

CANADA / JUDGMENT

R. v. Zakuti

2021 BCSC 2156

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2156 R. v. Zakuti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zakuti,

2021 BCSC 2156

Date: 20210504

Docket: 108481

Registry: Kamloops

Regina

v.

Sevim Zakuti

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Before: The Honourable Madam Justice Donegan

Oral Ruling on Defence Application for a Mistrial

Counsel for the Crown:

S.L. O'Connor

N. Wiberg

Counsel for the Accused:

J.D.A. Watt

Place and Date of Hearing:

Kamloops, B.C.

April 28, 2021

Place and Date of Judgment:

Kamloops, B.C.

May 4, 2021

Introduction

- [1] Mr. Zakuti applies for a mistrial on the third day of his jury trial. He is charged with sexual assault, unlawful confinement, two counts of uttering threats, and common assault of J.C.
- [2] J.C. is the first Crown witness. She was permitted to give her evidence from outside the courtroom by way of closed-circuit television ("CCTV") pursuant to s. 486.2(2) of the Criminal Code, R.S.C., 1985, c. C-46 [Code]. At the commencement of the third day of her evidence, when cross-examination was about to resume, J.C. advised me that she had been unable to see defence counsel on her monitor during cross-examination the previous day. She could hear him during his questioning, but could not see him. Upon my further inquiry, she also disclosed that she had been able to see Crown counsel on her monitor during examination-in-chief and that at no time when she testified did she have a view of the jury.
- [3] Mr. Zakuti submits that these technological problems have permitted the Crown's witness to give her evidence outside the scope of the testimonial accommodation that has been ordered, and in a manner that is inconsistent with the open-court principle. Mr. Zakuti emphasizes that the s. 486.2(2) accommodation is only to be used for the purpose of preventing the witness from seeing him. Mr. Zakuti argues that by preventing the witness from seeing the triers of fact and his counsel during questioning, the scope of the s. 486.2(2) order has been exceeded and the solemnity of the occasion has been lost for this witness. Mr. Zakuti argues that this ultimately undermines the s. 486.2(2) accommodation's truth-seeking function and the overall fairness of this trial.
- [4] Further, Mr. Zakuti submits that depriving his counsel of complete visual communication with the witness, in circumstances where the Crown was not so deprived, creates a perception of trial unfairness. He argues that nothing other than the granting of a mistrial can remedy these problems.

Legal Principles

- [5] Counsel did not refer me to any authorities involving the granting of a mistrial, but the legal principles engaged are well established.

- [6] The test for a mistrial is a stringent one. Once an error has occurred at trial, the judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: *R. v. Khan*, 2001 SCC 86 at para. 79. A mistrial is a discretionary remedy that should only be granted as a "last resort" in the "clearest of cases" where there has been "a fatal wounding of the trial process" that may cause a miscarriage of justice and which cannot be cured through less extreme corrective measures: *R. v. Muller*, 2013 BCCA 528 at paras. 65-66.
- [7] A "miscarriage of justice" is a flexible phrase which encompasses a range of situations: *R. v. Bugar*, 2018 BCCA 291 at para. 30. It includes not only a finding of trial unfairness, but the appearance of unfairness as well: *R. v. Wolkins*, 2005 NSCA 2 at paras. 84-89.
- [8] As other courts have recognized, the circumstances that underpin mistrial applications prior to verdict are myriad, but often involve the introduction of inadmissible evidence or the intrusion of some event from within, or related to, the trial that puts "trial fairness at risk or compromises the integrity of the decision-making process": *R. v. Arabia*, 2008 ONCA 565 at para. 51.
- [9] In *R. v. Harrer*, [1995] 3 S.C.R. 562, McLachlin J. discussed what trial fairness means at para. 45:
- [45] At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view . . . Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.
- [10] With that overview of the legal principles, I will turn now to the events that have led to this application.

The Events

- [11] The circumstances underpinning this application find no parallel in the authorities. J.C. is the complainant in this case. She is 32 years old and has suffered from drug addiction for many years. J.C.'s addiction is ongoing; she continues to consume primarily heroin and fentanyl.
- [12] Prior to the commencement of trial, I granted a Crown application to have J.C. testify outside the courtroom by way of CCTV, pursuant to s. 486.2(2) of the Code. This provision reads:
- (2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order

would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice. [My emphasis.]

- [13] J.C. was called as the first Crown witness. She began testifying just shortly before noon on the first day of trial. In accordance with my order and in keeping with s. 486.2(5) of the Code, arrangements were made for those within the courtroom to watch her testimony by means of a CCTV. At all times, she has given her testimony from another room inside this courthouse by CCTV. This is the room that is used here for many CCTV court appearances. It is often booked months in advance.
- [14] In the courtroom, J.C.'s image has been displayed on a large monitor affixed to a courtroom wall directly across the courtroom from the jury. The monitor's position and size has allowed us all to see and hear J.C. clearly. I have found it unnecessary to have a smaller monitor on my bench. Counsel's podium is located at the front right corner of the jury box, as you are facing it. The visual quality of the image and the audio quality are both very good.
- [15] J.C.'s examination-in-chief continued throughout the afternoon of the first day and into the following morning, ending at approximately 11:20 a.m. We were able to hear and see J.C. during all of her examination-in-chief. She did not express any difficulties seeing or hearing the questioner. She identified and testified about an exhibit. The process was seamless.
- [16] To provide some context, I will provide a very brief summary of J.C.'s evidence in direct examination. She testified that during the timeframe covered in the indictment, she was in the throes of drug addiction and living a lifestyle that saw her consuming drugs every day, moving from place to place, and committing property and fraud-related crimes to pay for drugs. She testified that her addiction remains ongoing and acknowledged several times that she continues to need to ingest fentanyl every day, including before court, on lunch breaks, and after court, in order not to feel the sickness associated with withdrawal.
- [17] As I explained during an earlier application, I have had no concerns about J.C.'s impairment during her testimony. She has shown no signs of impairment, she has been responsive to the questions asked of her, she has asked for appropriate clarification when needed, and her answers have been coherent and understandable.
- [18] J.C. gave detailed evidence about her association with Mr. Zakuti over a period of a few days in the summer of 2019. By way of general overview, J.C. alleges that Mr. Zakuti sexually assaulted her several times, including unwanted touching, two instances of forced oral sex, and multiple instances of forced vaginal intercourse. J.C. testified that during her final night in Mr. Zakuti's presence, there were three incidents of forced vaginal intercourse. J.C. also testified that during that night, Mr. Zakuti punched her on the side of her head, confined her to his motel room, kept her unclothed, forced her to hide in a shower when people came into the room, threatened to harm her, her family, and her pets, and pulled the trigger of an unloaded firearm or replica firearm or perhaps BB gun at the back of her head.

- [19] Cross-examination of J.C. began at approximately 11:45 a.m. on the second day of trial. Questioning continued throughout the afternoon, with a protracted afternoon recess to allow for a defence application in the absence of the jury. Again, we were fully able to hear and see J.C. during all of cross-examination. She did not express any difficulty seeing or hearing defence counsel, or me, for that matter, when I addressed her on occasion. The process continued to appear seamless.
- [20] To that point, cross-examination addressed J.C.'s drug addictions and drug consumption, both in the summer of 2019 and presently. The questioning also covered her record of criminal convictions, her outstanding criminal charges and overall criminal lifestyle, and the circumstances surrounding her meeting Mr. Zakuti and his friend. Other than some details pertaining to events leading up to the first allegation of sexual assault and a detail from one of the allegations of forced sexual intercourse that J.C. had not previously disclosed, cross-examination had not yet delved into the details of the actual allegations.
- [21] As a general observation, cross-examination so far has revealed more than one internal inconsistency in J.C.'s evidence, some memory frailties, as well as an instance where she admitted her evidence had been untruthful on a particular point. In other words, there is nothing to suggest that cross-examination to this point has not been effective.
- [22] On the third day of trial, when cross-examination was about to resume, defence counsel greeted J.C. by asking her if she could see and hear him okay. J.C. replied that she could hear him, but could not see him on her monitor. I stood court down for the problem to be addressed and, while the jury was leaving the courtroom, J.C. remained on our screen for a time and told us that she had been unable to see defence counsel on her monitor the previous day as well.
- [23] When the technological problem was rectified, I resumed court in the absence of the jury and raised my concern about J.C.'s remarks. With counsels' input, I conducted an inquiry of J.C. Through that inquiry, we learned that the monitor in front of J.C. is divided into two separate screens: my image appears on one screen and counsel's image at the podium appears on the other.
- [24] J.C. also advised me of the following:
- a) during the course of her testimony, the side of the screen bearing my image had occasionally been lost;
 - b) during examination-in-chief, Crown counsel's image, as she stood at the podium, always remained on the screen;
 - c) during cross-examination, the screen that was to bear defence counsel's image as he stood at the podium remained blue; and
 - d) other than on one occasion when she was able to see the jury filing into the courtroom, she did not have a view of the jury during her testimony.

[25] J.C. has not experienced any difficulties with the audio.

Decision

- [26] My inquiry of J.C. revealed two problems related to the CCTV equipment. The first is that the CCTV cameras, either because of their positioning in the courtroom or through their operation during court proceedings, or both, prevented J.C. from seeing the jury as she testified. The second problem arises from an unexplained technology failure during cross-examination. This problem prevented J.C. from occasionally seeing me and prevented her from seeing defence counsel at all as he asked her questions.
- [27] Mr. Zakuti's argument for a mistrial focuses primarily on the first problem. He argues that the improper placement or focus of the CCTV camera has effectively permitted J.C. to give her evidence in a manner inconsistent with the open court principle and outside the scope of the order that I made. He emphasizes that the purpose of my order was only to prevent the witness from seeing the accused. By preventing her from seeing the triers of fact, Mr. Zakuti argues that not only has the order's scope been exceeded, but the solemnity of the occasion has been lost for this witness, undermining the accommodation's truth-seeking function. I infer from his counsel's submissions that Mr. Zakuti argues that this irreparably undermines the fairness of this trial.
- [28] When I inquired as to whether counsel had any concerns about any potential impact(s) related to the second problem, Mr. Zakuti argued that depriving his counsel of complete communication with the witness in circumstances where the Crown was not so deprived, creates an inequality and perception of trial unfairness. Overall, he submits that nothing short of a mistrial can remedy these errors.
- [29] From the outset, it is important for me to highlight some important facts about what has occurred here. First, the technological problems that have occurred were inadvertent. Second, the moment they were discovered, they were immediately addressed. Third, the problems have not impacted the jury's ability to see, hear, and ultimately assess the evidence of this witness, nor have the problems impacted Mr. Zakuti's, counsels', or my ability to see, hear, and assess the evidence of this witness. Fourth, the technological problems have not prevented the witness from hearing the questions that have been asked and responding to them. The technological problems have impacted only what J.C. has been able to see. Finally, there is nothing to suggest that J.C.'s inability to either see the jury and, on occasion, me, or to see defence counsel during his questioning has impacted the manner in which she has given her evidence or the jury's reception of her evidence at all.
- [30] Adult witnesses are presumed to give evidence in a public courtroom. Section 486(1) of the Code provides that "any proceedings against an accused shall be held in open court". This requirement is fundamental to trial fairness. One aspect of this relates to the perceptions of the witness who testifies. The formality of the courtroom setting serves to highlight the fundamental importance of the rule of law, solemnity and seriousness of the proceedings,

and the need to tell the truth: R. v. N.S., 2017 ONCJ 977; R. v. J.T.H., 2021 BCPC 76 at paras. 16-17.

- [31] Of course, Parliament has carved out an exception to the presumption that adult witnesses testify inside the courtroom through the operation of s. 486.2(2) of the Code. This exception also promotes the truth-seeking function of the criminal trial as it serves to encourage the participation of vulnerable witnesses and permits them to give their evidence in a manner that facilitates the giving of a full and candid account of the acts complained of.
- [32] While permitting a witness to testify by CCTV promotes the truth-seeking function of a trial, it is also important that the accommodation maintain the formality and seriousness of the proceedings. Put another way, it is important that the testimonial accommodation does not somehow undermine the very truth-seeking function it is intended to promote by failing to maintain the formality and solemnity of the proceedings. The witness must know she is testifying in a courtroom. She should see, to the extent possible (excluding the accused, of course), what she would see if she were inside the courtroom. At a minimum, the witness should see the judge, the jury if applicable, and counsel as she testifies.
- [33] Now that this problem has been brought to my attention, it is simple to rectify. I will instruct Madam Registrar and others within Court Services who may be assisting with the CCTV process to ensure, with frequent monitoring, that the CCTV equipment allows the witness to see me, the jury, and counsel at the podium at all times. I will also instruct the witness to advise me immediately if she is unable to see me, the jury, or the counsel asking her questions.
- [34] The real question here is whether the failure of the witness to see the jury so far necessitates a mistrial. I am satisfied it does not.
- [35] The open-court principle has been respected in this trial in that the trial has been held in open court and J.C.'s evidence has been fully given and received in open court. I am satisfied that the solemnity and seriousness of the proceedings have not been lost on this witness. As the Crown submits, J.C. is testifying from a room within this courthouse. She has travelled to this courthouse each morning, has been escorted by uniformed sheriffs, and has had dealings with other court personnel such as Madam Registrar here in the courtroom who is dressed in her formal attire, as well. J.C. has seen me on her monitor sitting behind the bench, wearing my formal court attire, with the coat of arms behind me at most times. I have given her legal instructions and directions from time to time. She has also seen Crown counsel in her formal court attire.

- [36] I am satisfied that J.C. has been fully aware that this is a jury trial and that the jury is in the courtroom when she has testified. I reach this conclusion not only because she told me she saw the jury enter the jury box at one point on her screen, but also because during the Crown's pre-trial application in respect of this testimonial accommodation, I was advised that J.C. was aware this was a jury trial and specifically expressed feeling of anxiety about testifying in front of a jury.
- [37] In all of these circumstances, I am satisfied that the failure of the witness to see the jury during her testimony has not undermined the aura of solemnity at work that reminds a witness of her high duty to the rule of law and fellow citizens to speak the truth when testifying: J.T.H. at para. 16. I am satisfied that no prejudice to the accused has arisen from this, nor has there been any actual or perceived trial unfairness as a result of this. I am also satisfied that there has been no compromise to the integrity of the jury's decision-making process.
- [38] It is the second problem - that J.C. could not see defence counsel but could see Crown counsel during questioning - that is of greater concern to me. Let me be clear, my concern is not that the jury's ability to perceive and/or assess the testimony of J.C. has been undermined; it has not been, in my view. The jury, like all of us in this courtroom, were always able to see and hear J.C. clearly. As well, there is nothing to suggest that J.C.'s ability to see, or not see, defence counsel impacted the quality of her answers. Rather, my concern here relates to the imbalance this technology problem has caused, which could create the perception of trial unfairness.
- [39] J.C. does not suffer from any visual or hearing impairments. For her, communication is both verbal and non-verbal. In direct examination, she had both verbal and non-verbal communication with Crown counsel. She could, when or if she chose to, look at her questioner. I recall that she mostly looked down when questioned, but she could have looked at Crown counsel from time to time, I really cannot say. Whether her view of Crown counsel assisted her in any way, I similarly cannot say. What I can say is that the technological problem, that was unknown to all of us as it was occurring, had the effect of depriving defence counsel of the non-verbal aspect of his communication to her.
- [40] In recognizing this, I accept that J.C. would be under no obligation to look at her questioner and may not have looked at defence counsel on her monitor in any event. Many witnesses prefer to look at the judge, the jury, or anywhere else for that matter. However, the difference here is that J.C. did not have a choice. Her screen was blue.
- [41] In assessing the effect of what has occurred, it is important to observe that Mr. Zakuti does not point to any actual unfairness or any particular prejudice that this deprivation has caused. I am mindful, however, that this imbalance may create a perception of unfairness.

- [42] Effective cross-examination is integral to the conduct of a fair trial and it is, and it is also integral to a meaningful application of the presumption of innocence: *R. v. Osolin*, [1993] 4 S.C.R. 595 at pp. 663-65 and *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 69. As stated by the Supreme Court of Canada in *R. v. Lyttle*, 2004 SCC 5, unwarranted constraints on cross-examination may undermine the fairness of the trial:
- [2] the right of an accused to cross-examine witnesses for the prosecution - without significant and unwarranted constraint - is an essential component of the right to make full answer and defence.
- [43] I am of the view that this problem has not undermined trial fairness or the accused's right to make full answer and defence. I am also satisfied that there has been no compromise to the integrity of the jury's decision-making process.
- [44] Fortunately, the technological problem was discovered at a stage of cross-examination where the details of the actual allegations have not yet been explored. Approximately two hours of cross-examination, involving areas mostly peripheral to the actual details of what has been alleged, has occurred so far. Counsel is expecting at least another full day of cross-examination. Also fortunate is the absence of anything to suggest that cross-examination itself, or its effectiveness, has actually been undermined. Indeed, cross-examination has been fruitful so far in revealing several areas that the defence will no doubt urge the jury to find reflect negatively on J.C.'s credibility and the reliability of her evidence.
- [45] In all of these circumstances, I am satisfied that what has occurred here does not warrant a mistrial. The problems, considered singularly or cumulatively, have not created a fatal wounding of the trial process that cannot be cured by remedial measures. The potential for unfairness, perceived or otherwise, that arises from defence counsel's inability to non-verbally communicate with the witness can be cured, if need be, by allowing defence counsel to question the witness again on the topics he has already canvassed with her. Counsel may not wish to do so, but I will grant defence counsel that leave.
- [46] I will hear further submissions from counsel on what, if any, instruction I might give the jury about this. When we broke last day, I advised the jury simply that we had a technological problem and needed to adjourn. My intention, subject to hearing submissions from counsel, is to advise the jury this morning that the technological problem prevented J.C. from seeing defence counsel during cross-examination, but that she could hear him at all times. I would further advise them that because of this problem, which has now been fixed, I have granted defence counsel leave to revisit areas of cross-examination that he has already canvassed with the witness if he wishes to do so. I propose to tell J.C. the same thing, to prevent any confusion on her part when cross-examination resumes.

- [47] Further, at this time, I will direct Madam Registrar to ensure that J.C.'s monitor in the CCTV room always displays me, the jury, and counsel at the podium, and that any problems in that regard be immediately reported to me. I will also direct J.C., when she is in the courtroom, to ensure that her monitor is always operational, displaying me, the jury and counsel at the podium, and that she report any problems to me immediately.
- [48] In the end result, I dismiss the application for a mistrial. I will now hear submissions from counsel on my potential instructions to the jury.

"S.A. Donegan J."

DONEGAN J.

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