of the frequency with which he and the complainant had sex during the course of their relationship.

- [32] The Crown opposed the application, *inter alia*, on the basis that the proposed evidence impermissibly drew on the so-called "twin myths" targeted by s. 276 of the Code. The complainant, who was represented by counsel on the application, opposed it on the same basis and, relying on *R. v. Han*, 2018 BCCA 239 (in Chambers), also argued that the application should fail because it was based on a defence of honest but mistaken belief that had no air of reality.
- [33] The judge granted the application in part, in a ruling indexed at 2019 BCSC 2400 at paras. 22-25. He permitted the appellant to conduct a limited cross-examination with respect to the manner in which, for the 18-month period ending on March 16, 2016, the complainant had communicated with the accused to either initiate sexual activity or signal she was receptive to it. Defence counsel was required to submit draft prior sexual activity questions in advance, so the trial judge could ensure "they did not stray into forbidden territory."
- [34] The appellant's trial counsel then submitted his proposed questions, which the judge allowed in part. Defence counsel's questions at trial elicited, for example, that the complainant had on prior occasions signalled her consent to sexual activity by kissing the appellant and touching his genitals. The trial judge intervened when the prior sexual activity questions went beyond what was allowed.
- [35] In instructing the jury, the judge noted that consent could not be implied by virtue of the nature of the parties' relationship and that whether the complainant had been unfaithful (as had been alleged by the appellant in his evidence in chief) was not relevant to consent. He instructed them that "[n]ot only does no mean no, but only yes means yes. Nothing less than positive affirmation is required."
- [36] The basis for this ground of appeal arose when Crown counsel elicited evidence of the complainant's prior sexual activity during its cross-examination of the appellant.
- [37] Specifically, Crown counsel suggested to the appellant that before the appellant caught the complainant "cheating" in or around November 2015, the couple had sex "pretty much every day." He agreed. The Crown also elicited evidence that the frequency of the complainant's sexual activity with him decreased in the months leading up to March 16, 2016.
- (3) Position of the parties
- [38] According to the appellant, the Crown used the prior sexual activity evidence to suggest that he was frustrated and angry with the couple's lack of sexual activity, and that the first assault was a product of those frustrations. The appellant denied this, saying that he was frustrated with the complainant's attitude and the cycle their relationship was in, not their lack of sexual activity.

- [39] No voir dire was held to determine the admissibility of this evidence and neither defence counsel nor the trial judge objected to its admission during the appellant's cross-examination.
- [40] The appellant's position is that both the Crown and the judge erred in their approach to this evidence. His argument can be summarized as follows:
- (a) while s. 276(2) of the Criminal Code applies only to evidence adduced by or on behalf of the defence, in Barton at para. 80, the Court held that the principles underlying the admissibility of evidence of the complainant's prior sexual activity apply to the Crown as well as the defence;
 - (b) given that the reasoning dangers inherent in prior sexual activity evidence are potentially present regardless of which party adduces the evidence, trial judges should follow the Court's guidance in R. v. Seaboyer, [1991] 2 S.C.R. 577 [Seaboyer] to determine the admissibility of Crown-led prior sexual activity evidence in a voir dire;
 - (c) the requirement that the Crown bring an application to admit prior sexual activity evidence applies whether the Crown adduces the evidence as part of the Crown case or through cross-examination of the accused: R. v. Langan, 2019 BCCA 467 at paras. 18-20; R. v. Boyle, 2019 ONCJ 634 at paras. 38-39;
 - (d) the fact that the defence did not object did not absolve the judge of his duty to rule on its admissibility before the evidence went before the jury: Barton at paras. 68 and 74; Langan at para. 66; and
 - (e) the evidence had no probative value and carried a significant risk of prejudice to both the appellant and the complainant. Accordingly, the judge erred in admitting it.
- [41] The Crown's position can be summarized as follows:
- (a) the impugned portion of the Crown's cross-examination probed the appellant on evidence that he had led in chief. Further, it did not evoke or encourage drawing either of the twin-myth inferences. Viewed in context, it did not compromise the trial process in any way; and
 - (b) even if the evidence was improperly admitted, it did no harm, when viewed in the context of the trial as a whole.
- (4) Analysis
- [42] It is ironic, in my view, that this ground of appeal is largely based on what is said by the appellant to be prejudice caused to the complainant. Appellant's counsel was unable to refer to any authority, nor have I found any, where a sexual assault conviction was overturned on the basis of evidence said to be prejudicial to the complainant.
- [43] The legal framework which governs this ground of appeal is well known. An accused who seeks to lead evidence of the complainant's prior sexual history for a purpose apart from the twin myths must make an application and satisfy the pre-conditions for admissibility set out

in s. 276(2) of the Code. Where the Crown seeks to lead such evidence, trial judges should follow the Supreme Court's guidance in *Seaboyer* to determine the admissibility of the evidence in a voir dire: *R. v. Goldfinch*, 2019 SCC 38 at para. 75. Non-compliance with these principles, however, will not always undermine trial integrity. Rather, the individualized features of the case will determine the result: *R. v. C.M.M.*, 2020 BCCA 56 at para. 183.

- [44] What occurred in this case is that in his evidence in chief, the appellant testified that he was not sexually intimate with the complainant for some time both before and after March 16, 2016 because she had been unfaithful to him. His position was that the absence of sexual contact between the parties in the time leading up to March 16, 2016 and following was relevant to his denial of any sexual intercourse that day. In other words, the appellant said he knew he could not have had sex with his wife on March 16, 2016, because they did not have sex at all for a period of time commencing before, and ending after, that date.
- [45] In the impugned passages from the cross-examination to which the appellant objects in this Court, the Crown cross-examined him on this aspect of his evidence in chief, probing him as to the professed lack of sexual contact with the complainant and challenging the notion that it necessarily supported the conclusion that he had not had sex with her on March 16, 2016. The cross-examination arose from evidence the defence had put forward as probative in its case in chief.
- [46] I agree with the Crown that the impugned passages in the questioning were not directed at demonstrating that the complainant was less worthy of belief or more likely to have consented, that is, the twin-myth inferences targeted by s. 276(1) of the Code.
- [47] Even if the evidence was improperly admitted, in my view it did no harm to the integrity of the process when viewed in the entire context of the trial. The judge's pre-trial ruling in relation to the appellant's s. 276 application was alive to Goldfinch's direction that "[e]ven 'relatively benign' relationship evidence must be scrutinized and handled with care": Goldfinch at paras. 46 and 73. He then appropriately exercised his gate-keeping function over the course of the trial by reviewing sexual history questions before they were posed. His jury instruction cautioned that consent could not be inferred from the nature of the parties' relationship and that the complainant's alleged infidelity was irrelevant.
- [48] Furthermore, I agree with the Crown's submission that the central concern when evidence of the complainant's past sexual activity is improperly admitted is that the evidence could potentially prejudice the complainant and lead to a flawed acquittal: see *Barton* at para. 83; *Goldfinch* at paras. 43, 51 and 70. Those risks did not materialize here.
- [49] Accordingly, I would not accede to this ground of appeal.

Did the trial judge's interactions with the appellant result in a miscarriage of justice?

(1) Introduction

- [50] This ground of appeal is based on the appellant's argument as expressed in his factum that

[t]hroughout the appellant's testimony, the trial judge consistently and increasingly admonished him in front of the jury. These interventions prevented the appellant from presenting his story in his own way and suggested to the jury that he was not to be believed. In these circumstances, it cannot be said that justice was seen to be done.

(2) The parties' positions

[51] The appellant submits that the judge's interventions, particularly those which occurred in the presence of the jury, amounted to a miscarriage of justice warranting a new trial. In the circumstances of this case, he says that the interventions prevented him from telling his story in his own way and undermined the judge's neutrality, compromising his right to a fair trial.

[52] The Crown says that the judge's interventions were appropriate and refers to the judge's reasoning in dismissing the Mistrial Application.

(3) Analysis

[53] A trial judge may validly intervene to, among other things, focus the evidence on issues material to a determination of the case; clarify evidence as it has been given and is being given; avoid admission of irrelevant evidence; curtail repetitive evidence; and to prevent undue protraction of trial proceedings: *R. v. Murray*, 2017 ONCA 393 at para. 92 [Murray]. It is also well established that judges are not required to sit silent as "sphinx judges" regardless of the circumstances: *R. v. Brouillard*, [1985] 1 S.C.R. 39 at 44.

[54] In *Murray* the Ontario Court of Appeal described the applicable principles on appeal as follows:

[95] Appellate courts are reluctant to interfere on the ground that a trial judge improperly interfered during the course of a trial. A strong presumption exists that a trial judge has not intervened unduly at trial

[96] When undue intervention is advanced as a ground of appeal, the fundamental question for the reviewing court to determine is whether the interventions led to or resulted in an unfair trial. The issue is assessed from the perspective of a reasonable observer present throughout the trial. The analysis is contextual and requires an evaluation of the interventions cumulatively, likewise their cumulative effect on the actual or apparent fairness of the trial

[97] The question ultimately to be decided is whether the comments and interventions would create the appearance of an unfair trial to a reasonable person present throughout the trial proceedings. The analysis is not mathematical. And what is critical is what occurred in the presence of the jury. Events that took place in their absence, at least in most cases, cannot affect them or their decision

[Citations omitted.]

See also *R. v. Russell*, 2011 BCCA 113 at paras. 18-19 and 28.

[55] What transpired in this case was summarized by the judge in his Mistrial Ruling:

[9] In the case at hand, I am satisfied that a declaration of mistrial is not a remedy that the circumstances warrant.

[10] There is no question that the defendant repeatedly failed to provide responsive answers to the questions put to him in cross-examination. He sparred and argued with Crown counsel and several times launched into lengthy speeches which had virtually no relevance to the question asked.

[11] Because of that persistent pattern of conduct, I spoke to Mr. Stover. On a number of occasions, he was directed to answer the question he had been asked and to refrain from going on with long irrelevancies. At one point, I reminded him of the need to restrain himself and observed that he was not helping his cause by carrying on as he was.

[12] In my estimation, I was firm but polite in my interactions to him. He did not at any point engage in argument with me. In fact, he was reasonably respectful in our exchanges.

[13] I saw no reaction from any of the jurors to suggest they found the interchange to be upsetting or distressing.

[14] Given this assessment of the dynamic, it was and is my view that any concern could be adequately addressed by means of an appropriate jury instruction, and in the charge that was subsequently prepared and delivered, I provided a direction to that effect.

[15] I note that a draft of my jury charge was provided to counsel for review and comment. Defence counsel made no comment with respect to the measures taken in that charge to address the concern which underpinned the mistrial application.

[16] In the result, I am satisfied that the fair conduct of Mr. Stover's trial was not meaningfully harmed and accordingly an order for a mistrial was not warranted. I consider that the jury instruction was an appropriate remedy.

[56] The trial judge addressed his interactions with the appellant in his instructions to the jury:

There is another point I wish to make with you concerning the evidence of Mr. Stover. You heard Mr. Stover's testimony on Wednesday afternoon and then in the course of cross-examination on Thursday. Particularly during the course of this cross-examination, I had occasion to admonish him and may in fact have done so in terms that seemed stern and quite direct. I do not want my interaction with him to in any way influence your assessment of Mr. Stover or the evidence in this case. It is apparent that he was quite emotional in the course of giving his evidence. It is also a fact that he tended to give answers that went beyond the actual ambit of what was required. Finally, there seems little doubt that he expresses himself in ways that might seem to be at odds with polite discourse.

It is for you to make your credibility assessment of this man. And as I have indicated, you may well take into account the manner and demeanour in which he testified. With regard to the interactions I had with him, it is important that you do not let those interfere with your fair assessment of his evidence. In fact, when I admonished him, he was not in any way disrespectful, he acknowledged the court's concerns, and apparently attempted to comply. My interaction with him should not and cannot be taken by you as an adverse reflection on him, that he is a bad person. That should not influence your determination as to whether the charges against him have been proven.

- [57] The defence did not take issue with this aspect of the jury instructions when provided with the opportunity to comment: *Mistrial Ruling* at para. 15. Further, in this Court, the appellant is not expressly challenging the *Mistrial Ruling* as a ground of appeal.
- [58] I note that the appellant's own counsel also intervened on two occasions during his client's cross-examination, once when he considered "that the evidence the witness [was] giving may not [have been] relevant to the proceedings," and on another when he interjected that the appellant's evidence that the complainant had transmitted a sexual disease to him was speculative.
- [59] My review of the appellant's evidence and the judge's interjections support the comments and conclusions in the *Mistrial Ruling*. There is no doubt that the appellant was a challenging witness. Yet when I consider the interjections within the analytical framework to which I have referred, I am of the view that they were appropriate and that trial fairness was maintained.
- [60] Accordingly, I would not accede to this ground of appeal.

Did the trial judge err by admitting evidence of the appellant's past conduct and failing to give a limiting instruction?

(1) Introduction

- [61] This ground of appeal relates to the "taking sex" text message which was first raised by the appellant in his direct examination.
- [62] As I will explain further below, the appellant's position is that the evidence about the complainant's allegation that the appellant was "taking sex" from her prior to the indictment period was evidence of extrinsic misconduct by the appellant. Given its nature, it created a significant risk that the jury would engage in propensity reasoning or otherwise use the existence of the prior allegation to bolster the complainant's testimony at trial.
- [63] The appellant argues the judge erred in not conducting an admissibility assessment of this evidence, nor did he provide the jury with any limiting instructions on its proper and improper uses.

(2) Background

- [64] The evidence of the "taking sex" text message first arose during the appellant's examination in chief. It formed no part of the claimant's evidence.
- [65] In his direct examination, defence counsel asked the appellant whether he and the complainant had had consensual sex between March 16, 2016 and August 19, 2017. The appellant said yes, they did, but he was reluctant to do so because of the complainant's cheating and because of a text message she had sent him. In the text, the complainant said she felt the appellant was "taking sex" from her. He said he was unable to produce the text since his phone was broken.
- [66] The appellant testified that as a result of the text, he tried using his words more when initiating sexual activity with the complainant, although they would still occasionally use non verbal communication.
- [67] The parties disagree as to the timing of the text. In his evidence in chief, the appellant said he had received the "taking sex" message in 2016, about a week before he moved out of the family home, with him leaving about two weeks after March 16, 2016, possibly less.
- [68] On cross-examination, the appellant variously indicated that he had received the text message: (1) when he was loading equipment for (but had not yet begun) a boat salvage operation that started a few days before March 16, 2016; (2) "way before" March of 2016; and (3) around the time he had discovered the complainant's alleged infidelity, which on the evidence was approximately November of 2015.
- [69] The appellant also testified on cross-examination that he understood the "taking sex" message to mean that his wife felt sex "was too frequent for her" although he acknowledged that "having sex with someone without their consent is like taking sex from someone."
- [70] The text message was the first issue addressed in defence counsel's closing address to the jury. Counsel submitted that the appellant was "very careful afterwards to ensure there was unequivocal consent" and was "clearly somebody who takes consent very seriously." Counsel also stated that the appellant received the text message "sometime around March of 2016" but "before this March 16th, 2016 incident."
- [71] Counsel argued that the Crown had not met its burden with respect to the sexual assault charge, pointing to inconsistencies in the complainant's accounts of the assaults and her unwillingness to acknowledge when she was wrong. He submitted that the jury should accept the appellant's account of the events.
- [72] Crown counsel told the jury that the "nub of the question" they were being asked to decide was whether the appellant "took sex" from the complainant at any time during the indictment period. On another occasion he referred specifically to the text message itself. Counsel also noted the appellant's evidence that he had moved out of the family home after that message, suggesting to the jury that the text might be linked to the March 16, 2016 incident. He highlighted that whether the appellant "took sex" came down to credibility submitting that the appellant was lying and the complainant's evidence should be believed.

[73] During pre-charge discussions, the defence did not ask the judge to provide any specific instruction regarding the "taking sex" message and he did not do so in his charge. The jury instructions, however, did include general instructions on prohibited propensity reasoning which included the judge stating:

It is vitally important that you not conclude that, on the basis of things [the appellant] said, he is a person of bad character and is therefore more likely to have committed the offences with which he is charged. That would be improper. Mr. Stover must be judged on [] the evidence as to what occurred.

[74] The judge did not specifically refer to the "taking sex" evidence in the written instructions he provided to and reviewed with the jury. Specifically, he did not address it when reviewing the addresses made to the jury by counsel the day before. However, towards the end of his instructions he referred to a written summary of the parties' positions which had been provided to him by counsel. Having reviewed the defence written summary, which did not refer to the taking sex evidence although, as I have noted, it did form a part of the oral address, he turned to the Crown's written summary and said this:

I will now read to you a summary of the Crown's position.

Crown counsel says to you that the credibility of the three main witnesses, [the complainant], Ms. Watson, and Mr. Stover, is the key issue. To determine credibility, the jury should bring its collective experience to bear and analyze the evidence through the lens of this longstanding acrimonious and dysfunctional relationship.

Mr. Stover's evidence should not be believed. He was evasive in his answers, often not addressing the question put to him at all. Instead, he tended to make statements, often casting aspersions on the other witnesses. He also told the police that he did not remember the events of March 16, 2016. In his evidence, he said he definitely did not have sex with [the complainant] that day or the next at all. He also confirmed that one of the reasons he moved out in March 2016 was because [the complainant] had told him that she felt like he was taking sex from her, which is consistent with [the complainant's] evidence that he sexually assaulted her on or about March 16.

[Emphasis added.]

(3) The parties' positions

[75] The appellant submits that the judge erred both by not conducting an admissibility analysis of the taking sex evidence at any time, and by not providing a limiting instruction to the jury as to the uses they could make of that evidence.

[76] He acknowledges that defence counsel's role in introducing the "taking sex" text message evidence is a relevant factor for this Court to consider in assessing its admission at trial. Accordingly, the argument "must be regarded with skepticism": R. v. B.D., 2016 ONCA 673 at para. 49 [B.D.]. However, this is not a complete answer to the risk of trial unfairness since the trial judge bears ultimate responsibility for ensuring that only admissible evidence is

placed before the jury: B.D. at paras. 50-51; Barton at para. 68; and R. v. Oseguera, 2014 BCCA 352 at para. 64. This is particularly so given that the evidence was also presumptively inadmissible under s. 276(2) of the Code.

[77] He submits that had the judge conducted an admissibility analysis, the evidence would have been excluded from the trial, as its prejudicial effect outweighed its probative value in that

- the evidence had some limited probative value, in respect of the discrete issue of the defence of honest but mistaken belief in communicated consent;

- that defence, however, played a minimal role in the case since the principal defences were that the appellant did not have sex with the complainant on March 16, 2016 and that the complainant actually consented to the sexual activity on August 19, 2017 (at least initially);

- the evidence's prejudicial effect was substantial since bad character evidence is inherently prejudicial. There was a substantial risk that the jury would use it to bolster the complainant's claim that the appellant sexually assaulted her in March 2016 and August 2017, as the Crown urged them to do and the judge referenced; and

- the text message amounted to an inadmissible prior consistent statement of the complainant.

[78] In any event, the appellant says a limiting instruction was required regarding the impermissible uses of the evidence, specifically that it was not admissible as proof of the truth of its contents, to advance propensity reasoning as to the appellant's bad character, or to bolster the complainant's credibility.

[79] The Crown opposes this ground of appeal on the basis that the appellant is retroactively challenging the admissibility of evidence he himself led, which was central to his defence, and in respect of which he did not seek a limiting instruction. Furthermore, the evidence was part of the narrative and was equivocal in nature.

(4) Analysis

[80] I approach this issue from the perspective most favourable to the appellant, being, as he submits, that the text was sent shortly before the alleged incident of March 16, 2016.

[81] I will first consider the appellant's argument that the judge ought to have conducted an admissibility inquiry which should have resulted in the taking sex evidence being ruled inadmissible.

[82] I would not accept this submission, which I consider to be "opportunistic" and to be "regarded with skepticism": B.D. at para. 49, cited at para. 76 above.

[83] First of all, the evidence did not, as the appellant now submits in this Court, play a "minimal role" in this case.

- [84] Rather, it was introduced during his examination in chief and was a fundamental component of the defence theory in relation to both incidents. The appellant relied on the evidence to advance his proposition that he was more vigilant about obtaining consent after receiving the message, something which he testified he took "very seriously".
- [85] In my view, the appellant introduced the taking sex evidence as part of the narrative to explain why he was subsequently very careful to obtain explicit consent from the complainant prior to engaging in sexual activities. In that regard, to the extent the text could be considered as the complainant's prior consistent statement, it was admissible pursuant to the narrative exception to the rule: *R. v. Gill*, 2018 BCCA 275 at paras. 75-76 [Gill].
- [86] Furthermore, if this evidence was "character evidence" then I accept the Crown's argument that it was the appellant who put his character in issue: *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716 at para. 63.
- [87] In *R. v. Handy*, 2002 SCC 56 at para. 31, the Court explained that the admission of extrinsic misconduct evidence risks giving rise to "reasoning prejudice," wherein a jury might become confused by, or place undue weight on certain evidence, or "moral prejudice," wherein a jury might dismiss an otherwise reasonable doubt as to the accused's guilt on the basis of their general bad character. The appellant says that these risks existed in this case and should have led to the evidence being ruled inadmissible.
- [88] I disagree. In my view, there is little to no doubt that the evidence would have been admitted had the judge performed an admissibility analysis at the time the issue was raised in the appellant's direct evidence. The taking sex evidence was central to the defence theory of the case and any prejudicial effect to either the appellant or the complainant was far outweighed by its probative nature.
- [89] I will now turn to the question as to whether a limiting instruction ought to have been given to the jury.
- [90] Although a limiting instruction is typically required when prior consistent statements are admitted into evidence, no such instruction is required "where the defence itself relies on the prior statement": *R. v. Ellard*, 2009 SCC 27 at para. 43. That was clearly the case here, to the extent that the text message can be characterized as a prior consistent statement. Accordingly, the judge was not, in my view, obliged to give a limiting instruction in respect of this aspect of the evidence.
- [91] The applicable framework in relation to bad character evidence and limiting instructions was considered by Justice Harris in *R. v. Bradshaw*, 2020 BCCA 97:
- [48] When evidence of an accused's bad character is admitted for limited purposes, it is "generally understood that the judge should instruct the jury about the permitted and prohibited uses of that evidence": [*R. v. A.L.*, 2020 BCCA 18] at para. 141; see also *G.(S.G.)* at para. 65.

- [49] That said, "the question of whether the failure of a trial judge to give a limiting instruction with respect to bad character evidence constitutes reversible error must be assessed through the lens of reality". In the absence of a "realistic possibility of the jury misusing evidence of disreputable acts", failure to provide a limiting instruction does not constitute reversible error: *R. v. Bhullar*, 2011 BCCA 395 at para. 28. The issue must be assessed viewing the charge fairly, contextually, and as a whole. "At the end of the day, the overriding question is whether the jury was properly equipped to decide the case absent a limiting instruction against general propensity reasoning": *R. v. Calnen*, 2019 SCC 6 at para. 9.
- [50] A relevant factor to consider when assessing a non-direction on bad character evidence is trial counsel's failure to object. A failure to object may indicate "the overall satisfactoriness of the jury charge" (particularly from the defence perspective), or the insignificance of the alleged omissions: *Calnen* at para. 38; see also *R. v. Daley*, 2007 SCC 53 at para. 58; *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 38. Weight should be given to the perceived importance of the issue to trial counsel, who had the benefit of observing the trial unfold in real time. In certain circumstances, the absence of an objection may also suggest that counsel made a conscious tactical decision not to seek a limiting instruction: *Calnen* at paras. 38-41.
- [92] In *R. v. Beausoleil*, 2011 ONCA 471, the Ontario Court of Appeal summarized several factors relevant to determining whether a limiting instruction is required:
- [20] The requirement for such an instruction will depend on a variety of circumstances, including the nature and extent of the bad character evidence in issue; the issue(s) at the trial to which the bad character evidence is properly relevant; the likelihood that such an instruction will confuse the jury or unnecessarily draw attention to the discreditable conduct; and other factors affecting the extent of the risk that such evidence will be used improperly.
- [93] Appellate courts apply a "functional approach" in reviewing a judge's jury instructions, asking "whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence," including where a judge's non-direction on impugned evidence is at issue: *Calnen* at paras. 8-9. The inquiry is contextual and demands adequacy, not perfection: *Calnen* at para. 11 and *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 62.
- [94] It is now helpful to review some of the language used by Crown Counsel in his oral closing submissions in relation to this evidence which included:

Let's think of the rest of these circumstances. He knows that his wife had said to him that, "you take sex from me. Don't like it when you take sex from me." He says he took it seriously, so therefore he would be more certain of a no. But there was never here on any evidence any verbal, even on Mr. Stover's evidence, any verbal communication of a yes I'm going to get back to another aspect of that at the end, because I want to talk about the March 2016 incident.

There's a big difference, ladies and gentlemen, between, "I don't remember if we had sex," and "No, we did not have sex." And he's saying, "No, we definitely did not have sex." And there obviously was an opportunity, even on his evidence. And there's no corroboration, there's no camera in the room, there's nobody saying, "yes on this particular day this happened." There isn't usually in these sorts of cases as one can imagine. So you have to think, okay, one of them's lying about that. And that can be difficult to decide. But think about some of the things that were happening around that time. One, we know he left the home not too long after that. Couple of weeks, 10 days, we don't know the exact -- he left. What was one of the reasons he gave you for leaving? Because my wife told me that she's - he's taking sex from her. And this just so happens to be right around the same time of the 16th of March 2016 is a definitive "no," but that is much more suggestive of yes, there was an incident that he took sex from [the complainant]. And how did he sort of talk about that? He talked about the boat being raised and says, "That's why I know." And then he talked about that there was some sort of text message when she had said this sometime. None of those text messages [indiscernible/rapid speech] can't find them. So you have to ask yourself, well, why is that? But those are all very -- that - it's very significant, in my respectful submission, that he leaves shortly after this incident of whatever happened around the six -- he left the residence. And he left, ladies and gentlemen of the jury, because his wife told him that she was -- he was taking sex from her.

So -- and that, as I said from the very beginning of these -- my address to you, that's the nub of the question. Did he take, Mr. Stover, sex from his wife, [the complainant], at some point between March 2016, August of 2017 without her giving her free and voluntary consent?...

- [95] When the text message evidence is considered within the context of the trial as a whole, as shown in part by the extracts from Crown's counsel's address I have quoted above, it is important in my view that there was no encouragement by the Crown in its oral submissions to have the jury use the evidence for an improper purpose, such as propensity reasoning.
- [96] Despite several opportunities to comment on the instructions, the defence made no submissions on the need for a specific limiting instruction on this issue.
- [97] I agree with the Crown that the defence's failure to request a limiting instruction on the "taking sex" text message is unsurprising. An instruction that characterized the text message as relating to a prior instance of misconduct would have contradicted the defence's theory that the evidence was beneficial to its case, as expressed both in evidence and in closing submissions. I am not satisfied that a limiting instruction could have been given which would not have undermined that very theory.
- [98] Accordingly in these circumstances, there is, in my view, no realistic possibility that the defence was prejudiced by the lack of a specific limiting instruction, particularly when the trial judge also gave a general instruction on the fact that it was "vitally important" that the jury not find the appellant was more likely to have committed the offences on the basis of concerns about his character.

[99] The only caveat I would add relates to the judge summarizing at the end of his instructions the written summary he had been provided by the Crown, which included:

He also confirmed that one of the reasons he moved out in March 2016 was because [the complainant] had told him that she felt like he was taking sex from her, which is consistent with [the complainant's] evidence that he sexually assaulted her on or about March 16.

[Emphasis added.]

[100] As I have noted, this statement did not form part of the Crown's oral submission or the judge's written instructions which the jury had with them during their deliberations. In my view, this reference accorded with the proper use of a prior consistent statement, being to assist the trier of fact "in assessing the truthfulness or reliability of the declarant's in-court testimony" pursuant to the "narrative as circumstantial evidence" exception: *R. v. Angel*, 2019 BCCA 449 at para. 72.

[101] Alternatively if this reference by the judge to the Crown's written position was an error, then for the reasons I have given and based on the entirety of the trial process and the role the text message played within it, I am of the view that it could have made no difference to the trial outcome. Accordingly, it would be appropriate for the Court to apply the proviso in s. 686(1)(b)(iii) of the Code to uphold the verdict.

Disposition

[102] For the reasons I have outlined, I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Goepel"

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/20/03/2020BCCA0368.htm>

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

Prepared on 29 October 2026 · Esheria