NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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Intoxication, Consent and Honest But Mistaken Belief

The Evidence of An Accused Must Be Weighed Properly by a Trial Judge

In the recent Ontario Court of Appeal decision, *R. v. S.B.*, 2023 ONCA 784, the Court came to separate concurring reasons to grant a new trial.

The decision starts with the minority opinion regarding honest but mistaken belief in communicated consent. As is well established since *R. v. Barton*, 2019 SCC 33, consent must be *communicated* by either words or actions and, if it is found that the complainant did not consent, the defence of honest but mistaken belief is only available if the accused took reasonable steps to ascertain consent.

In this case, the judge did not address the evidence of the accused and accepted the testimony of the complainant in regard to the sequence of events. The minority opinion, by Justice MacPherson, considered the conviction unsafe because the trial judge did not sufficiently grapple with evidence from the accused that the complainant was giving non-verbal signals that could be taken as consent after significant time had passed since her consumption of alcohol.

The majority did not agree with Justice MacPherson regarding mistaken belief but granted a retrial on the basis that the trial judge reached a conclusion about the complainant's capacity to consent that was not sufficiently explained in grounding that conclusion to the whole of the evidence.

In this case, writing for the majority, Justice van Rensberg stated:

> I have concluded however that the trial judge erred in his analysis of the *actus reus* of the offence. In finding that C.F. lacked capacity to consent to sexual intercourse because she was 'in and out of consciousness', the trial judge did not consider S.B.'s evidence relating to the relevant time period – when the two were alone in S.B.'s car together. S.B.'s evidence, while not determinative, was relevant circumstantial evidence on the question of C.F.'s incapacity to consent, and was relevant to the assessment of the credibility and reliability of C.F.'s evidence. The trial judge's failure to

> consider S.B.'s evidence on the issue of capacity to consent was a material error that justifies allowing the appeal.

Having decided that the complainant lacked the capacity to consent the trial judge then decided he did not have to determine if there was consent because it was vitiated by incapacity. Primarily, the trial judge relied solely on the evidence of the complainant and did not explain why he rejected the evidence of the accused on various discussions and actions that took place during the relevant time frame.

While it was open to the trial judge to give reasons for rejecting the evidence of the accused, in this case, that exculpatory evidence was deemed irrelevant. As stated by the majority:

> The trial judge did not review and assess S.B.'s evidence about C.F.'s conduct bearing on the issues of her level of intoxication and her capacity to consent because he considered such evidence to be irrelevant.

While consent is certainly subjective and in the mind of the complainant, testimony regarding non-consent and levels of intoxication is still subject to a credibility assessment.

The accused's evidence about the complainant's actions should have been assessed as circumstantial evidence regarding the complainant's level of intoxication and the vitiation of consent.

> Even if the trial judge was of the view that the issue of capacity turned largely on C.F.'s evidence, he erred in failing to assess the credibility and reliability of such evidence based on all of the evidence, including S.B.'s account. A trial judge is obliged to consider the whole of the evidence in deciding the case: *R. v. Gostick* (1999), 137 C.C.C. (3d) 53 (Ont. C.A.), at paras. 14-18. It is an error for a trial judge to fail to reconcile the inconsistencies between the Crown and defence evidence: *R. v. D.A.*, 2012 ONCA 200, 289 O.A.C. 242, at para. 11.

Simply put, the judge must give reasons for why the exculpatory evidence of an accused's testimony was rejected. A failure to do so amounts to a *W.(D.)* error in which the judge is essentially choosing between testimony without considering all the evidence as a whole.

Stereotypes vs Legitimate Inferences

Amidst growing awareness about how stereotypes and "rape myths" have historically undermined the justice system, numerous courts have recognized that evidence is not a myth just because it may undermine the complainant's version of events.

In *R. v. Crouch*, 2023 CMAC 11 the Ministry of Defence ("The Crown") lost an appeal of

acquittals, primarily alleging that evidence at trial was inappropriately admitted for consideration by the hearing panel without sufficient instruction.

In particular, citing *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107, the Court Martial Appeal Court agreed that:

> Simply because evidence might, in one context, be a myth or stereotype does not mean that it has those characteristics in all contexts. Nor is the evidence always inadmissible. If the evidence is relevant to a fact in issue, the evidence generally will be admissible.

The Roth citation also emphasized reasoning that has been endorsed by numerous Courts of Appeal from the article by Professor Lisa Dufraimont in "Myth, Inference and Evidence in Sexual Assault Trials", (2019) 44 Queen's L.J. 316 at 353:

> Criminal courts … carry the heavy responsibility of ensuring that every accused person has a fair trial. Subject to the rules of evidence and the prohibition of particular inferences, this requires that the defence generally be permitted to bring forward all evidence that is logically relevant to the material issues. Repudiating myths and stereotypes means rejecting certain discriminatory lines of reasoning, but it does not make whole categories of evidence irrelevant or inadmissible. Indeed, sweeping prohibitions that would rule out any consideration of particular forms of evidence are avoided as inconsistent with the accused's right to make full answer and defence and with our overall approach to finding facts. Outside the prohibited lines of reasoning identified as myths, relevance remains an elastic concept that leaves a wide scope for reasoning from logic and human experience.

In the case of *R. v. Crouch*, the defence had adduced evidence of post-incident communications that were alleged to have gone to "the non-avoidance stereotype" that real victims would avoid communication with a perpetrator. The Appellate Court found that the friendly communications were properly used to rebut the complainant's testimony about having avoided and not answered any communications from the accused after the alleged incident.

Importantly, the Appellate Court found that the emails were not only relevant to undermine the credibility of the complainant's denials but to support the testimony of the accused in that they remained on good terms for some time after the alleged assault. It is important because too often it is only the testimony of the complainant that is taken at its highest during trial.

This case is an important reminder that the evidence of both a complainant and an accused during trial should be received with the same neutrality and that evidence which supports the defence should be granted the same weight.

Trial Delays Found Unreasonable Due in Part to Loss of Prelim Inquiry Right

In 2019 Canadian Parliament enacted Bill C-75, which eliminated access to a preliminary Inquiry for any charges having less than 14 years as a maximum penalty. This eliminated the option for a prelim for most sexual assault cases.

In the recent decision of *R. v. Flaumenbaum*, 2023 ONCJ 462 the accused was granted a stay of proceedings under s. 11(b) of the *Charter* due to a failure to complete his trial in a reasonable time. Part of the delay was due to a mid-trial application.

The trial judge found that, had the accused been granted a preliminary inquiry, he could have laid the foundation for what became a mid-trial *Mills* application - seeking third party records.

There were also disclosure issues due to the complainant having made three separate statements and a failure to disclose the third statement and a legible copy of the complainant's sexual assault evidence kit (SAEK) from the hospital in a timely manner.

In regards to refusing to discount the trial delay due to the mid-trial *Mills* application the judge aptly stated at paras 54-56:

> [54] When Parliament chose to remove preliminary hearings for sexual assault cases in Bill C-75 it altered what had been the traditional means by which defence counsel would lay a foundation for a *Mills* application. Prior to these amendments, in cases where the Crown proceeded by indictment, defence counsel would normally seek permission of the court to cross-examine the complainant at a preliminary hearing about the existence of any private records. If the answers to those questions provided a basis for a *Mills* application, following a decision on committal before the provincial court justice, the application would be brought before the Superior Court of Justice at a future date as that was the trial court.
>
> [55] Post Bill C-75, preliminary hearings are not available for sexual assault cases where the Crown proceeds by indictment. As a result, more sexual assault trials are being set in the Ontario Court of Justice. One consequence of these changes is that bifurcated hearings in sexual assault cases have become more common as the cross-examination of the complainant during the trial itself becomes the only mechanism through which defence counsel can obtain sufficient evidence to establish the "likely relevance" threshold test. These prosecutions take more court time

> accordingly and scheduling them in a busy trial court often becomes difficult. That reality, however unfortunate, is not an exceptional circumstance. This procedure was known to occur in some sexual assault cases prior to Bill C-75, and it was entirely foreseeable that the procedure would become more common as a result of the legislative changes Parliament enacted. Furthermore, it has been four years since Bill C-75 came into force.
>
> [56] Fundamentally, had the Crown provided complete disclosure earlier in this case, trial dates would likely have been obtained sufficiently far in advance of the 18-month ceiling that a mid-trial *Mills* application could have been completed without compromising Mr. Flaumenbaum's section 11(b) rights. It is well known that modern sexual assault trials can be notoriously procedurally complex and the Crown must make scheduling and prioritization decisions consistent with that reality in order to ensure these cases are brought to trial within the *Jordan* time limits. Mr. Hebscher took reasonable steps to obtain future dates for the *Mills* application and the trial proper following the completion of the available court time on July 24, 2023.

Significantly, the trial judge also made comment that double booking of trial judges and lack of proper court staffing should be considered institutional delay:

> [36] A trial judge's lack of availability to hear a case on previously scheduled dates will normally constitute institutional delay. Between May 29-31, 2023, half the available court time was devoted to other matters that were prioritized instead of Mr. Flaumenbaum's case. These cases had even lengthier histories.
>
> [37] A lack of available judicial resources is not an exceptional circumstance: see *R. v. Perrault,* 2020 ONCA 580, at para. 2. While the Crown is not responsible for the staffing of the courts, the Crown at large is responsible for preventing systemic delay: see *Perrault* at para. 5. The trial could not finish during these originally scheduled dates due to the overburdened caseload this courthouse continues to endure. More time simply had to be obtained.

This case is a good reminder that, though the pandemic was an unforeseeable event, continued backlog delays cannot result in an accused having to suffer and bear the extra expenses due to what is actually a systemic delay.

Most cases which are stayed due to an 11(b) violation involve a number of factors in combination. This case stands out in making an important recognition about how Parliament's choice to eliminate preliminary inquiries may sometimes contribute to a stay of proceedings and removed a very helpful procedural resource in complicated cases like sexual assault.

Accused's Right to Disclosure Cannot Be Held Against Him

In yet another case of alleged "tailoring of evidence," the Ontario Court of Appeal granted a new trial in *R. v. Haidary*, 2023 ONCA 786. This is a repeated problem in which an accused's testimony is dismissed on the grounds that the judge felt it was contrived to cater to having seen the Crown's case against him prior to testifying.

While there are legitimate reasons a trier of fact may reject the evidence of an accused, it is impermissible to reject it solely on the grounds that he had access to Crown disclosure in advance of his testimony.

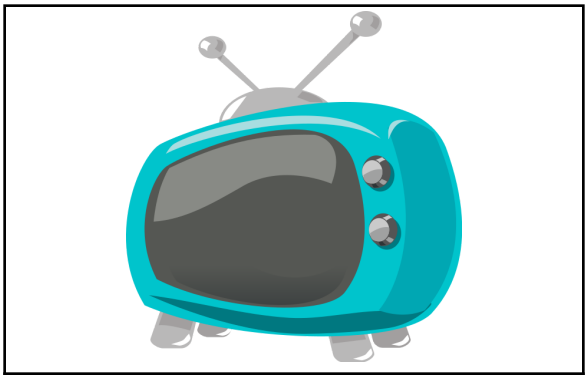
In this case, omissions from the accused's prior statements did not amount to an inconsistency and the additional information offered at trial could not properly be seen as "tailoring."

While recognizing that there are legitimate reasons to reject testimony based on inconsistent statements the Court clarified the difference:

> But when a trial judge goes on to make an affirmative finding based on these inconsistencies that the accused changed their version of events by tailoring their testimony to account for evidence that they subsequently learned about, the trial judge has gone beyond the mere consideration of the impact of prior inconsistencies and has added another important makeweight in favour of rejecting entirely the testimony of the accused. To appreciate the point, consider that testimony often survives prior inconsistencies, whereas a finding that the accused tailored their testimony to the evidence requires the rejection of the "tailored" testimony in its entirety. Moreover, a finding that the accused tailored their evidence is a determination that the accused engaged in post-offence conduct in an effort to avoid conviction. Such a finding creates a risk that, advertently or inadvertently, a finding of tailoring will operate as an indicium of guilt. Adding an inference of tailoring is not a benign addendum to the analysis of prior inconsistencies. It is a finding of importance with potentially devastating consequences for the accused.

This point is particularly relevant given Parliament's amendments to the *Criminal Code* to prevent complainant's from being "ambushed" or surprised by evidence in the accused's possession.

The right of an accused to be present at their own trial and to know the case to be met is a fundamental right that simply cannot be used to undermine the believability of an accused's testimony at trial.



The Excessive Use of CCTV

It is becoming more common for complainants to be permitted to testify via CCTV instead of attending the courtroom in person simply because the charges relate to sexual assault.

In the unreported case of *R. v. Nathan* in Ontario Superior Court decided on November 14, 2023, Justice Presser ruled that it was not sufficient to grant a CCTV application by the Crown simply because the complainant had an emotional reaction to having to testify in court.

In particular Justice Presser stated:

> I acknowledge that the complainant has expressed some emotional distress at the prospect of testifying in person. However, in my view, the mere demonstration of emotional distress is not sufficient to meet the test established in 486.2(2).
>
> If it were, we would never have witnesses testifying in person in court. Most witnesses find the process of testifying gives rise to at least some emotional distress.

Cases To Watch

R. v. Christopher James Kruk SCC file #40095
Crown appeal based on alleged stereotypes.

B.E.M. v. His Majesty the King SCC File# 40221
Lack of corrective instruction after the Crown used a personal anecdote in the jury address.

His Majesty the King v. Edwin Tsang
SCC File# 40447
Use of stereotypes and generalisations about what people would or would not do in a sexual encounter with a stranger.

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