COURT OF APPEAL OF YUKON

Citation: *R. v. J.N.N.*,
2025 YKCA 11

Date: 20250905
Docket: 22-YU893

Between:

Rex

Respondent

And

J.N.N.

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraphs 7, 49, 56, and 57(d) on September 9, 2025.

Restriction on publication: A publication ban has been imposed under section 486.4 restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant, referred to in this judgment as "the complainant". This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Cooper
The Honourable Madam Justice Fenlon

On appeal from: An order of the Territorial Court of Yukon, dated October 13, 2021 (conviction) (*R. v. J.N.N.*, 2021 YKTC 53, Whitehorse Docket 20-00777).

Counsel for the Appellant:	B.R. Anderson
Counsel for the Respondent:	L. Lane
Place and Date of Hearing:	Whitehorse, Yukon May 15-17, 2024
Place and Date of Judgment:	Whitehorse, Yukon September 5, 2025

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Cooper
The Honourable Madam Justice Fenlon

Summary:

The appellant was convicted of sexual assault. The only evidence connecting him to the assault was the presence of his DNA on the complainant's underwear. The Crown, without seeking leave to do so, asked the complainant whether she had previously had sexual relations with the appellant, and she replied that she had not. The trial judge found that, in light of her evidence, the only reasonable explanation for the presence of the appellant's DNA was that he committed the assault. On appeal, the appellant contends that the Crown should not have been permitted to pose the question without a voir dire. He also cites several examples that he says show that his counsel did not provide him with effective assistance at trial.

Held: Appeal allowed, new trial ordered. The Crown ought to have sought a voir dire and obtained leave before adducing evidence of the complainant's lack of sexual history with the accused. In the circumstances of the case, it seems inevitable that the Crown's questioning would have been authorized. If posing the question without a voir dire had been the only problem with the trial, the Court would have had to consider application of the proviso in s. 686(1)(b) of the Criminal Code. In this case, however, the evidence of trial counsel clearly establishes that she fell short in providing reasonable representation of the accused. It follows that there must be a new trial.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The appellant appeals from his conviction on a count of sexual assault, contrary to section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46.

The Evidence at Trial

[2] The complainant was a homeless person who lived in Whitehorse. For the most part, she lived outdoors, keeping her possessions in a backpack, and sleeping on benches or under trees. When there was space at the local emergency shelter, she slept there, and on occasion, she was able to sleep on couches at friends' homes.

[3] On the night prior to the assault, she was at the shelter. During the day on August 1, 2019, she was at several places in Whitehorse, eventually going to an apartment on Front Street that was the home of Dale Regett to do some cleaning for him. While carrying some laundry out of the bathroom, she was struck on the head and knocked unconscious. She did not see who hit her and had no real recollection of who was present in the apartment at that time. Her evidence did not suggest that she saw the appellant there.

[4] When she regained consciousness, the complainant found herself alone in the apartment. Her pants, socks, shoes and underwear had been removed. She put on her pants and socks, stuffed her underwear into her pant pocket, and left the apartment, returning to the shelter where she had stayed the previous night.

[5] At the shelter, she experienced sensations and physical symptoms consistent with having been penetrated vaginally. She spoke to a staff member, describing what had happened. The staff member convinced the complainant to go to the hospital, and accompanied her there. At the hospital, a sexual assault examination was performed. Vaginal swabs were taken, and some of her clothing, including the underwear she had put into her pocket, was taken by the police for forensic examination.

[6] Although some male DNA was detected in the vaginal swabs, the forensic laboratory was unable to obtain a profile of that DNA.

[7] Three areas of the underwear were found to be stained with human semen. The appellant's DNA was determined to be the major component detected in two of the stained areas. Those two areas also contained a minor component of DNA contributed by another person but the laboratory was unable to obtain a profile of that minor component. The third stain included DNA from three individuals, but no profiles could be obtained from that stain.

[8] Beyond the DNA evidence, there was nothing before the court that suggested that the appellant had been in the area of Mr. Regett's apartment on August 1, 2019, nor anything tying him to the assault. The only witness as to what occurred in Mr. Regett's apartment was the complainant, and she had limited recollection of events prior to being knocked unconscious. She had been drinking that day, and said that her recollection of events was "really fuzzy". Mr. Regett, who might have been in a position to clarify the circumstances at the apartment prior to the assault, was not available to give evidence as he died before the trial, and no statement from him was tendered.

[9] The complainant knew the appellant, having seen him at the emergency shelter. They had relatives in common, and she said that she "considered him family". They had talked at the shelter and "hung our a few times here and there", including in the smoking area outside the shelter, but "other than that, there was no relationship".

[10] At the end of the complainant's evidence in chief, she was asked questions with a view to showing that there was no reasonable explanation for the presence of the appellant's semen on the underwear she had been wearing prior to the assault, apart from his alleged participation in the assault:

> Q These underwear in the exhibit bag marked as Exhibit 7, where did they come from?

A Those are also my underwear. [the “also” is a reference to the fact that the complainant had earlier been asked questions about a different pair of underwear that she had put on at the hospital].

Q Are those underwear that you bought?

A Yes, those were underwear I'd boughten previously prior to 2019.

Q Okay. So you'd had them for a while, you know, prior to 2019.

A Yes.

Q Did you ever share this pair of underwear with anyone?

A No.

Q And I mean, apart from maybe - were these underwear that you would have had with you carried around in your backpack from time to time?

A Yes, that would have been. I always had extra underwear and socks and stuff like that in my bag.

Q Were these underwear ever out of your possession, to your knowledge, at any time in the months leading up to this event on August 1st, 2019?

A No.

Q To your knowledge, did [the appellant] ever handle or have these underwear in his possession?

A No.

Q Did you ever leave them anywhere unsecured and unattended?

A No. My bag was always with me and if it wasn't, they had lockers [at the emergency shelter that] I was able to-lock- my backpack up in.

Q Did you ever knowingly have any sexual contact with [the appellant]?

A No.

Q Did you ever knowingly consent to having any sexual contact with [the appellant]?

A No, I did not.

[11] The judge accepted this evidence and found that there was no reasonable possibility that the semen had been transferred to the underwear when it was laundered or at any subsequent time. He also found that the evidence eliminated any possibility that the semen was deposited on the underwear during consensual sexual activity.

[12] The simple question for the judge was whether the presence of the appellant's DNA in semen found on the complainant's underwear was proof of the appellant's involvement in a sexual assault. He found that it was:

> [66] I am satisfied beyond a reasonable doubt that the only way in which the DNA of [the appellant] and the semen of [the appellant] could have ended up on her clothing as described is if, in fact, he had been responsible, whether alone or in conjunction with unknown others, for removing [the complainant's] clothing for the purpose of some sort of sexual event, whether the event was intercourse, whether the event was digital penetration, or whether the event was something short of that. The only explanation that makes any sense in my mind for [the appellant]'s semen being found as it was, is that he was involved in a sexual event with her. That event must have occurred when she had been knocked to the floor.

[13] On this appeal, it is not suggested that the judge's findings of fact were inconsistent with the evidence. Rather, the appellant argues that that a new trial is required because:

a) The Crown improperly adduced evidence of the complainant's prior sexual history without first obtaining leave to do so; and

b) Defence counsel at trial provided ineffective representation.

[14] On the hearing of this appeal, we were satisfied that there was a *prima facie* basis for the contention that the accused did not receive effective representation at trial, and we granted a motion that we hear *viva voce* evidence from the appellant and from his trial counsel on that issue.

Evidence of Prior Sexual History

[15] The appellant contends that the Crown should not have been allowed to adduce evidence to the effect that the complainant had not engaged in prior sexual activity with the appellant without first obtaining leave to pursue that line of questioning.

[16] Section 276(1) of the *Criminal Code* specifically provides that in proceedings in respect of specific sexual offences (including sexual assault):

> … [E]vidence that the complainant has engaged in sexual activity, whether with the accused of with any other person, is not admissible to support an inference that, by reasons 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.

[17] Section 276(2) sets out a requirement for a *voir dire* where the accused seeks to adduce evidence of the complainant's sexual history:

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

[18] The stringent limitation on adducing evidence of the complainant's prior sexual history is designed to protect the complainant from prying and to avoid the so-called "twin myths" reasoning in sexual assault cases: *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

[19] While it is arguable that social attitudes towards sexual activity—and any relationship it might have to credibility or reliability—have changed substantially over the years, strict limits on evidence of sexual history remain in place; indeed they have, if anything, become more stringent in recent years: *R. v. Goldfinch*, 2019 SCC 38; *R. v. Kinamore*, 2025 SCC 19.

[20] Section 276(2), in its terms, applies only to evidence adduced by or on behalf of the accused, and is arguably confined to “sexual activity” and not to its absence. The courts, however, have formulated common law rules that mirror and amplify s. 276.

[21] The trial judge heard an application for a mistrial after he had given his judgment. He rejected the idea that the Crown’s evidence was improperly admitted.

[22] The Crown made similar submissions on this appeal, relying particularly on *R. v. Brothers*, 1995 ABCA 185, and *R. v. Pittiman* (2005), 198 C.C.C. (3d) 308, 2005 CanLII 23206 (Ont. C.A.), aff’d 2006 SCC 9. The appellant took the position that all evidence of a complainant’s prior sexual history is presumptively inadmissible, including an absence of such activity.

[23] *Kinamore*, decided after this appeal was argued, has laid to rest any suggestion that that questions going to an absence of sexual activity fall outside the ambit of “evidence of sexual history”. It overrules *Brothers* and *Pittiman*. Given the Supreme Court of Canada’s recent judgment in *Kinamore*, the trial judge’s reasoning on the mistrial application cannot stand, and the Crown’s main argument on this appeal must also fail.

[24] Further, *Kinamore* established that the Crown, as well as the accused, is precluded from adducing sexual history evidence without first making an application and obtaining permission from the trial judge.

[25] The Crown should have made an application to the court before it posed questions to the complainant aimed at adducing evidence of an absence of any sexual history between her and the appellant.

[26] It is clear to me that, had an application been made and a *voir dire* taken place, the evidence at issue in this case would have been allowed to be adduced. It is not evidence that is capable of inducing reliance on discriminatory beliefs or bias, prejudices the complainant’s personal dignity, or is capable of arousing sentiments of prejudice, sympathy, or hostility in the mind of the trier of fact. Rather, it simply

goes to the question of whether there is a rational explanation of the presence of the appellant's DNA on the complainant's underwear.

[27] In *Kinamore*, the Supreme Court of Canada mentioned *R. v. R.V.*, 2019 SCC 41, citing it at paras. 83–84 as an example of a situation in which evidence of an absence of sexual activity on the part of the complainant "was not introduced for inverse twin myth reasoning." In that case, the complainant's pregnancy was used as evidence that the accused had engaged in sexual activity with her. Her abstinence from sexual activity before the alleged assault was obviously relevant to the issue.

[28] Equally, in this case, the absence of any previous sexual contact between the complainant and the appellant was essential to rule out the possibility that the semen on her underwear was deposited prior to August 1, 2019. The evidence was adduced for that limited purpose, and not to boost the complainant's general credibility or standing in the eyes of the trier of fact.

[29] The appellant says that, notwithstanding that the evidence might have been found admissible after a *voir dire*, it must be excised because no *voir dire* took place. He says that the Crown cannot, in such a case, rely on the *curative proviso* in s. 686(1)(b) of the *Criminal Code*.

[30] The Crown attempts to avoid that issue, contending that "a close reading of the decision shows the judge did not perceive the evidence as being about prior sexual contact and did not rely on it in convicting the appellant."

[31] In my view, it is clear that the judge understood the evidence to be about prior sexual contact, and that he did rely on it as negating any possibility that the appellant's semen was deposited on the complainant's underwear during consensual activity prior to August 1, 2019. I am, therefore, not persuaded by the Crown's argument.

[32] I am not fully convinced that the *proviso* in s. 686(1)(b) could not apply in this case if the only defect were the failure on the part of the Crown, the defence, and the judge to recognize that a *voir dire* was necessary. If a *voir dire* would inevitably have allowed the questioning that, in fact, took place, it seems to me arguable that ss. 686(1)(b)(iii) and (iv) of the *Criminal Code* applies, and that the Court could dismiss the appeal.

[33] It is not necessary, however, to address that question. As I will indicate, it is apparent from his trial counsel's evidence that the appellant was denied effective representation by defence counsel.

Ineffective Representation by Counsel

[34] At the outset of this appeal, we acceded to the appellant's request to hear evidence going to the question of whether the appellant had effective representation at trial. Both the appellant and his trial counsel testified before the Court.

[35] In *R. v. Mehl*, 2021 BCCA 264, the Court of Appeal for British Columbia set out the requirements for a successful appeal based on ineffective assistance of trial counsel:

> [134] An appellant who asserts ineffective assistance of counsel must establish three things: (1) the factual foundation for the claim—that the acts or omissions of counsel that are alleged to be incompatible with the exercise of reasonable professional judgment in fact occurred: *R. v. G.D.B.*, 2000 SCC 22 at para. 27; (2) counsel's acts or omissions amounted to incompetence; and (3) counsel's ineffective representation caused a miscarriage of justice: *R. v. Archer*, 2005 CanLII 36444 (ON CA), [2005] O.J. No. 4348 at paras. 119–120 (C.A.).

[36] It is important to recognize that the standard that is applied to counsel's representation is not a standard of perfection, but rather a standard of competence. A court is not entitled to second-guess the decisions and strategies of counsel unless they display incompetence. In *Mehl*, at para. 135, the Court quoted from *R. v. Ball*, 2019 BCCA 32:

> [108] The bar for establishing professional incompetence is high and surpassing it is challenging. It is strongly presumed that counsel's conduct fell within the wide range of reasonable professional assistance, deference will

> be accorded to counsel's strategic and tactical decisions and the "wisdom of hindsight" has no place in the analysis.

[37] In *Ball*, at para. 109, Justice Dickson suggests that the Court should begin the analysis by considering the prejudice component of an ineffective representation claim before addressing the performance component. I agree with her view that the Court should avoid unnecessary "grading" of counsel's work and must not take on the role of the legal profession's governing body. Nonetheless, the question of the order in which the Court assesses the components of an ineffective representation claim is not one that is invariable. It will often be the case that the prejudice component cannot be adequately analyzed without a precise delineation of the extent of the inadequate performance.

[38] In my view, this is a case where it is helpful to start with a discussion of the nature of the deficiencies in performance.

[39] As I have indicated, we accepted affidavits and heard *viva voce* evidence from both the appellant and from his trial counsel. The appellant's evidence was often difficult to follow and was not entirely consistent, though that does not mean, of course, that it should be ignored. His trial counsel's evidence, on the other hand, was generally straightforward. While there were a few inconsistencies in her testimony and some assertions that were not easy to accept, for the most part her evidence was given in a forthright and contrite manner. In many instances, she acknowledged that her work had not met the requisite standard.

[40] Counsel's contemporaneous notes were often sparse, and that did cast doubt on the accuracy of some of her current recollections. While I accept that counsel attempted to be truthful in her testimony, the absence of contemporaneous notes is a factor to be considered in evaluating it.

[41] In my view, it is clear on the appellant's trial counsel's evidence that he did not receive effective assistance in all required areas at trial. Further, the deficiencies were such that they interfered with fundamental decisions that the appellant had to

make and undermined the procedural integrity of the trial. I outline four of those deficiencies below.

[42] First, counsel did not properly inform the appellant regarding his decision on the mode of trial. The appellant first met with his counsel on April 21, 2021. She says that at that time he clearly stated that he wished to be tried in Territorial Court and that he did not want to testify. The appellant, on the other hand, says that from the beginning, he wanted a jury trial.

[43] If the appellant made a decision on mode of trial at all at that first meeting, it was a decision made in the absence of essential information. At the time of the first meeting, it appears that counsel was under the impression that the appellant's DNA had been detected in a vaginal swab rather than on the complainant's underwear. Further, counsel appears to have mis-stated the date of the offence, leaving the appellant with the understanding that it took place at a time when he did not reside in Whitehorse.

[44] Without an understanding of the essential evidence that had been disclosed and the timeframe of the offence, the appellant could not meaningfully make a decision as to how to proceed.

[45] In any event, in her evidence, counsel concedes that she did not discuss the advantages and disadvantages of electing a trial in Territorial Court at that time, or indeed at any time before the trial. This was a complex case. The choice of procedures could not be approached cavalierly. The appellant's extensive record made it likely that the proceedings could, if he were convicted, become dangerous offender or long-term offender proceedings. Counsel does not, however, appear to have warned the appellant about the likelihood of such proceedings. She also does not appear to have taken any steps to ensure that any election the appellant made was an informed one.

[46] The Crown notes that the appellant was experienced with the court system—he had approximately 70 convictions prior to his trial. I am not convinced that the number of convictions can be taken to mean that the appellant understood the advantages and disadvantages of different modes of trial.

[47] The failure of counsel to ever address these issues with the appellant was a serious problem. He did not have the benefit of professional advice with respect to his election.

[48] A second major failing by trial counsel was her lack of communications with the appellant as to the stage of proceedings. He deposes that he did not understand, when he attended court on the trial date, that the matter was scheduled to proceed at that time. He says that he understood that the date was a bail application.

[49] Given the gravity of the offence and the consequences for the appellant, it was imperative that he understand that the trial was commencing. Indeed, counsel ought to have engaged the appellant in discussions regarding her plans for trial at (or preferably before) that time.

[50] A third major issue upon which the appellant appears to have received inadequate representation was on the decision as to whether to testify. There were certainly reasons why the appellant might have chosen not to testify. He had an extensive criminal record, and it was likely that he would be cross-examined on it. Further, it is obvious that he has difficulty concentrating, such that giving evidence in a coherent manner would be a challenge for him. These challenges only increased the importance of his counsel discussing with him the benefits and disadvantages of giving evidence.

[51] Finally, I consider that counsel did not adequately deal with the appellant's statements to her on the question of whether he and the complainant ever engaged in sexual activity. That question was one that was likely to be a considerable importance in the trial.

[52] The appellant says that, from the outset, he advised his counsel that he and the complainant had had sexual relations. That position is not reflected in counsel's notes, and I am not convinced that the appellant made any such assertion.

[53] It is clear, however, that at some point during the Crown's evidence, trial counsel passed the appellant a note, asking him, "Did you ever have sex with her?" Counsel says that in response, he shrugged his shoulders and whispered, "Maybe, I don't know". At that point, as counsel concedes, it was incumbent upon her to get further information from the appellant. It was crucial to his defence that his counsel follow up on his response before undertaking her cross-examination of the complainant and before the appellant made a final decision on whether to testify.

[54] It is apparent that counsel did not, at that stage, have any discussion with the appellant as to whether he should testify, and did not seek instructions from him before advising the court that he would not be calling a defence.

[55] The appellant levels other allegations of incompetence against his trial counsel. These include failing to object to the Crown's questioning of the complainant on prior sexual history and failure to cross-examine the complainant on her evidence that she had not had sexual relations with the appellant. In my view, these particular allegations fall short of the standard necessary to prove ineffective assistance. I am not persuaded that, at the time of the trial, it was entirely clear that the Crown's questioning on sexual history was improper. It was even less clear that an objection at that point could accomplish anything beyond causing delay.

[56] Similarly, the decision as to how and whether to cross-examine the appellant was one of strategy. While the decision not to cross-examine was a questionable one, I would not characterize it as being an incompetent one.

[57] I would have no hesitation, however in describing counsel's representation of the appellant to be "incompetent" in the major ways I have already discussed:

a) Providing inadequate advice and information on the issue of election of mode of trial;

b) Failing to keep the appellant informed of the trial date and of issues surrounding the consequences of a possible long-term offender or dangerous offender proceeding;

c) Failing to consult with the appellant on the question of whether he would testify and failing to discuss his options with him; and

d) Failing to follow up on the appellant's assertion during trial that he might have had sexual relations with the complainant.

[58] Having identified the major deficiencies in counsel's representation of the appellant, and having characterized them as amounting to incompetence, it remains to consider the prejudice component; that is, whether counsel's incompetence caused a miscarriage of justice. Again, the judgment in *Mehl* summarizes the law well. At para. 141, the Court notes that in most cases, an appellant will attempt to show that unreasonable acts or omissions of trial counsel make the verdict unreasonable. The Court accepts that to succeed on this basis, an appellant must generally establish that but for counsel's ineffective assistance, there is a reasonable probability that the case would have had a different result (citing *R. v. G.D.B.*, 2000 SCC 22; *R. v. D.A.*, 2020 ONCA 738; *R. v. Joanisse*, [1995] O.J. No. 2883 (C.A.), leave to appeal ref'd (1997), [1996] S.C.C.A. No. 347; and *R. v. Jex*, 2007 ONCA 737).

[59] I am not convinced that standard is reached in this case. While counsel acted incompetently in several respects, it is not at all clear that more competent representation would have resulted in a higher probability of the appellant securing an acquittal, or even of securing less severe findings of fact.

[60] Not all cases, however, require that an appellant demonstrate substantive injustice in order to secure a new trial. The Court in *Mehl* stated:

> [143] The second route to a miscarriage of justice invites examination of whether the acts or omissions of counsel found to fall outside the range of reasonable professional assistance resulted in a fundamentally unfair adjudicative process. An unfair adjudicative process alone is generally understood as being sufficient to establish a miscarriage of justice. It is not

> necessary for a reviewing court to ask whether the verdict would have been the same absent the incompetent provision of professional representation, because the unfair process itself gives rise to a miscarriage of justice: *R. v. D.G.M.*, 2018 MBCA 88 at para. 6. As Doherty J.A. noted in *Joanisse* at para. 75, "[a] reliable verdict may still be the product of a miscarriage of justice if the process through which that verdict was reached was unfair". Procedural unfairness may arise if, for example, counsel is impaired, acts in a conflict of interest, fails to include the appellant in a fundamental decision, or fails to comply with the instructions of the appellant [citations omitted].

[61] The Court in *Mehl* goes on to discuss specific failures of counsel to act in a way that preserves the appearance of trial fairness:

> [145] The appearance of trial fairness, if not the actual fairness of the trial, may also be undermined where an appellant has been denied the right to make a fundamental decision about the conduct of the defence, such as whether to testify or elect the mode of trial: *R. v. K.K.M.*, 2020 ONCA 736 at para. 91; *D.G.M.* at paras. 32; Stark [*R. v. Stark*, 2017 ONCA 148] at para. 20. This will occur when counsel makes the decision, or when counsel provides no advice or advice so deficient that the appellant is effectively precluded from making an informed choice about a matter of fundamental importance to the conduct of the defence: *K.K.M.* at para. 91; *Stark* at para. 20; *R. v. Trought*, 2021 ONCA 379 at paras. 69, 74–75.

[62] It is in this respect that the appellant has shown that his trial counsel's failures have undermined the appearance of a fair trial. The appellant's fundamental choices to elect mode of trial and to decide whether to testify have been abrogated by his counsel's failure to provide him with even basic advice. His ability to participate in important decisions was undermined by his counsel's failure to keep him abreast of developments, including the trial date and the probability that the Crown would seek an extraordinary order following conviction.

[63] I emphasize that these deficiencies are, when considered cumulatively, monumental and have completely undermined the appellant's ability to participate meaningfully in a process that will have dire consequences for him.

[64] In my view, counsel's representation of the appellant was not only inadequate and incompetent, but also consequential. It undermines confidence that an appearance of fairness was preserved.

[65] In the circumstances, I am satisfied that this case satisfies the stringent tests set out in *Mehl* and that a new trial is necessary to preserve the appearance of justice. I would allow the appeal from the guilty verdict on the sexual assault count and order a new trial.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Cooper"

I AGREE:

"The Honourable Madam Justice Fenlon"