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Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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Sexual Assault Appeals After *R. v. G.F.*

"Bad Reasons" Are Not A Ground of Appeal

The Courts of Appeal have responded quickly to the Supreme Court's guidelines included in the May 14, 2021 decision of *R. v. G.F. and R.B.*, 2021 SCC 20, citing the decision over twenty times within the first month of release.

In a section titled "Appellate Review of Trial Reasons" the Supreme Court majority warned that "'bad reasons' are not a ground of appeal and emphasized the deference owed to the credibility assessments of trial judges.

Specifically, the majority of the Supreme Court criticized "appellate court decisions that scrutinize the text of trial reasons in a search for error," and "parsing imperfect or summary expression on the part of the trial judge."

Citing *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, Justice Karakatsanis noted the difference between reasons which lack substance and the large volume of recent appeals in which the trial judge's language was merely deemed "ambiguous."

In their separate reasons, concurring with the outcome of the appeal, Justices Brown and Rowe expressed concern about how those guidelines may be interpreted:

"It remains, however, the case —— and we do not take our colleague as disagreeing —— that an appellate reviewer's role is not discharged by giving trial reasons for judgment a once-over-lightly perusal, but by reading and considering the trial judgment in order to assess whether, in light of the evidence and arguments at trial, it shows that the trial judge discerned and decided the live issues so as to permit meaningful appellate review (*Sheppard*, at para. 28; *R.E.M.*, at para. 57).

"Seen in that light, abstract warnings about 'parsing' and 'scrutinizing' are not, in our respectful view, particularly helpful as concrete guidance to appellate reviewers. Rather, the degree of scrutiny that appellate courts should bring to bear follows from the purposes of that scrutiny, which is to ensure that the trial judge's reasons are (as noted above) sufficient to explain the verdict to the accused, to

provide public accountability and to permit effective appellate review."

Within the *G.F.* decision, Justice Karakatsanis offered further explanation of three recent sexual assault cases in which the Supreme Court had reversed the decisions of the Courts of Appeal with only brief comments.

In *R. v. Langan*, 2020 SCC 33 the appellate court had speculated that messages may have been used for an impermissible reason though the trial judge's reasons were not clear that they had been used improperly.

In *R. v. Kishayinew*, 2020 SCC 34 and *R. v. Slatter*, 2020 SCC 36 the trial judges were not required to clearly separate out their credibility assessments from reliability concerns.

The main message was that the reasons of a trial judge need to be read contextually but, as Justices Brown and Rowe pointed out, assuming a conviction is "safe" without fulsome review would assume the conclusion.

Appeals focused on alleged errors of credibility assessment or uneven scrutiny have been notoriously difficult grounds to argue successfully. This decision will likely have an impact on the way conviction appeals are crafted and, while *W.(D.)* assessments continue to be a common ground of appeal, the Supreme Court guidelines will likely reduce the number of cases where credibility is the core successful argument.

Expert Testimony on Memory

The Alberta Court of Appeal granted a retrial in July in a case where expert evidence on false memories was not permitted at trial.

In *R. v. S.K.M.*, 2021 ABCA 246 the complainant had become "concerned" that she may have been "raped" by her uncle as a child. When she confronted him, the complainant believed that the accused had admitted to a sexual assault.

At trial, the defence attempted to call an expert to give testimony on false memories. It was conceded by the Crown that Dr. Deryn Strange was qualified as an expert but the trial judge ruled that her testimony was "unnecessary" for the jury to hear.

False memories are different than alleging a complainant is fabricating a false allegation. It was the defence position that the complainant honestly believed that the assault took place.

The general concern is that this type of expert evidence will be adopted as a credibility assessment by the trier of fact. Expert testimony needs to be limited to general information that the average person may not understand about a subject but be constrained

from substituting the expert's conclusions about credibility.

In the case of false memories, the defence is arguing that the complainant is credible but factually wrong. The expert was relevant to understanding how a person could honestly believe that her memory of the event was true despite the event not actually having happened.

The Court of Appeal noted that "Dr. Strange expressed her expert opinion that it was necessary for her to give the jury the scientific evidence behind the creation of false memory, not the trial judge. The trial judge offered no explanation as to why he rejected Dr. Strange's considered opinion about why and from whom the delivery of the science to the jury ought to emanate".

This appeal also was granted on other grounds including lack of limiting instruction on the use of prior consistent statements by the complainant and admission of hearsay evidence from the complainant's husband.

The complainant's husband had been allowed to testify that, while intoxicated, he phoned the appellant and accused him of the alleged historical sexual assault and that the appellant had been silent in response.

The husband's testimony about how his relationship with the complainant had deteriorated and resulted in his own alcoholism was also found to have been "highly prejudicial evidence akin to bad character that should not have been left with the jury, particularly without a proper limiting instruction as to its use."

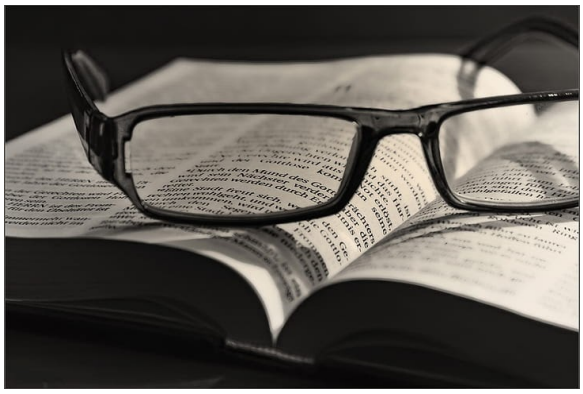
Post-Incident Behaviour

In June the Ontario Court of Appeal addressed the use of "post-incident demeanour" in *R. v. Rose*, 2021 ONCA 408. This was a case where the complainant's evidence left the trial judge with some concerns about her evidence but a video recording of her leaving the residence convinced him that the assault had happened.

A video from the apartment lobby had been entered into evidence on consent. The Crown and defence each argued that different inferences should be drawn from the footage. As circumstantial evidence, Justice Jamal wrote:

"Such post-event demeanour evidence can be invoked by either side: it can assist the defence in raising a reasonable doubt on the issue of consent, or it can assist the Crown in proving non-consent."

Though the Court of Appeal deemed the trial judge's description of the complainant's demeanour on the video footage to be "exaggerated" they found his core conclusions could be supported by the evidence.



Complainant's Standing in 276 /278.92 Application Hearings

Since the new regime was created by Bill C-51, the extent of a complainant's standing is still unclear in the application phase. Recently, in *R. v. R.R.*, 2021 ONCJ 304, Justice Thomas ruled that the complainant could not cross-examine the accused on his affidavit.

Though the complainant is given the right to "appear" and make submissions in phase two of an application, the right to counsel was deemed to be for the purpose of enhancing feedback on the privacy issues related to the proposed evidence.

Justice Thomas ruled that "the complainant does not have standing with respect to the issues at trial, as she remains a witness."

It was also noted that if the complainant's counsel had the right to cross-examine the accused on his affidavit, then it would follow that an unrepresented complainant would have the same right to cross-examine the accused herself.

Other Cases To Watch

R. v. J.J, 2020 BCSC 349 SCC File # 39133
Constitutional appeal of section 278.92 regime. The hearing should take place in the Fall of 2021

This decision will give continuity and important guidance across Canada on how to interpret the new legislation from Bill C-51 if it is deemed to be constitutional.

R. v. Kirkpatrick, 2020 BCCA 136 SCC File # 39287
This case will be looking at the correct interpretation of the Supreme Court decision in *Hutchinson* as it relates to consent being dependent on condom usage. The lower court was also split on whether failure to use a condom was a form of fraud.

R. v. Ndhlovu, 2020 ABCA 307 SCC File # 39360
Whether or not mandatory SOIRA order is unconstitutional.

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