SUPREME COURT OF YUKON

Citation: *R v Kodwat*, 2026 YKSC 4

Date: 20260114
S.C. No. 25-01501A
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

JACKIE JAMES KODWAT

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*.

Before Chief Justice S.M. Duncan

Counsel for the Crown	Andreas Kuntz
Counsel for the Defence	Kevin Drolet and Lauren Wildgoose

This decision was delivered in the form of Oral Reasons on January 14, 2026. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): Defence has brought a motion for a directed verdict on the basis that there is not sufficient and admissible evidence to permit a properly instructed jury to return a verdict of guilty in this case. Essentially, the defence is saying that the differences in the testimony between the two witnesses make it impossible for reasonable inferences to be drawn that they are testifying about the same incident. This significantly prejudices the defendant and raises the concern about the absence of legal

protections normally provided for propensity reasoning and similar fact evidence and more than one count.

[2] The differences identified by defence include:

- no identification of the accused by the complainant, and identification only by the other witness who testified;
- different dates that the alleged incident occurred-the complainant stated 2011; the witness stated 2012; and
- other differences in the evidence about the location of the incident, the type and length of the alleged touching, and the direction from which the man approached the children.

[3] The Crown says first, and perhaps most importantly, that they are not alleging that two separate incidents occurred. Instead, the Crown will be asking the jury to draw an inference that the reference by the witness to the 2012 date was an error- that there was one incident only, and that it occurred in 2011. Therefore, the Crown says the concerns that defence raises relating to two separate incidents are not present.

[4] The rule that sets out the test for a motion for directed verdict comes from the leading case of *United States of America v Shephard*, [1977] 2 SCR 1067, a 1976 case of the Supreme Court of Canada, and that is whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty (see *R v Charemski*, [1998] 1 SCR 679 at para. 2).

[5] At para. 3, the Court goes on to say:

> For there to be "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" in accordance with the *Shephard* test, the Crown must adduce <u>some</u> evidence of culpability for every essential definitional

> element of the crime for which the Crown has the evidential burden. … (citations omitted, emphasis in original)

[6] The jurisprudence following these cases has been interpreted by a number of different courts over the years, and the following factors have been summarized by the British Columbia Supreme Court in *R v Millington*, 2015 BCSC 143 (at para. 17). I am only going to read the factors that I believe are relevant to this case. These are the factors that the British Columbia Supreme Court says arise from the jurisprudence on motions for directed verdict:

> 1. The test to be applied by a trial judge on a motion for a directed verdict of acquittal is the same as that to be applied by the preliminary inquiry judge under s. 548(1) of the *Criminal Code*, namely, whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. (citation omitted)
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> 2. It is no part of the judge's task on a motion for a directed verdict to assess credibility or to draw inferences from the facts. (citation omitted)
>
> …
>
> 4. Where the judge determines that the Crown has presented direct evidence as to every element of the offence charged, the motion for a directed verdict of acquittal must be dismissed. (citation omitted)
>
> …
>
> 7. In performing the limited weighing [and that is the limited weighing that the judge on a motion such as this can do], the judge does not draw inferences from facts, does not assess credibility, and does not evaluate the inherent reliability of the evidence itself. Rather, the judge assesses the reasonableness of the inferences to be drawn from the circumstantial evidence to determine whether, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt. (citations omitted)

> 8. On a motion for a directed verdict, the judge must assume that all credibility findings have been made in favour of the Crown. The judge's role at this stage is not to decide whether he or she would convict or whether he or she would draw an inference of guilt from the circumstantial evidence. Rather, the question is whether a reasonable jury properly instructed could draw an inference of guilt. (citations omitted)

[7] All of these factors are taken from *R v Arcuri*, [2001] 2 SCR 828, 2001 SCC 54.

[8] The last relevant factor I will reference is:

> 9. Where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered: *R. v. Sazant*, 2004 SCC 77, at para. 18.

[9] On this last point, I note that the Court in *R v Douglas*, 2023 ONSC 1611, which is a decision of the Ontario Superior Court from 2023, in dismissing an application for directed verdict, said the following:

> [22] … For this purpose, I also took the Crown's evidence at its highest and considered the inferences most favourable to the Crown.

[10] As everyone knows, the jury must make findings of credibility and reliability of the witnesses who testified in this case. The defence has pointed out discrepancies in the testimony of the witnesses, while the Crown has pointed to similarities. These similarities include:

- the school location of the alleged event;
- the same four people who were there;
- the playground at the school where they were located;
- the kind of game they were playing;
- the wooden stump on which the complainant was seated by the man;
- the first contact by the man;

- the fact of the touching and the position of the man in relation to the complainant;
- the observations about the man's intoxication; and
- where the girls went after the alleged incident.

[11] The Crown says that the error they say the witness made with the date of 2012 can be attributed in part to the fact that it was provided in the context of a police interview of the witness when she was young (age 12).

[12] Applying the legal test for directed verdict, including the factors mentioned, I dismiss the application for directed verdict. The differences in the testimony will be matters for the jury to decide as they make their determinations on credibility and reliability. The jury can, in my view, be properly instructed about the approach to take to these inconsistencies and the requirement to prove beyond a reasonable doubt each of the essential elements of the offences, including identity and time.

[13] The context of the testimony about the events and the interviews and statements that occurred when the witnesses were children is also relevant to those assessments. I note the *R v W(R)*, [1992] 2 SCR 122 decision of the Supreme Court of Canada in discussing a child's testimony when they testified about events in childhood and when they made statements or provided evidence when they were children. The Court said in that case:

> … the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which [they are] testifying. (at 134)

[14] The Court also said in that case:

> … Since children may experience the world differently from adults, it is hardly surprising that details important to adults,

> like time and place, may be missing from their recollection. (citations omitted) (at 133)

[15] As a result, as I said, I do not think the test for a motion for directed verdict has been met and I also dismiss the application for a mistrial on the basis that the Crown is not alleging that there were two incidents in this case.

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DUNCAN C.J.