COURT OF APPEAL OF YUKON

Citation: *R. v. S.C.C.*,
2022 YKCA 2

Date: 20220202
Docket: 19-YU854

Between:

Regina

Respondent

And

S. C. C.

Appellant

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Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Charlesworth
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Territorial Court of Yukon, dated October 2, 2019 (*R. v. S.C.C.*, 2019 YKTC 36, Docket 18-10006).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	L. Whyte
Place and Date of Hearing:	Whitehorse, Yukon November 25–26, 2021
Place and Date of Judgment:	Vancouver, British Columbia February 2, 2022

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Charlesworth
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Appeal from conviction for sexual assault. The complainant and appellant had known each other for many years. The complainant alleged that the appellant sexually assaulted her when they were socializing at his house one evening. The appellant denied the allegation. The appellant had been arrested, and gave the police a statement. The statement was used by the Crown in cross-examination without a voir dire to determine voluntariness. The day prior to the trial, defence counsel had advised the Crown that the appellant was not contesting voluntariness, but the judge was not so advised. The appellant's evidence raised concerns in relation to whether the statement was voluntary. The judge accepted the evidence of the complainant, and found that the appellant's evidence was not credible, in part, based on the prior statement. Held: Appeal allowed, new trial ordered. The trial judge erred in not holding a voir dire to determine the voluntariness of the appellant's statement to the police. Although defence counsel waived a voir dire on voluntariness, this waiver was not valid, and there were sufficient red flags with respect to voluntariness, including the appellant's epileptic seizure prior to giving his statement, his lack of memory, and his belief that he had no choice and would be detained if he did not give a statement, that the judge should have declared a voir dire. Section 686(1)(b)(iii) could not apply. The remaining issues, ineffectiveness of counsel and errors in the reasons for judgment, did not result in reversible error.

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Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] S.C., the appellant, is a distant cousin of the complainant, whom I will refer to as A.B. On May 1, 2018, sexual activity occurred between S.C. and A.B. The question at trial was whether the Crown proved beyond a reasonable doubt that A.B. did not consent to the sexual activity in question. The trial judge believed A.B.'s evidence that she did not consent, disbelieved the evidence of S.C. and convicted S.C. of sexual assault. S.C. appeals that conviction.

[2] I would allow the appeal and order a new trial.

Background

[3] S.C. and A.B. live near each other in a small community in the Yukon. They have known each other for many years, and are distantly related. The two would, from time to time, get together to have a few drinks and play some video games or watch a movie.

[4] Only A.B. and S.C. testified at the trial. The day prior to the commencement of the trial, defence counsel advised the Crown that S.C. would waive the need for a *voir dire* with respect to the voluntariness of a statement he made to the police when he was arrested. The Crown used that statement during cross-examination of S.C.

[5] A forensic DNA report was filed by consent. S.C.'s DNA was found on A.B.'s vaginal swab. A.B.'s DNA was found on a penile swab taken from S.C. on his arrest. Some areas of the front of a tank top worn by A.B. were tested, and no male DNA was discovered.

The evidence of A.B.

[6] On April 30, 2018, A.B. went to S.C.'s house, expecting the usual evening of pleasant socializing. S.C. lived with his mother and his brother, but both were away at a mining camp. A.B. and S.C. both had quite a few alcoholic drinks.

[7] A.B. testified that when they were sitting on the couch, S.C. moved towards her, put his hand on her thigh, and moved his hand towards her crotch area. She repeatedly pushed his hand away, but he kept trying to move his hand up.

[8] A.B. testified that that she did not want him to do that because they were cousins; she did not like him “that way”; and she did not want to do “that” at all.

[9] They went into his bedroom to watch a movie, and had more to drink. After a while, he tried to get on top of her and kiss her. She pushed him off and said no. She said she told him they can’t do that because they were cousins. They argued back and forth, with S.C. asking her “why”.

[10] A.B. said he took off her pants and shirt and got on top of her. She was overwhelmed. Sexual intercourse occurred. She said she was afraid, and froze. She testified that part way through the act, she “got the courage to push him off”, said “no, I can’t do this”, and he got off of her. They then talked about how each had previously been sexually assaulted by relatives. I add, parenthetically, the evidence of prior sexual assaults was initially tendered by the Crown, without the benefit of an inquiry pursuant to s. 276 of the *Criminal Code*, in relation to prior sexual activity.

[11] A.B. felt S.C. understood her and that they connected on an emotional level. She felt that he would listen to her when she said no. She testified that he promised her safety, and that she could sleep there. He gave her some pyjama bottoms to put on, and she fell asleep.

[12] Sometime later, she woke up and realized that she was on her stomach. The pyjamas she was wearing were pulled down and S.C. was having vaginal intercourse with her from behind. She said about 30 seconds later he ejaculated on her back. She did not move, or indicate that she was awake. She heard him leave the room, wash up, and pass out on the couch in the living room. She got up, put on her own pants and ran home crying. Her father called the police.

[13] A.B. acknowledged that she had always heard that S.C. had epilepsy, but she had never seen him have an epileptic seizure, and did not see him have a seizure

that night. She did not recall what top she was wearing, but she did give her clothes, including the pyjama bottoms, to the police. When asked in cross-examination whether she was confused, or had dreamt the second incident, A.B. said that was not possible.

Evidence of S.C.

[14] S.C. testified that he and A.B. were friends, and that he had known her most of his life. They would "hang out" from time to time as friends. On April 30, he called her and invited her over. A.B. arrived at his home around 8 or 9 p.m. They were drinking and playing video games. Later they moved to the kitchen, drank more and played cards. S.C. testified that it was in the kitchen where A.B. told him she had previously been sexually assaulted, and how it affected her. She was very upset. He denied that he told her he had been assaulted by anyone. Both drank quite a bit of alcohol.

[15] After an hour or so, they moved to his bedroom to watch a movie. S.C. testified that they began kissing; they each took their own pants off; and they had sexual intercourse for approximately one minute. S.C. testified that A.B. did not tell him she did not want to do that, did not push him off of her, and was kissing him back. She participated in the kissing, and had removed her own pants. S.C. said they realized that what they were doing was wrong and stopped. They told each other they would not talk about what occurred. He was embarrassed, and she was disappointed. S.C. gave her a pair of pyjama bottoms, he went to the bathroom, and then to the living room to sleep on the couch.

[16] When he woke up, he did not know where he was, and he realized he had had an epileptic seizure, to which he was particularly prone when drinking alcohol to excess. When he has a seizure, his memory is "wiped". When he remembered that A.B. was there, he looked for her in the bedroom. She was gone, so he went back to sleep in his bed. The next thing he knew, the police were at his home and arrested him.

[17] S.C. denied sexually assaulting A.B. His evidence was that only one incident occurred. He denied the second incident described by A.B.

S.C.'s Statement to the Police

[18] In direct examination, S.C. testified that when the police arrived, they told him he had sexually assaulted A.B. He went willingly to the police station. S.C. testified to the following in direct examination:

> Q They read you your rights at your house?
>
> A Yea, in the truck. And then when we went up again they read my rights. And then they gave me a — to do a penis swab I had to get done. And they told me that if I didn't get it done and ask them when I wanted to stay — leave, I had to — they said they could hold me for 48 hours in a cell. So I just went and got the penis swab done. And then we went back, went to the bathroom. Then they brought me to another room and got — went on camera and did a testimony about everything that would happen and everything I remembered that night.
>
> Q So you gave a statement.
>
> A Yes.
>
> Q Did you want to give a statement? Was it — did you agree to give a statement?
>
> A I agreed with because I wanted to go home and I wanted to sleep. And I wasn't feeling well and I didn't want to be there because I was shaking around too much.
>
> Q Do you think that the statement you gave was accurate?
>
> A No, it was not accurate. Because I could barely remember too much of that night because I just had a seizure. And I just wanted to get it over with so I could go back home and go to bed.

[19] S.C. testified that his memory was still foggy from the seizure when he was speaking with the RCMP, and that it takes a day or so before his memory fully returns. S.C. testified that when his memory does return, it is fully restored.

[20] During cross-examination, Crown counsel questioned S.C. on what he told the police in his statement. The trial judge was not told that there was a waiver with respect to voluntariness, nor did he raise the issue of a *voir dire*. S.C. testified that he was not functioning properly, and that he did not realize what he was doing. He did not tell the police that he had had a seizure.

[21] The cross-examination is as follows:

> Q Okay. So the bottom of page 3 there, starting at line 66. Do you remember being asked this question and giving this answer:
>
> > Q But can you, um, can you kind of run it down from the beginning for me?
> >
> > A Yeah, we were drinking last night, um, we were sat down drinking, playing video games, like card games, uh, started getting too drunk and then we decided we wanted to go — she wanted to go to sleep and I wanted to go to sleep, so she stayed over. She was drinking hard liquor, so she went out and passed out in her room, watched a movie for a bit, and then she passed out in my room. And then I woke, went and laid on — I told her I was just going to lay down in the living room and she passed out. And I went to bed and then I woke up the next morning and I went to see if she was still there, and then she was gone and she wasn't there. So I went and lay down in my room and then you guys showed up. (as read)
>
> Do you remember being asked that question —
>
> A Yes.
>
> Q — giving that answer? Okay. So you gave that answer during a period when you couldn't remember at all what had happened?
>
> A But the full state — when I don't remember my full stuff, I only remember so much about what I can remember.
>
> Q So it's not that you lost your whole memory, it's that you lost part of your memory?
>
> A It takes time for my memory to come back and that's all I told them is all I remembered.
>
> Q Okay. So that's what — then you went on to tell them on the next page, when they say "Okay," and when you said, "And as far as I know" — sorry, I'm looking on line 77. The question is "Okay." And you continue at 77:
>
> > A And as far as I know, that's what happened, because I blanked out halfway through the night too.
> >
> > Q You blanked out?
> >
> > A Yeah.
> >
> > Q What does "blanked out" mean?
> >
> > A Got drunk. Don't remember too much.
> >
> > Q Don't remember too much?
> >
> > A As far as I know, it's what happened.
>
> So you'd agree with me, then, that really you gave a pretty accurate account to the police. The only part that you seem to have forgotten was the part about having sex with [A.B.].

A Yeah, because I was too ashamed to remember and I don't remember — I didn't remember the beginning of what happened. I wasn't too sure about if that's what — actually what happened. And I wanted to get out of the police station because I was too ashamed to even be there. And I wasn't feeling good in that time.

Q You wanted to get out so you thought that telling them that you blacked out and couldn't remember was a good way of doing that?

A I just gave a statement as I remembered, yes. And most of it I don't remember at the beginning — at the beginning I remember most of it, and then I gave them what I remembered because I didn't want to get held in a cell for 48 hours sitting there, because at the time I had a seizure during that morning and I wasn't feeling good.

Q Okay, and then at page 5, you — they asked you — well, actually you said at page (sic) 112, for context,

> A I was sleeping out in the living room but I wake up top of her?
>
> And you were asked the question,
>
> Q Well, you blacked out, right, so that could have happened; right?
>
> A Yeah.

A Yeah.

Q

> Q So your basic recollection ends just before going into the bedroom or around the bedroom time.
>
> And your answer was that yeah, that's what you remember, that — that's correct? Those are the — at least those are the questions you were asked and —

A Yes, that's what —

Q — the answers you gave?

A — the question was asked, yes.

Q And when asked on that same page at 121:

> Q But as far as you're concerned, you never put —

…

> Q But as far as you're concerned, you never put your penis in her?
>
> A As far as I remember, yes.

A Yes, that's what I said.

Q So at this point, you didn't remember — you're saying you didn't remember any sex with [A.B.] at all?

A Yes.

Q You just remembered all the stuff that went on before the sex? (Nodding yes.)

And what did you mean — or do you — first of all, at the bottom of page 6, the very last line there, this is Cpl. Stewart [the interviewing officer] speaking, when he says,

Q You and her are — would you guys be friends?

A I hope so, but I did something. I did something. Something's wrong. Shouldn't be done. I don't remember.

At that point you were —

A That point I was —

Q — referring to having sex with [A.B.]?

A — I didn't — wasn't too sure what happened or I — I didn't remember too much of anything after what happened. My — it was blurry and I didn't know if I should've said yes or no, and I was …

Q Okay, but you knew enough to know that you had done something wrong?

A No, I didn't know if I did something wrong or not. And because I was still easily confused and I still didn't remember where I was in that time, so I just gave them — said what I said.

Q So you just randomly chose to say "I did something. Something's wrong. Shouldn't be done"?

A Yes.

Q But you didn't remember actually doing anything wrong? Okay, and I'm suggesting to you that you actually did remember doing something wrong and that you did remember sexually assaulting [A.B.].

A No, I don't remember sexually assaulting [A.B.], and I didn't sexually assault [A.B.].

Q And I'm going to suggest to you also that when you spoke to the police you remembered having sex in the first incident [A.B.] spoke of —

A Yeah.

Q — but you decided to skip over that and pretend you didn't remember it.

A No, it was I don't remember it. I didn't remember 'til the next day after I got home with my memory back.

Q It just hopped back into place?

A Yes, it just comes back and pops back into place, ma'am.

Q And we already addressed the fact that you didn't tell the police you had a seizure. Do you remember talking to the police about seizures?

A No, because I was at the point when they asked me at the beginning when they came there, they asked me to go and told me I was

sexually assaulted someone. I couldn't think of anything and I wasn't at my right straight of mind when I was there.

Q Okay. But what I mean is do you remember the police asking you about your seizures, what kind of seizures you have?

A Yeah, they asked me if I had seizures, yes.

Q And you didn't take that opportunity to say, Yeah, in fact I just had one a few hours ago?

A No.

Q Okay. Something relevant you might have wanted to mention?

A Yeah, I guess, yeah.

Q When you were talking to the police, at least, you knew that — you thought there was some possibility that you could have sexually assaulted [A.B.]. Is that fair?

A Yes.

Q And so you were apologetic because you were — because you knew that you could have — you thought you could have done it.

A Yeah, because I was scared or I thought I did. Something like that shouldn't happen. It's not right.

Q And so you at page 11, line 239, you were asked,

Q So that's fresh. So what do you think should happen here?

Your answer was,

A If I did do it, I did do it, so.

So you're saying at that point you thought there was some possibility you had done this?

A Yeah. I was scared that I did and I wasn't too sure.

…

Q And [A.B.] just disappeared in the morning and went to the police?

A Yes.

Q And you wanted to get things over with at the detachment, so you thought the best way of doing that was telling them that you might have —

A Tell them —

Q — that you might have raped [A.B.] —

A Tell them the statement, yes, to get it done.

Q Pardon?

A Telling the statement, yes, because I didn't want to stay in a cell.

Q Okay, well, I'm going to suggest to you that they didn't actually tell you that. And have you listened to the recording of their dealings with you?

A No.

Q Okay. Is it possible that that —

A Oh, they told me —

Q — that they didn't actually say that?

A They said that they could hold me for 48 hours. They said they hold you in a cell for 48 hours.

Q If?

A Yeah.

Q If what?

A If I didn't give a statement or talk to a lawyer.

Q If you didn't talk to a lawyer, they would hold you?

A Yeah, I had a choice to talk to a lawyer.

Q Are you saying that they told you they would hold you for 48 hours if you didn't call a lawyer?

A No, they said they could hold me for 48 hours.

Q Was there an "if" part to that where they —

A No, there was no if.

Q Okay. So it wasn't —

A They just said that they could hold me for 48 hours by law.

Q Okay. And you're not claiming that they told you they could hold you for 48 hours if you didn't give a statement? They just —

A No, well —

Q — said they could hold you —

A Yeah, and I —

Q — for 48 hours?

A — just wanted to go, and I couldn't talk, really function during the time, and I just told them what I remembered.

Q Okay. Which was everything except the part about sex with [A.B.].

A Yeah.

Q And so I just want to be clear that you're not saying they told you they could hold you for 48 hours if you didn't give a statement, they just told you — you're saying they told you they could hold you for 48 hours in law, and then you decided to give a statement.

A Yes, because I just wanted to go home. And this was the first time I'd ever been in trouble, so I'm not too sure about the law.

Q Did you talk to a lawyer?

A No, I didn't.

[22] In re-examination, S.C. was asked the following by his counsel:

Q Just in relation to when you said the officer told you he could hold you for 48 hours, was that in relation to the sample in terms of he could get a warrant to take a sample and —

A Yes.

Q — hold you for 48 hours? It's a bit of a leading question, but —

A Yeah, it is.

Q — is that —

A Yes, it is.

Q Did he — is that what you understood the holding —

A Yes, that's what I thought —

Q — for the 48 hours was —

A — it meant by hold me 48 hours.

Q Okay. So it wasn't if you didn't call a lawyer?

A No.

Q Or —

A It was just saying that he gave me a choice afterwards to talk to a lawyer.

Q Okay. And why did you not talk to a lawyer?

A Because I just wanted to get it over with and I didn't want to be there anymore, where I was still trying to sink through with everything that happened that I still couldn't remember and started remembering things and I was too ashamed to talk. And I didn't realize what happened. And then when I got back to the house and I went back, I woke up next day and I started to remember things. I got to sitting there, thinking, and I remembered everything that happened. And then when I realized what I did, I was too ashamed to even talk about it.

Q And if you were too ashamed, why?

A Because I wasn't raised to be fooling around with my cousins.

[23] The issue of voluntariness arose only in submissions, when the following was said:

> CROWN: First of all, Your Honour, I just want to clarify — my friend and I discussed this — that one of the reasons the Crown is — did not call reply

> evidence — we intended to address this before submissions — is that, as stated earlier, the penile swab, there is no issue with the penile — the constitutionality of the penile swab or the voluntariness of the statement. My friend is not arguing that the comment about the 48 hours of holding, if it was made, had any impact on the giving of the statement. So I'm not going to —
>
> DEFENCE: No, I can confirm that. And I did indicate to my friend I would confirm on the record that constitutionality of the —
>
> THE COURT: Well, she would have made the argument if —
>
> DEFENCE: — penile swab and the voluntariness was not at issue. Initially we had the — voluntariness was going to be an issue, but we determined that it wasn't necessary in this case, so I can confirm that.

Trial Judge's Reasons

[24] The trial judge reserved overnight, and delivered brief reasons for judgment the next morning. He concluded that A.B.'s evidence was credible and believable. He found S.C.'s evidence incapable of belief, relying in part on S.C.'s police statement to assess his credibility.

Issues on Appeal

[25] S.C. raises a number of grounds of appeal. He submits that:

i) The trial judge failed to recognize evidence that supported a defence to the charge;

ii) The trial judge misapprehended the evidence;

iii) The trial judge misapplied the law with respect to consent;

iv) The trial judge failed to apply the correct burden of proof;

v) The trial judge erred for failing to hold a *voir dire* to determine the voluntariness of the appellant's statement to the police;

vi) Trial counsel was ineffective for:

a) Failing to adduce good character evidence of the appellant;

b) Failing to tender evidence contradicting A.B.'s evidence that she would not consent to sexual activity with a cousin as a result of misunderstanding *Criminal Code* s. 276;

c) Failing to adduce evidence of prior false allegations of sexual assaults by A.B.;

d) Failing to cross-examine the DNA expert on the lack of semen on the back of A.B.'s tank top;

e) Failing to adduce evidence that A.B. was seen drinking and partying at a bar days after the sexual assault;

f) Failing to take proper instructions in relation to the voluntariness of S.C.'s statement to the police, failing to object to the admission of the statement, and re-examining S.C. to weaken evidence that cast doubt on the voluntariness of his statement to the police; and

g) Inadequate cross-examination of A.B. and final submissions.

Section 276 of the Criminal Code

[26] S.C. applies to adduce fresh evidence in support of his allegation of ineffective assistance of counsel. Two pieces of that evidence raise a question about the application of s. 276 of the *Criminal Code* to appeal proceedings. The first involves evidence said to contradict A.B.'s statement that one reason for not consenting to the sexual activity in question was because S.C. was her cousin. The second involves evidence alleging that A.B. made prior false allegations of sexual assault.

[27] The admission of prior sexual activity is governed by ss. 276, 278.93 and 278.94:

> 276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to

support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is relevant to an issue at trial; and

(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

…

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

…

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

> (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.
>
> (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and
>
> > (a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
> >
> > (b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and
> >
> > (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.
>
> (5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

[28] Crown counsel took the position that s. 276 and the procedure outlined in ss. 278.93 and 278.94 applied to the hearing before this Court, and that the complainant's counsel would have standing to make submissions at the appeal.

[29] While S.C. did not make an application to tender evidence of prior sexual activity, the application to adduce fresh evidence sufficiently set out the evidence proposed to be tendered and the relevance if admitted.

[30] This Court expressed the view that s. 276 applied to a limited degree: the parts of the hearing that engaged the issues were heard *in camera*. This Court was of the view that while s. 278.93 applied, if the tendered evidence was "capable of being admissible", and otherwise met the criteria of fresh evidence, then the fresh evidence would be admitted for the purpose of the appeal, and a new trial would be required to examine whether the evidence was admissible at trial. Thus, s. 278.94 would not be engaged on an appeal, and A.B.'s counsel did not have standing to make submissions on the appeal. I note, however, that the issue was not fully canvassed as S.C. did not take a position on the procedure.

Fresh Evidence on Appeal and the Allegation of Ineffective Assistance of Counsel

[31] As noted, S.C. tendered fresh evidence to support his allegation of ineffective assistance of counsel.

[32] The test for the admission of fresh evidence on an appeal is well-established. An appellate court has the power to admit fresh evidence pursuant to s. 683(1)(d) of the *Criminal Code*:

> 683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> …
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[33] The leading case in terms of adducing fresh evidence on appeal remains *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d) [now s. 683(1)(d)]. The overriding consideration must be in the words of the enactment "the interests of justice" … [T]he following principles have emerged:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[34] The evidence tendered in this appeal does not relate to a factual matter in terms of an element of the offence. It addresses whether something went wrong in the trial process itself and, therefore, amounted to a miscarriage of justice. In such cases, the *Palmer* test is not as strictly applied.

[35] An approach to the test was set out by Cromwell J.A. (as he then was), in *R. v. Wolkins*, 2005 NSCA 2:

> [58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.
>
> [59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called *Palmer* test…
>
> …
>
> [61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the *Palmer* test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307 at paras. 73 - 77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616 at paras. 43 - 46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see *R. v. G.D.B.*, [[2000] 1 S.C.R. 520].

[36] The British Columbia Court of Appeal has not entirely rejected the *Palmer* test when applied to allegations of ineffective assistance of counsel. It has found it applies, but in a modified form. In *R. v. Dunbar*, *Pollard, Leiding and Kravit*, 2003 BCCA 667, the Court said:

> [35] The most significant modification of the *Palmer* principles, where the fresh evidence goes to the integrity of the trial process, is the relaxation of the due diligence criteria: *R. v. Appleton* (2001), 156 C.C.C. (3d) 321, 55 O.R. (3d) 321 ¶16-17 (C.A.).
>
> [36] Where the fresh evidence goes to the integrity of the trial process, appellate courts also have not rigidly adhered to the procedure for admitting fresh evidence on appeal set out in *R. v. Stolar*, [1988] 1 S.C.R. 480, 62 C.R. (3d) 313, [further citations omitted]. In each of these cases, the court admitted fresh evidence so that it could properly evaluate the integrity of the trial process. This inquiry differs from the usual situation contemplated in *Stolar* where the fresh evidence goes to a substantive issue at trial and a ruling that

> it is admissible means, according to the fourth *Palmer* criterion, that the fresh evidence could reasonably be expected to have affected the result at trial. Instead, where the fresh evidence is adduced to challenge the integrity of the trial process, the fresh evidence can be admitted and the question of whether a miscarriage of justice occurred then assessed to determine whether a new trial is required.
>
> [37] Although the due diligence factor and strict *Stolar* procedure may be disregarded in the context of the present case, the other *Palmer* criteria remain applicable. In particular, the relevance of the fresh evidence and its credibility are important factors to consider: [citations omitted]. In addition, it is clear that the fresh evidence must be otherwise admissible in the sense that it complies with the generally applicable rules of evidence: [citations omitted] Evidence comprised of hearsay, speculation, opinion or mere argument is no more admissible as fresh evidence on appeal than it is at trial: [citations omitted].

[37] This approach was reaffirmed in *R. v. Aulakh*, 2012 BCCA 340 and *R. v. Mehl*, 2021 BCCA 264 at para. 23.

[38] The way to approach the admissibility issue is to determine whether, based on the fresh evidence, there was a miscarriage of justice as a result of counsel's conduct in the context of the applicable legal framework. If so, the evidence should be admitted and the appeal allowed.

[39] I note the observations of the Court in *R. v. Moazami*, 2021 BCCA 328:

> [236] We would like to make an observation regarding how fresh evidence is addressed in the context of ineffective assistance of counsel (or any issue affecting the integrity of a trial). The test for the admission of such evidence is a modified *Palmer* test, as outlined in both this section and in the abuse of process section of these reasons. The jurisprudence from this Court frames the issue in two ways, once the evidence has been found to be reliable and relevant: i) the evidence is "admitted" for the limited purpose of determining the issue at hand: *Aulakh* at para. 68, and cases that have followed it such as *Ball* at para. 103 and *R. v. Jerace* 2021 BCCA 94 at para. 108; and ii) the Court "receives" the evidence (per the language in s. 683(1)(d) set out above), and "admits" the evidence only if a miscarriage of justice is shown. Once admitted, a remedy (usually a new trial), is granted: *Mehl* at para. 23, *Hamzehali* at para. 39
>
> [237] In our view, the two approaches are not different in substance, only language. The language used in the second approach is perhaps more consistent with the *Criminal Code* and *Stolar* at para. 14, but both have the same end result. In this case, we have received and considered all of the evidence submitted, but have dismissed the applications to adduce fresh evidence.

[40] The test for assessing alleged ineffectiveness is set out in in *R. v. G.D.B.*, 2000 SCC 22:

> [26] The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> [27] Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> [28] Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> [29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, *supra*, at p. 697).

[41] S.C. and his trial lawyer filed affidavits, and both testified before the Court.

[42] S.C. appears to be functionally illiterate. The first two paragraphs of his affidavit were prepared by him to demonstrate his inability to write. He and his trial counsel agreed in their testimony in this Court that she read the disclosure information to him at one of their meetings.

[43] Of relevance to the issues in this appeal, S.C. deposed that he relied heavily on his lawyer; that he had never been in trouble with the law before this charge; and that he gave his lawyer a number of instructions that he believed were not followed. These include: advising her that he had many good character references, but she advised him that they could not be used during the trial; that A.B. made false allegations of a similar nature regarding three other people, and his lawyer told him that the evidence was not relevant; that A.B. "came onto" his brother several times, which he felt was relevant because A.B. had said she would not have sexual activity

with a cousin, but his lawyer told him that evidence was not important and could not be used at trial; and that a couple of days after the alleged assault, A.B. was drinking and partying in a local bar, but his lawyer told him that information could not be used at trial; and that his lawyer did not follow-up on the lack of DNA on the back of A.B.'s tank top.

[44] He further deposed that he did not understand what "voluntariness" meant in the context of his statement to the police, and did not understand that he could object to the admission of that statement. He deposed that when he testified, he said that the police told him that they could keep him in the cells for 48 hours; that he was hungover; that he had had a seizure and wasn't feeling well; and believed he would have to stay in the cells for 48 hours if he did not talk to the police, so he told them what they wanted to know.

[45] In response, S.C.'s lawyer deposed that she spoke with him on the telephone once and met him, she believed, in her office for several hours on February 13, 2019 and at other times.

[46] She acknowledged that she told S.C. that good character references were not relevant, citing legal principles that good character is of limited value in sexual offence trials.

[47] She acknowledged that S.C. did tell her about false allegations by A.B. against others, but she believed that they were not admissible pursuant to s. 276 of the *Criminal Code*. She also acknowledged that S.C. told her about A.B. "coming onto" to his brother, but again felt that s. 276 of the *Criminal Code* prevented the admission of that evidence. Similarly, counsel was of the opinion that evidence of A.B. drinking in a bar after the event was irrelevant.

[48] In terms of the DNA testing, counsel was of the view that cross-examining the expert regarding the tank top would not have advanced the defence, nor would cross-examining the complainant regarding what she was wearing.

[49] The lawyer deposed, in relation to the voluntariness of the statement that:

> 13. In response to paragraph 28 of [S.C.]'s Affidavit, I reviewed all the disclosure with [S.C.], including what happened at the police detachment and I did not feel there was sufficient evidence to argue that [S.C.]'s statement was not voluntary. I assessed the grounds to exclude, and I was satisfied that the statement would not have been excluded. I explained to [S.C.] that we could argue that his statement was not voluntary, but based on his answers to my questions, specifically that he felt that he had nothing to hide, I felt it would be determined to be voluntary. [S.C.] provided additional information in court that he did not tell me when I asked him about his statement.
>
> 14. In response to paragraph 29 of [S.C.]'s Affidavit, I do recall [S.C.] telling me that he was hungover, tired and did not recall much of what had happened the night before. He also thought he might have suffered a seizure in the morning, but he did not advise the RCMP of this fact. He told me he did not feel threatened and basically told the truth that he did not really remember what happened. He never told me that the police officer told him they could hold him for 48 hours and that he would have to stay in the cells for 2 days if he did not give a statement. What he told me is that the police told him that if he did not provide a penile swab then he would have to wait in the cell until they got a warrant.

[50] S.C.'s evidence was generally consistent with his affidavit. He did not recall a meeting of several hours with his lawyer, only shorter meetings. He testified that he told her that he had had a seizure the morning of his arrest; that he did not feel well; that his memory was uncertain and he could not remember what had happened; and that he felt threatened as the police said they could hold him for 48 hours.

[51] When asked about the alleged conduct of A.B. with his brother, T.J., S.C. said that he had not seen anything himself, except A.B. grabbing T.J.'s arm, or trying to grab him, years ago. No affidavit was filed by T.J. No explanation of the alleged prior conduct was given, except that "she came onto him".

[52] The lawyer testified that the case occurred during a circuit court. She had travelled from Whitehorse to the town where the circuit was being held, and after appearances on April 9, met with S.C. for the trial the next day. She was representing nine clients on the two-day circuit, but only had the one trial.

[53] The lawyer was cross-examined on her notes, and acknowledged that she was aware that notes were very important, however, she agreed that she was not a

good note-taker. She had notes from what appeared to be three client meetings with S.C., but April 9 was the only date recorded in her notes.

[54] She testified that she recalled that S.C. told her that he thought he had a seizure the morning he was arrested. She said she was surprised when he testified at trial that he thought he had no choice but to provide a statement. She testified that he had not told her that previously. In her affidavit, she said that he had not told her that the police said they would hold him for 48 hours; indeed, she re-examined him on this point. However, when reviewing emails to the Crown dated February 7, 2019, in response to a Crown request to provide her position on the voluntariness of the statement, the lawyer said to the Crown:

> I cannot admit that his statement was voluntary. If you wish to rely on it, then I presume we will have to do a [*voir dire*] with [Corporal] Stewart. [S.C.] will say he thought he had no choice but to give a statement and he didn't understand his rights. He also suffered a seizure that morning before he was arrested and he claims it affected his ability to recall.

[55] She acknowledged that she had forgotten that email and those instructions.

[56] The Crown sent another email on April 9, 2019, the day before trial, asking about voluntariness, so she knew what witnesses she needed at trial. A response came from counsel for S.C. at 4:23 p.m. that, "I met with my client and we will not be disputing the voluntariness of his statement".

[57] In the lawyer's notes from April 9, there is a reference to "voluntariness" and "Thought had to give it, but also wanted to give it".

[58] Counsel agreed that if a person "thought they had to give a statement", that could affect the voluntariness of the statement. She agreed that there was no reason not to challenge the voluntariness of the statement, and that she was aware that the Crown intended to use it to cross-examine S.C. She thought the trial would have to be adjourned if she challenged the voluntariness of the statement, but S.C. was on bail pending his trial, so that was not a reason to rush forward with the trial. She said the decision not to contest voluntariness on April 9 was rushed. She acknowledged

that the reasons for challenging the voluntariness of the statement in her February 7 email were the same as what S.C. testified at trial.

The Failure to Hold a *Voir Dire*

[59] I address this ground first, as in my view, the trial judge erred in failing to hold a *voir dire*. The error cannot be cured by the application of s. 686(1)(b)(iii) of the *Criminal Code*, and I would order a new trial on that basis.

Admission of S.C.'s statement to the police

Legal Framework of the Confessions Rule

[60] It is trite law that an out-of-court statement by an accused person to a person in authority is not admissible at trial unless and until the Crown proves, beyond a reasonable doubt, that the statement is voluntary. *R. v. Hodgson*, [1998] 2 S.C.R. 449 at paras. 12, 29. A statement is voluntary when it is given without fear of prejudice or hope of advantage, and is the product of an operating mind: *Hodgson* at para. 15.

[61] In *Hodgson*, the Court discussed the notion of trial fairness in the context of the confessions rule, quoting the following, at para. 22:

> …More recently, McLachlin J. in *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 173 specifically linked the confessions rule to fundamental notions of fairness and the principle that accused persons should not be conscripted to provide evidence against themselves. She put it in this way:
>
> > . . . one of the themes running through the jurisprudence on confessions is the idea that a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police. This idea is accompanied by a correlative concern with the repute and integrity of the judicial process. This theme has not always been ascendant. Yet, its importance cannot be denied. It persists, both in Canadian jurisprudence and in the rules governing the rights of suspects in other countries.

[62] The Court in *Hodgson* considered when a trial judge needs to hold a *voir dire* of their own motion, and the role of the appellate court when a *voir dire* is not held:

> 41 The trial judge has a duty "to conduct the trial judicially quite apart from lapses of counsel": see *R. v. Sweezey* (1974), 20 C.C.C. (2d) 400 (Ont.

> C.A.), at p. 417. This includes the duty to hold a *voir dire* whenever the prosecution seeks to adduce a statement of the accused made to a person in authority: see pp. 417-18. However, where the defence has not requested a *voir dire* and a statement of the accused is admitted into evidence, the trial judge will only have committed reversible error if clear evidence existed in the record which objectively should have alerted him or her to the need for a *voir dire* notwithstanding counsel's silence. Thus, the test for holding a *voir dire* is assessed by an appellate court's objective review of the evidence in the record to determine whether something should have triggered the trial judge's obligation to conduct an inquiry. This test is different from the test applicable on the *voir dire*, which requires the trial judge to undertake an examination of the reasonable belief of the accused and the circumstances surrounding the making of the statement to determine both whether the receiver is a person in authority and whether the statement was made voluntarily.
>
> …
>
> 44 Specifically, the reasoning in [*Erven v. The Queen*, [1979] 1 S.C.R. 926], with which I agree, has two implications for the present case. First, the requirement that a *voir dire* be held cannot be founded upon the presence of evidence which is conclusive of the very issue to be examined on the *voir dire*. Second, a *voir dire* is required in respect of any statement made by an accused person to a "person in authority". See *Erven*, *supra*, at p. 931. Thus, given the highly prejudicial nature of confession evidence, the trial judge has an obligation to hold a *voir dire* of his or her own motion, notwithstanding the absence of any request by counsel, wherever the Crown seeks to adduce a statement made by an accused to a person in authority. Clearly, counsel for the accused may waive the *voir dire*. Once the waiver is given, it is unnecessary to hold the *voir dire*.
>
> 45 However, the trial judge's obligation is triggered only where the evidence makes the need for a *voir dire* clear. Evidence which clearly demonstrates that the receiver of the statement made by the accused was closely connected to the authorities should alert the trial judge to hold a *voir dire*. This evidence progresses along a spectrum. That is, where the receiver of the statement is a "conventional" person in authority, such as a police officer or prison guard, the trial judge clearly has an obligation to proceed to a *voir dire*. In such a case, the connection to the authorities is readily apparent. Similarly, where the evidence clearly discloses a close connection between the receiver of the statement and the authorities which indicates that the receiver was, in the circumstances, acting as a person in authority, this may be sufficient to trigger the trial judge's obligation to hold a *voir dire*.
>
> [Emphasis added.]

[63] Thus, whenever a statement to a person in authority is tendered by the Crown, a trial judge has the obligation to hold a *voir dire* to determine voluntariness, even if one is not requested—unless there is a waiver of the *voir dire* by the defence.

[64] On appellate review, reversible error based on the failure to hold a *voir dire* occurs only when clear evidence existed that objectively should have alerted the judge to the need for a *voir dire*, notwithstanding defence counsel's silence. The appellate court conducts an objective review of the evidence to determine whether something should have triggered the trial judge's obligation to conduct an inquiry. In cases such as this one, where it is said that the defence waived the necessity of a *voir dire* in advance of the trial and obviated the need for a voluntariness enquiry, the failure to hold a *voir dire* will amount to reversible error if the waiver was not valid.

Discussion

[65] The day prior to the trial, defence counsel advised the Crown that the *voir dire* with respect to voluntariness would be waived. In my view, this was not a proper waiver, as discussed below.

[66] The Crown did not tender the statement as part of her case, but kept it in her pocket to use during cross-examination if S.C. testified. The trial judge was <u>not</u> told of the waiver of voluntariness until after cross-examination was concluded. The moment cross-examination commenced in relation to that statement, the trial judge had an obligation to stop the proceedings and declare a *voir dire*, or at the very least, be satisfied that there was a clear and unequivocal waiver of the *voir dire*. He did not. S.C. testified to a number of things that were "red flags" in relation to the issue of voluntariness. He said that he had had a seizure that morning and his memory was "wiped". He said he did not remember what happened. He thought he had to give a statement or he would be held for 48 hours. He was not feeling well and did not want to be held for 48 hours; he wanted to go home. He told the police what he thought they wanted to hear so he could go home. The evidence of S.C. should have alerted the trial judge of the need to declare a *voir dire* and assess the voluntariness of the statement.

[67] In my view, when the record is viewed objectively, there is clear evidence for this Court to determine that the evidence of S.C. should have triggered the trial judge's obligation to conduct an inquiry. Had he done so, he would have been told

that the defence advised the Crown prior to the trial that it was waiving the necessity of a voluntariness *voir dire*. At that point, in light of S.C.'s evidence, the judge was required to satisfy himself that the waiver was valid.

[68] On the evidence before this Court, including the record, affidavits and testimony, it appears that counsel should not have waived the voluntariness of the statement. In her email of February 7, defence counsel advised the Crown the basis on which she thought the statement was not voluntary (why she would disclose this to the Crown is unclear). Counsel acknowledged in her evidence that she forgot the contents of that email, as in her affidavit she attested that S.C.'s evidence surprised her—when, in fact, much of it is outlined in the email. Nothing had changed between February and April when she made the admittedly rushed decision to waive voluntariness.

[69] Given the potential for S.C.'s statement to have been improperly admitted, and the effect on the credibility findings of the trial judge, even if the waiver had been appropriate when it was made, it fell by the wayside when S.C. testified. As noted above, S.C.'s evidence at trial raised sufficient red flags that the judge, the Crown, and defence counsel all should have been alive to the fact that voluntariness of the statement was very much in issue.

[70] In my opinion, the statement should not have been referred to, or admitted, without the benefit of a *voir dire* to assess voluntariness. In my view, it was clear from S.C.'s evidence during the trial, that there was a live issue with respect to the voluntariness of his statement to the police and the purported waiver of the necessity to hold a *voir dire* was invalid.

[71] Normally, credibility findings are the sole domain of the trial judge, and given considerable deference. Here, however, the judge, in his reasons, based his finding

that S.C. was not credible in large part based on the cross-examination of S.C. on his statement to the police:

> [12] S.C. testified on his own behalf. He indicated that he had "hung out" with [A.B.] on as many as 25 occasions during the year prior to that event. His telling of the night's events is quite different.
>
> [13] After inviting [A.B.] over to his house, the two began drinking, were talking about relationships while playing cards in the kitchen, and then started to watch a movie in the bedroom. They started kissing. Pretty soon their pants were off and they were having intercourse, but both suddenly stopped as they both apparently had the same simultaneous epiphany that this was "wrong". He then went to the living room and fell asleep.
>
> [14] S.C. is of the view that he then must have had a seizure due to his excessive alcohol consumption. He came to this conclusion because when he woke up, he did not know where he was and had no recollection of the night before, "My memory was wiped".
>
> [15] The next thing S.C. knew, the police were at his house. He subsequently gave video statement to the police which was "inaccurate" because his memory was not yet fully restored. He failed to mention anything about a seizure to the police.
>
> [16] S.C. says on the one hand, he thought she was consenting, then "I would never do something like this", that is, have sex with his cousin. He never discussed having sex with [A.B.]. "[A.B.] never stopped me".
>
> [17] While S.C.'s memory was faulty upon awakening, he was sure his current memory is accurate. When asked whether he ejaculated on [A.B.], he said, "No", "Don't know", "Maybe". He did not remember the event accurately when speaking with the police because he was, "Too ashamed. As far as I remember, I did not put my penis inside her. I was scared, so I told the police I might've done it."
>
> [18] The version of events related by S.C. was garbled, confused, illogical, and essentially incapable of belief.

[72] The reasons for judgment demonstrate that the trial judge relied on S.C.'s statement when he assessed, and rejected, S.C.'s evidence as not credible.

Application of the Curative Proviso

[73] I have concluded that the trial judge erred when he failed to declare a *voir dire* and assess voluntariness. The Crown, however, seeks to invoke s. 686(1)(b)(iii) to

dismiss the appeal on the basis that admitting the statement did not result in a substantial wrong or miscarriage of justice:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> …
>
> (b) may dismiss the appeal where
>
> …
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

[74] In order to invoke the curative proviso, the Crown must show there is no "reasonable possibility that the verdict would have been different had the error ... not been made": *R. v. Sekhon*, 2014 SCC 15 at para. 53.

[75] In *R. v. Van*, 2009 SCC 22 at para. 34, the Court clarified the two categories of error where s. 686(1)(b)(iii) applies:

a. harmless or minor errors that could not have had any impact on the verdict; and

b. serious errors that would justify a new trial, but for the fact that the evidence against the accused is so overwhelming that any other verdict would have been impossible to obtain.

[76] In determining whether an error falls into the first category, the overriding question is whether the error, on its face or in its effects, was so minor, so irrelevant to the ultimate issue, or so clearly non-prejudicial, that no reasonable judge or jury could possibly have rendered a different verdict if the error had not been made: *Van* at para. 35.

[77] The second category of error arises where "the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result". This is a higher standard than beyond a reasonable doubt, which reflects the fact that it is

difficult for an appellate court to consider retroactively the effect that an error of law could reasonably have had on the outcome. This is particularly true when considering a jury trial where no detailed findings of fact will have been made. See *R. v. Trochym*, 2007 SCC 6 at para. 82.

[78] Where credibility is a central issue in the case and it is improperly undermined, appellate courts are reluctant to apply the curative proviso: *R. v. Eshghabadi*, 2008 BCCA 163 at para. 15.

[79] S.C.'s statement to the police was incorrectly admitted into evidence. The statement was used against S.C. on the central issue—the assessment of his credibility. Thus, it cannot be said that, "there is no reasonable possibility that the verdict would have been different had the error …not been made". As a result, it cannot be said there was no substantial wrong or miscarriage of justice, and the curative proviso cannot be applied.

[80] I would allow the appeal on the basis that the trial judge erred in failing to declare a *voir dire* to determine the voluntariness of S.C.'s statement, and would order a new trial.

Grounds of Appeal in Relation to the Trial Judge's Reasons

[81] Appellate courts have often been reminded not to embark on a technical search for error in the trial judge's reasons for judgment. Reasons are to be considered in context and applying a functional approach: *R. v. G.F.*, 2021 SCC 20 at para. 5.

[82] S.C. raises four issues in relation to the reasons for judgment. In my view, these issues overlap, and I will address them together.

[83] The context in which to consider the reasons include that counsel argued that if A.B. did not consent to sexual activity, then S.C. had a mistaken belief in communicated consent. In my view, mistaken belief in communicated consent did not arise on the evidence in this case. A.B. testified that she did not consent; S.C.

testified that she did consent. However, defence counsel raised mistaken belief in communicated consent in submissions, and the judge addressed the issue. His manner of approaching the issue is alleged to be in error.

[84] S.C. submits that the trial judge erred in concluding at paras. 19 and 20:

> [19] I accept the version of events as depicted by [A.B.] as credible and believable.
>
> [20] Nevertheless, having made that finding [that A.B. was credible], even on S.C.'s version of the events, there is nothing in what he relates that could be taken to constitute consent on [A.B.]'s part. He took no steps to ascertain that she was consenting.
>
> [Emphasis added.]

[85] S.C. submits that the judge placed the onus on S.C. to establish consent. At first blush, the paragraph does appear to have that effect. However, when considered in context, the reasons can be read as the judge addressing the issue of consent first, at para. 19. Once he accepted A.B.'s evidence that she did not subjectively consent, and rejected that of S.C., he then turned to the issue of mistaken belief in communicated consent, which does require evidence of reasonable steps to ascertain consent: *Criminal Code*, s. 273.2(b). Thus, when paras. 19 and 20 are read together, one could read the reasons as the judge addressing consent in para. 19 and mistaken belief in communicated consent in para. 20, and therefore did not commit the error of placing an onus on S.C. to establish consent.

[86] S.C. submits that in para. 20, the judge misunderstood the issue of actual or subjective consent on the part of A.B. The judge did not refer to or consider S.C.'s evidence that A.B. "kissed [him] back" and that she removed her own pants in advance of sexual intercourse, which was some evidence that A.B. may have subjectively consented. He accepted the evidence of A.B. without referring to the evidence of S.C. on the issue of A.B.'s subjective consent. The judge instead considered S.C.'s evidence as a whole, and concluded that his evidence was not capable of belief, and by implication, rejected S.C.'s evidence in relation to A.B.'s subjective consent.

[87] While the trial judge's reasons are not as clear as they could be on the issue of consent, he accepted the evidence of A.B., and her evidence was clear that she did not consent to sexual activity. I do not find that the trial judge made a discrete error in failing to refer to S.C.'s evidence in relation to consent by A.B. It would have been preferable for the judge to refer to the evidence of S.C., but when the reasons are read as a whole, it cannot be said that he committed a reversible error in this regard.

[88] Next, S.C. submits that the judge failed to apply the proper burden of proof. He submits that is demonstrated in para. 20 of the reasons for judgment, as set out above.

[89] This ground of appeal is raised above, and simply framed differently as a separate ground. S.C. does not have to point to evidence that he took reasonable steps to ascertain that A.B. was consenting, unless he is relying on a mistaken belief in communicated consent: s. 273.2(b). Here, S.C., (erroneously, in my view), through his counsel's submissions, did rely on a mistaken belief in communicated consent. As noted above, the trial judge accepted the evidence that A.B. did not consent, and did not find S.C. credible. He then turned to the issue of mistaken belief in communicated consent. I concluded that, while not particularly well worded, the trial judge did not make a reversible error. Similarly, I see no basis for finding that the trial judge failed to apply the correct burden of proof when the reasons are read functionally and contextually, as a whole.

[90] Next, S.C. submits that the trial judge misapprehended his evidence at para. 16:

> [16] S.C. says on the one hand, he thought she was consenting, then "I would never do something like this", that is, have sex with his cousin. He never discussed having sex with [A.B.]. "[A.B.] never stopped me".

[91] S.C. argues that he did not say that he would never have sex with his cousin. Second, S.C. did not say that A.B. "never stopped [him]" was a basis for inferring a mistaken belief in communicated consent.

[92] In addition, S.C. also says that the judge misapprehended his evidence as demonstrated in para. 17 of the reasons.

> [17] While S.C.'s memory was faulty upon awakening, he was sure his current memory is accurate. When asked whether he ejaculated on [A.B.], he said, "No", "Don't know", "Maybe". He did not remember the event accurately when speaking with the police because he was, "Too ashamed. As far as I remember, I did not put my penis inside her. I was scared, so I told the police I might've done it."

[93] The Crown concedes that the trial judge did misapprehend some of S.C.'s evidence. The Crown agrees that the judge "summarily expressed" S.C.'s evidence, however, it submits that the misapprehension was not a material one. In light of my conclusion with respect to S.C.'s statement, it is not necessary to parse the reasons for error, as the misapprehension affected the judge's assessment of S.C.'s evidence, and was closely linked with his statement to the police.

Ineffective Assistance of Counsel

[94] I have already addressed the issue arising from the waiver of a *voir* dire. It is not necessary to determine if the waiver of the voluntariness of the statement is sufficiently egregious to amount to ineffective assistance of counsel. However, the fact of the waiver does not assist the Crown in establishing its burden to invoke s. 686(1)(b)(iii).

[95] I will address the remaining issues as listed by S.C.:

i. Good character references

[96] S.C.'s lawyer advised him that good character references were not helpful. In my view, she did not give incorrect advice. The law is well-settled that in cases of sexual assault, good character references have little weight: *R. v. Profit*, [1993] 3 S.C.R. 637.

ii. Alleged prior false allegations of sexual assault by A.B. with respect to other people

[97] S.C.'s lawyer advised him that such allegations were not admissible pursuant to s. 276 of the *Criminal Code*. Generally, such evidence is inadmissible, either as a

result of the application of s. 276 of the *Code*, or the collateral facts rule of evidence. However, the evidence may be relevant in some circumstances, such as those set out in *R. v. Riley* (1992), 11 O.R. (3d) 151 (C.A.) at 154–155:

> The only legal basis of which we are aware that would justify the cross-examination of this complainant along the lines suggested would be in order to lay the foundation for a pattern of fabrication by the complainant of similar allegations of sexual assault against other men. This should not be encouraged unless the defence is in a position to establish that the complainant has recanted her earlier accusations or that they are demonstrably false.

[98] S.C.'s lawyer did not investigate the allegations in order to rule out their relevance. However, on appeal, no fresh evidence was tendered to support such allegations. Had there been relevant evidence available, it should have been tendered to support the allegation of ineffective assistance of counsel.

iii. Allegations that A.B. "came onto" S.C.'s brother, T.J.

[99] The evidence was tendered to address the issue of A.B.'s credibility with respect to her statement that one of the reasons she did not consent to sexual activity was because S.C. was her cousin. T.J. is also her cousin. That evidence was potentially admissible on that point, and not necessarily excluded by s. 276. The evidence was apparently not tendered for the inference that A.B. was more likely to have consented, or was less worthy of belief, but to present a challenge to her evidence regarding consent. S.C.'s lawyer should have investigated the allegation in order to determine if the evidence was "capable of being admissible", instead of simply concluding it was not admissible. However, on appeal, there was no admissible evidence supporting any activity with A.B. and T.J. other than S.C.'s evidence that he saw A.B. grab T.J.'s arm or grab at him some time ago. That evidence is irrelevant. No affidavit was filed from T.J. that supported the allegations by S.C. that A.B. "came onto T.J.".

[100] I note that the issue on appeal is not whether the evidence was admissible at trial, or even whether it was "capable of being admissible", but whether defence counsel should have conducted further inquiries.

iv. That A.B. was seen drinking and partying shortly after the alleged sexual assault

[101] In my view, counsel for S.C. was correct when she concluded that evidence was irrelevant.

v. Failing to consult with the DNA expert with respect to testing A.B.'s tank top

[102] A.B. testified that S.C. ejaculated on her back. S.C.'s lawyer made unsuccessful efforts the day of the trial to speak with the DNA expert regarding whether the back of A.B.'s tank top had been tested for S.C.'s DNA. As noted, the front of the top had been tested. The absence of evidence permitted counsel to argue that there was no evidence that S.C. had ejaculated on her back. She did not know if a test had occurred, and if so, whether it was positive but not mentioned in the report. In this instance, counsel concluded that it was better to have an absence of evidence rather than risk positive evidence being uncovered. She was not wrong in that regard.

vi. Cross-examination and closing submissions

[103] S.C. submitted that counsel failed to cross-examine A.B. on inconsistencies between her trial evidence and her statement to the police. No examples were provided.

[104] In terms of closing submissions, S.C. submits that defence counsel "applauded the complainant's evidence as believable". In fact, the final submission was as follows:

> And I mean admittedly, [A.B.] was quite convincing in her evidence. Her recollection was quite good on some things, but in my submission it was maybe too convincing – or too good in some areas, and she was very vague in other areas in her recollection, which is, in my submission, because of the amount of alcohol. And it's just dangerous to accept certain parts of her evidence when there's – she's very vague about other parts of her evidence.

[105] The final submission did not applaud the complainant's evidence as believable, but pointed out flaws in the evidence in an effort to undermine the reliability of the testimony.

[106] No flaw in counsel's conduct has been demonstrated on that basis.

[107] In my view, there is no basis to overturn the conviction arising from counsel's conduct.

Conclusion

[108] I would admit the fresh evidence to the extent that the question of the voluntariness of the statement and validity of the waiver is addressed. I would not admit the evidence tendered with respect to the other grounds of appeal. In my view, s. 276 is not engaged in this appeal, as the evidence the appellant says should have been considered and called by the defence at the trial has not been shown to meet the criteria of prior sexual activity as noted in the *Criminal Code*.

[109] I would allow the appeal and order a new trial on the basis that the trial judge erred in failing to hold a *voir dire* to determine whether S.C.'s statement to the police was voluntary.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Justice Charlesworth"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"