

# SUPREME COURT OF YUKON

Citation: *R v Amin*,  
2022 YKSC 51

Date: 20221014  
S.C. No. 20-01515D  
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

RUDRA PULASTYAKUMAR AMIN

Before Justice K. Wenckebach

Counsel for the Crown

Somboun Tsai

Counsel for the Defence

Jennifer Budgell

**Publication, broadcast, or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*. [This ban does not apply to Michelle Palardy]**

**This decision was delivered in the form of Oral Reasons on October 14, 2022. The Reasons have since been edited for transcription without changing the substance.**

## REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The accused, Rudra Amin, is charged with seven counts of sexual assault against three complainants. The matter proceeded to trial before a jury. After the defence and Crown made their closing addresses, defence applied for a mistrial. Mr. Amin says that Crown counsel made improper closing submissions. He submits that the problems with the submissions are so extensive that

they cannot be cured by instructions. The Crown says that the submissions were not improper but, if I decide otherwise, instructions can be provided to the jury.

[2] The questions before me are:

- (a) Were the Crown's submissions improper?; and
- (b) If they were, what is the appropriate remedy?

### **ANALYSIS**

- (a) Were the Crown's submissions improper?

[3] I find that Crown's submissions were improper.

[4] The submissions in issue are twofold. First, in his closing address, the Crown stated several times that Mr. Amin had strong sexual urges and, at times, the Crown linked these statements to the fact that Mr. Amin was unfaithful to his girlfriend or was dating Michelle Palardy and A.G. at the same time.

[5] For instance, at one point, Crown stated that Mr. Amin was "a young man with a raging, lustful sexual appetite". He followed this by noting that, at the time he was accused of sexually assaulting one complainant, S.G., he was in a relationship with a second complainant, Michelle Palardy, and would soon after enter into a relationship with A.G. as well. He also said that Mr. Amin was "young, with an active, lustful sexual appetite". Shortly thereafter, the Crown said that Mr. Amin was a "young man with an intense sexual appetite" and had "no qualms about cheating on his girlfriend".

[6] When he made these statements, he would sometimes pose the question whether, based on what the jury members knew of Mr. Amin, it would be more consistent for Mr. Amin to act properly or "act on his sexual urges without the complainant's consent".

[7] Second, the other submission at issue occurred at the end of the Crown’s statement. Crown called Mr. Amin “a real bastard” and stated that the jury should “send a message” to Mr. Amin.

[8] Crown counsel has a special and specific role that shapes the submissions they can present in their closing addresses (*R v Clyde*, 2021 ONCA 810 at para. 34 (“*Clyde*”).

[9] Firstly, Crown must not make “legally impermissible submissions that effectively undermine a requisite degree of fairness” (*Clyde* at para. 34).

[10] Additionally, Crown must be careful in the words they use in their closing statement. Crown’s concern is not winning or losing but, rather, they must demonstrate moderation and impartiality. Thus, the Crown should not “engage in inflammatory rhetoric” or “demeaning commentary or sarcasm” (*Clyde* at para. 34).

[11] I will consider the Crown’s references to Mr. Amin’s sexual appetite first and then the language he chose.

#### *References to Sexual Appetite*

[12] By making statements about Mr. Amin’s sexual appetite, Crown made legally impermissible submissions. Thus, the statements invite the jury to adopt assumptions from so-called “common sense” that are not based on evidence. It is improper for the trier of fact to use ““common sense” or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour” (*R v JC*, 2021 ONCA 131 at para. 61).

[13] In this case, Crown counsel linked the fact that Mr. Amin was in relationships with two women without their knowledge and made sexual advances towards a third with the

conclusion that he had strong sexual appetite. No evidence was adduced about Mr. Amin's sexual activities other than the offences for which he was charged. There was thus no evidence about the sexual relationships Mr. Amin had with the two women or with anybody else. There was therefore no reason to conclude that Mr. Amin sought these relationships with the two women because of his sexual appetite. The Crown was asking the jury to make conclusions about whether Mr. Amin sexually assaulted women based on assumptions about his sexual appetite that were, in turn, based on spurious reasoning arising from how many women he dated at a time.

[14] In addition, the submissions were legally impermissible because they could lead the jury to speculate about the complainants' sexual history and could lead to improper reasoning based on myths and stereotypes.

[15] Evidence about a complainant's prior sexual activity has historically been used for improper purposes in sexual assault trials. Because of this, an accused must apply under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") to introduce evidence of a complainant's prior sexual activity.

[16] Section 276 does not apply to the Crown. But where the Crown is seeking to introduce evidence of prior sexual history, a *voir dire* should be held to ensure that the evidence is being introduced for a proper purpose (*R v Barton*, 2019 SCC 33 at para. 80). Both Crown and defence are limited in the use they can make of a complainant's sexual history.

[17] Moreover, evidence of a relationship implying sexual activity is captured by s. 276 (*R v Goldfinch*, 2019 SCC 38 at para. 54).

[18] Here, a s. 276 application was brought [redacted].

[19] In his closing address, Crown counsel [redacted] did not violate my order.

However, by linking the fact he dated both women at once to Mr. Amin's supposed strong sexual appetite, he opened the door to speculation about Michelle Palardy's and A.G.'s sexual relationships with Mr. Amin. A jury member could conclude that Crown counsel was insinuating that Michelle Palardy and A.G. each had a sexual relationship with Mr. Amin but because of his sexual appetites that was not enough for him.

[20] Alternatively, a jury member could also believe that Crown counsel was insinuating that because Mr. Amin was dating two women and attempted to have sexual activity with a third, he could not control his sexual impulses. Either way, these speculations, or others, could lead the jury to rely on myths and stereotypes in its reasoning.

[21] Crown's submissions are also legally impermissible because they invite the jury to engage in propensity reasoning. The Crown's submissions can lead to propensity reasoning in two ways: the Crown suggested several times that, given that the jury members knew that Mr. Amin was dating two people at once and had a strong sexual appetite, it was more likely that Mr. Amin had behaved improperly with the complainants than he behaved properly. In doing so, the Crown asked the jury to conclude that Mr. Amin sexually assaulted the complainants because he was unfaithful to his girlfriend.

[22] Moreover, Crown counsel's submissions could lead the jury to use cross-count evidence in impermissible ways. The trier of fact is allowed to use cross-count evidence to assess credibility. They are not allowed to use evidence from one count as proof that the accused is the sort of person who would commit the offences charged, however.

Crown counsel's submissions did not explicitly do this. However, Crown's problematic use of evidence from one charge on his submissions on another charge could lead a jury member to easily fall into this error.

[23] Therefore, Crown's submissions were legally impermissible in several ways.

[24] I also find that Crown counsel used inflammatory rhetoric. Calling Mr. Amin a "real bastard" clearly crossed the line. The phrase "send a message to the accused" is not as egregious and could at times be appropriate. In this case, however, given the Crown's approach, it suggests that the Crown was asking the jury to punish Mr. Amin.

[25] Crown counsel is not on trial here, but it is concerning to me that during argument on the mistrial application he argued that he engaged in "rhetorical flourishes" rather than recognizing his error. Calling an accused a "bastard" is never appropriate.

[26] I therefore conclude that the Crown's submissions were improper.

(b) What is the appropriate remedy?

[27] I conclude that, given the nature of the submissions, I must intervene. In this case, instructions cannot cure the prejudice the submissions caused to Mr. Amin. A mistrial is required.

[28] The overarching question I must address is whether "Crown's closing address has caused a substantial wrong or miscarriage of justice, including by prejudicing the accused's right to a fair trial" (*Clyke* at para. 33).

[29] Where a Crown's comments have been sufficiently prejudicial, a court must intervene. It can do so providing clarifying instructions to the jury or by declaring a mistrial. Mistrials should be declared only in the clearest of cases.

[30] There are three reasons why in the case at bar the prejudice cannot be cured through instructions to the jury.

[31] First, the possibility of propensity reasoning is very high. Because of the nature of the charges in the evidence, there was already a real risk of propensity reasoning.

Mr. Amin is charged with seven counts of sexual assault against three complainants.

The complainants' evidence about how Mr. Amin sexually assaulted them, their relationships to him, and the types of touching he engaged in was also similar. Without a careful charge, jury members could engage in impermissible cross-count reasoning.

[32] As well, there was quite a bit of bad character evidence that was adduced. There was evidence that Mr. Amin cheated on his girlfriends and lied to them, which both Crown and defence drew out. There was also evidence that Mr. Amin was controlling and possessive in his relationship with Michelle Palardy. The Crown went so far as to say in his closing that the relationship was "abusive". Finally, one witness revealed that Mr. Amin had been rumoured to have been fired from his job.

[33] Except for the evidence about being fired, the bad character evidence was properly adduced. However, it was necessary to deal with the evidence carefully so that the jury would not engage in propensity reasoning. Because there was so much bad character evidence and because of the possibility of cross-count reasoning, Crown's address, which invited the jury to engage in propensity reasoning, made it more likely that even a strongly worded instruction would not be sufficient to prevent some propensity reasoning from occurring.

[34] Second, the submission that Mr. Amin had a strong sexual appetite and the conclusions that could be drawn from that was an important element of the Crown's

submissions, albeit not the only element. Mr. Amin's counsel submitted that the Crown made the statement five times. In my review of the closing, Crown made the statement about incidents involving at least two of the three complainants and were not made as a passing reference. These submissions would have made an impression on the jury.

[35] Third, the submissions were about key issues in the trial: whether the sexual activity happened and what the nature of the sexual activity was. Improper submissions that bear directly on the actual issue in the case is a factor in considering whether to intervene and, if so, how (*Clyke* at para. 36, citing *R v Pisani*, [1971] SCR 738 at 740).

[36] I have also considered that we are at the end of the proceeding. I have considered that the jury members have interrupted their lives for two weeks for this trial and that the three complainants have had to provide extensive and what was likely very difficult testimony.

[37] However, with regret, taking the factors together, I must conclude that even a perfect instruction would not cure the prejudice to Mr. Amin, and I therefore declare a mistrial.

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WENCKEBACH J.