

COURT OF APPEAL OF YUKON

Citation: *R. v. Weatherston*,
2026 YKCA 5

Date: 20260320
Docket: 25-YU928

Between:

Rex

Respondent

And

Leslie Iain Page Weatherston

Appellant

Restriction on Publication: A publication ban was imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of information that could identify the complainant. On January 15, 2025, the trial judge granted a consent application to rescind this publication ban. The publication ban no longer applies.

Before: The Honourable Mr. Justice Abrioux
The Honourable Madam Justice MacPherson
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of Yukon, dated September 20, 2024 (conviction) (*R. v. Weatherston*, Whitehorse Docket 22-01513).

Counsel for the Appellant: J. Budgell

Counsel for the Respondent: W. McDiarmid

Place and Date of Hearing: Whitehorse, Yukon
November 21, 2025

Place and Date of Judgment: Whitehorse, Yukon
March 20, 2026

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice MacPherson

The Honourable Justice Gomery

Summary:

The appellant appeals his conviction for sexual assault following a jury trial. He advances two principal grounds of appeal being that the judge erred in (1) dismissing his application to admit certain evidence under s. 276 of the Code as to the nature of his and the complainant's relationship and (2), failing to manage the trial properly following the Crown's admitted violation of the s. 276 ruling during the appellant's cross-examination such that his right to make full answer and defence was compromised. Held: Appeal allowed on the basis of the second ground of appeal. The conviction is quashed and a new trial is ordered. The judge erred in her attempts to remedy the Crown's breach of the s. 276 ruling by not reconsidering, on her own initiative, that ruling due to a material change of circumstances. The remedial measures the judge undertook at the parties' joint request, which included providing a mid-trial instruction and allowing a limited re-examination of the appellant were inadequate and failed to restore trial fairness. The situation was then exacerbated by both the Crown's closing submissions, and the judge's charge to the jury, all of which precluded the appellant from making full answer and defence and rendered the trial unfair.

| Table of Contents | Paragraph Range |
|---|------------------------|
| INTRODUCTION | [1] - [3] |
| BACKGROUND | [4] - [36] |
| The <i>Seaboyer</i> and s. 276 pre-trial applications | [16] - [26] |
| The rulings on extrinsic disreputable conduct and the defence of honest but mistaken belief in communicated consent | [27] - [36] |
| The evidence of disreputable conduct | [28] - [31] |
| The honest but mistaken belief in communicated consent ruling | [32] - [36] |
| ISSUES ON APPEAL | [37] - [58] |
| Issue 1: Did the judge err in her s. 276 order? | [38] - [55] |
| The parties' positions | [38] - [44] |
| Discussion | [45] - [55] |
| Issue 2: Did the judge err by not properly managing the trial following the Crown's improper cross-examination such that the appellant's right to make full answer and defence was compromised? | [56] - [58] |
| STANDARD OF REVIEW | [59] - [159] |
| Background | [60] - [81] |
| The parties' positions | [82] - [88] |
| Legal framework | [89] - [93] |
| Discussion | [94] - [158] |
| Introduction | [94] - [96] |
| Analysis | [97] - [150] |
| The curative proviso | [151] - [158] |
| Issues 3 and 4: The disreputable conduct and honest but mistaken belief in communicated consent rulings | [159] - [159] |
| DISPOSITION | [160] - [160] |

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] In September 2024, a jury found the appellant, Leslie Weatherston, guilty of one count of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]. The conviction pertained to an incident that occurred while the appellant and the complainant were ending their long-term relationship.

[2] The appellant challenges his conviction on the basis that the trial judge erred in: (1) declining to admit certain evidence under s. 276 of the *Code*; (2) failing to rectify adequately a Crown violation of the s. 276 order which occurred during the appellant's cross-examination, such that his ability to make full answer and defence was compromised; (3) admitting presumptively inadmissible evidence of the appellant's disreputable conduct; and (4) finding no air of reality to the defence of honest but mistaken belief in communicated consent.

[3] For the reasons that follow, I would accede to the second ground of appeal, quash the conviction, and order a new trial.

Background

[4] At the time of the alleged sexual assault, the appellant and complainant had been in a relationship for approximately four years. They did not live together. They each testified and had different accounts as to the circumstances of the alleged assault.

[5] The complainant testified that, in the days leading up to Christmas 2020, she went to the appellant's home to end their relationship—something she had attempted to do several times before.

[6] According to the complainant's testimony, she told the appellant on December 18, 2020 that she had been with another man, to make it clear that the relationship was over. He then became angry. She further testified that the appellant demanded to know the identity of the other man and threatened violence against

him. She believed the appellant was capable of carrying out his threats; she testified that she had experienced mental abuse during the relationship, and the appellant had told her stories about things he had done in the past. This included an incident in which a man had stolen his truck at a party. According to the complainant, the appellant told her that he had beaten the man “until he bled”, and the man had been hospitalized as a result.

[7] The complainant testified that she went to the appellant’s home a few nights later in order to seek closure of the relationship. When she entered the house, he was sitting on the couch. He did not say anything but was looking at her with “dead eyes”. According to the complainant, she could see “anger and madness”. The appellant told her to take her clothes off and go to the bedroom. She testified that she “froze” and thought about how the appellant had threatened the man with whom she had been unfaithful. She did what the appellant told her to do. He followed her into the bedroom, where the alleged sexual assault occurred.

[8] The complainant could only recall some details about the incident, explaining that she “was somehow not there anymore”. She remembered, for example, that the room was “gloomy”. She also recalled that during the alleged sexual assault, the appellant slapped her in the face and was not wearing a condom. According to the complainant, the appellant did not ask for her consent to engage in sexual activity.

[9] She testified that throughout the incident, she could only think about what the appellant said he would do to the man she had been unfaithful with. She felt that she had no choice but to have sex with him because of the way he looked at her when she arrived at his home, and because of his earlier comments about beating up the other man.

[10] During cross-examination, the complainant testified that she was not in fact in a relationship with the other man. She also acknowledged she was not present at the incident involving the stolen truck (which had occurred before she met the appellant). She had only heard of the truck incident in a conversation with the appellant.

[11] She also agreed that there had been no prior incidents of violence in the relationship. She said that it continued afterwards for eight months, until August 2021, because she did not want to admit to herself that she had been sexually assaulted.

[12] The appellant testified. He denied sexually assaulting the complainant and maintained that he believed the sexual encounter was consensual. He stated that a few nights before the alleged sexual assault, the complainant disclosed that she had been with another man but that she did not end the relationship with him at that time. He testified that learning of her infidelity made him sad, but he denied that he was angry or that he threatened to assault the other man.

[13] The appellant testified that he invited the complainant over to his home for dinner a few nights later. He described how, after the complainant removed her parka, he told her to take her clothes off and head to the bedroom. She said “yes, okay”, and went into the bedroom. The appellant testified that they undressed each other and embraced, leading to the alleged assault.

[14] During direct examination the appellant said that the complainant never said anything affirmative or negative about sexual activity but she did agree to take off her clothes. He testified that he slapped the complainant lightly on the face, explaining that he believed she was consenting to the sexual activity because of the sounds and facial expressions she was making, which, in his view, indicated pleasure. According to the appellant, after having sex, he and the complainant had dinner. He believed they may have also watched a movie.

[15] The appellant confirmed that he and the complainant continued their relationship until August 2021. He stated that he first became aware of the sexual assault allegation after the relationship ended.

The *Seaboyer* and s. 276 pre-trial applications

[16] In advance of the trial, the Crown brought a *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 1991 CanLII 76, application to adduce evidence of the complainant’s prior sexual

activity. The Crown sought to introduce evidence about what had occurred a few days before the alleged sexual assault—that is, that she told the appellant she had slept with someone else, and that upon hearing this, the appellant became angry and threatened to assault the other man.

[17] *R. v. Kinamore*, 2025 SCC 19, which was rendered after the trial in this matter, now governs the process for Crown applications to adduce evidence of prior sexual history.

[18] The Crown submitted that the *Seaboyer* evidence was relevant to the complainant’s fear of the appellant on the night of the sexual assault. The Crown also argued that the evidence was relevant to the appellant’s knowledge of the complainant’s state of mind at the time of the sexual activity, in the event he intended to raise the defence of honest but mistaken belief in communicated consent. The evidence was for the purpose of proving that the appellant knew the complainant had ended their relationship when she disclosed her infidelity. The Crown sought to limit the appellant’s cross-examination of the complainant to the conversation about the alleged infidelity, without eliciting any details about the alleged infidelity itself.

[19] The appellant filed a cross-application under s. 276 of the *Code*. On the condition that his proposed s. 276 evidence be admitted at trial, he did not oppose the admission of the *Seaboyer* evidence. He sought to adduce evidence that during the summer of 2020, he was taking medication that impacted his sexual function and his libido. As a result, he and the complainant had an “open relationship” at the time so she could have sexual relationships with other partners. According to his testimony, he was the one who suggested the open relationship.

[20] In support of the appellant’s application, he filed an affidavit stating that he and the complainant agreed to the open relationship around August 2020. The appellant also said that:

- he requested the complainant not tell him anything about the other relationships she was having;

- in the autumn of 2020, the appellant’s medications were adjusted and his libido returned; and
- after his libido returned, he and the complainant resumed being a monogamous couple.

[21] The appellant argued that if the *Seaboyer* application were granted, he should be permitted to testify about the open relationship, in order to explain why he did not become angry or threaten the other man upon learning of the complainant’s infidelity a few days before the alleged sexual assault. He did not seek to lead any details of the complainant’s other sexual relationships or whether she had engaged in any other sexual relationships at all.

[22] The judge granted the *Seaboyer* application but dismissed the appellant’s s. 276 application.

[23] She found that the *Seaboyer* evidence was relevant. It provided context for the complainant’s evidence that she feared the appellant. It was also potentially relevant if the defence of honest but mistaken belief in communicated consent was raised. The trial judge limited the appellant’s cross-examination of the complainant on the *Seaboyer* evidence to questions about whether and when the conversation about her infidelity occurred, what the complainant said, and how the appellant reacted both at the time of the conversation and afterwards: (the “*Seaboyer*/s. 276 Ruling”).

[24] In dismissing the s. 276 application, the judge found that, on the appellant’s own evidence as stated in his affidavit, he and the complainant had returned to a monogamous relationship by the autumn of 2020, prior to the date of the alleged sexual assault. Accordingly, “[t]he reason Mr. Weatherston gave to explain why he would not have gotten angry was no longer applicable”.

[25] The judge also observed that, by telling the appellant about her infidelity, “the complainant had violated Mr. Weatherston’s request that he not be told anything about who she was seeing or what they were doing together. The judge concluded

that, “[t]he evidence cannot therefore be used to attack the complainant’s evidence that Mr. Weatherston got angry and she became frightened”, and was therefore irrelevant. Given her finding that the evidence was not relevant to an issue to be determined at trial, the trial judge did not review the factors in s. 276(3) of the *Code* for admission of the evidence.

[26] I shall return to both the *Seaboyer* and s. 276 applications when I consider the first and second grounds of appeal.

The rulings on extrinsic disreputable conduct and the defence of honest but mistaken belief in communicated consent

[27] As I will explain, I need not consider the grounds of appeal relating to extrinsic disreputable conduct and the defence of honest but mistaken belief in communicated consent. I shall nonetheless briefly address these rulings.

The evidence of disreputable conduct

[28] On appeal, the appellant argues that there should have been a *voir dire* to discuss certain evidence that was adduced before the jury concerning the alleged prior disreputable conduct. As I outlined above, this evidence related to the incident involving the stolen truck and what the appellant allegedly told the complainant he did to the purported thief.

[29] The appellant did not object to any of the questions the complainant was asked about the truck incident, nor did the trial judge intervene. In her charge, the judge stated that the jury had “heard evidence suggesting that [the appellant] physically assaulted someone in the past”. She told the jurors that they might consider the evidence to help decide if they believed in the complainant’s fear of the appellant. She was clear in her charge that it could not be used to determine the appellant was a person of bad character and therefore more likely to have committed the sexual assault.

[30] The appellant argues that it was prejudicial to him for this evidence to be put before the jury and relied upon by the Crown. He says it is immaterial that he did not

object at trial because the judge should have acted on her own accord as the “gatekeeper” of the trial.

[31] The Crown argues that the judge took sufficient steps to avoid an adverse inference based on bad character. Further, the truck incident was relevant to the complainant’s fear of the appellant, which ultimately led to her compliance with the appellant’s demands on the night of the alleged sexual assault.

The honest but mistaken belief in communicated consent ruling

[32] During an adjournment that came about while the appellant was being cross-examined (which I discuss below in relation to the second ground of appeal), the judge invited submissions on whether there was an “air of reality” to the defence of honest but mistaken belief in communicated consent. In an oral ruling, she held that there was no air of reality to the defence (the “Mistaken Belief Ruling”). She analyzed the availability of the defence in two alternative circumstances: based on the appellant’s testimony in his direct examination that the complainant verbally consented by saying “yes, okay”; and his change in that evidence on cross-examination that the complainant never verbally consented. The ruling occurred before the appellant’s re-examination, in which he repeated the latter testimony that the complainant said nothing when he asked her to take off her clothes.

[33] Regarding the first circumstance, the judge found that the appellant and complainant’s testimony was too diametrically opposed for the defence of honest but mistaken belief in communicated consent to be available. The only issue was whether consent existed at all.

[34] Regarding the second circumstance, the judge found that the appellant’s change in testimony that there was no verbal consent, also gave no air of reality to the defence of honest but mistaken belief in communicated consent. The appellant adduced no evidence of attempts to ascertain consent.

[35] As a result, the defence of honest but mistaken belief in communicated consent was not put to the jury.

[36] The Crown agrees with the appellant that the judge could have waited until after the appellant finished testifying prior to ruling on the defence. The Crown submits, however, that the appellant should have realized that the only argument available to him was that he had taken reasonable steps to obtain consent. He could have made submissions on that point at the time. While there was an “imperfect” procedure, it did not result in a miscarriage of justice.

Issues on Appeal

[37] I would frame the issues on appeal as being whether the judge erred:

- 1) in dismissing the appellant’s s. 276 application;
- 2) by not properly managing the trial following improper cross-examination by the Crown such that the appellant’s right to make full answer and defence was compromised;
- 3) in admitting presumptively inadmissible evidence of the appellant’s disreputable conduct; and
- 4) in finding no air of reality to the defence of honest but mistaken belief in communicated consent.

Issue 1: Did the judge err in her s. 276 order?

The parties’ positions

[38] The appellant submits that the trial judge erred in finding the s. 276 evidence irrelevant to an issue at trial. The complainant was expected to testify that, in an effort to end her relationship with the appellant, she told him in December 2020 that she had been with another man. The appellant contends, that there was no other evidence indicating when this alleged sexual encounter occurred during the course of her relationship with him. He says that the trial judge appeared to assume that the complainant was referencing an affair that occurred after he and the complainant had resumed their monogamous sexual relationship in the autumn of 2020, but this assumption was not supported by the evidence.

[39] The appellant also submits that, regardless of when the purported infidelity occurred, his evidence that he and the complainant were in an open relationship for a period of time at his suggestion was relevant to explain why he did not react with anger or threats when the complainant disclosed her infidelity. The evidence of an agreement to have an open relationship supported his version of events and would have provided the jury with important context for his reaction to learning of the infidelity. He submits that the judge erred in finding that the evidence did not support the inference the appellant sought to draw.

[40] The judge's second reason for denying the s. 276 application concerned the appellant's argument that the complainant allegedly "violated" the appellant's request that she not disclose details of any other relationships. The judge concluded that evidence of the open relationship could not be used to challenge the complainant's account that the appellant became angry and that the complainant became frightened. The appellant submits that the judge, for the second time, appeared to treat anger as the default—that is, the only possible emotional response the appellant could have experienced to learning of infidelity. Rather than assessing whether the evidence was relevant to an issue at trial, the judge effectively usurped the jury's role by deciding that the evidence could not possibly support the inference the appellant sought to draw.

[41] Underlying the appellant's argument on this ground of appeal is the central pillar of the Crown's case: that the appellant became angry when he heard of the complainant's infidelity, and that he subsequently threatened violence against the other man. According to the Crown's theory, the appellant's anger contributed to the complainant's fear on the night of the alleged sexual assault and explained why she unwillingly resigned herself to the appellant's attempt to have sex with her.

[42] The appellant says that the trial judge's ruling meant that, beyond merely denying that he became angry, the appellant was entirely precluded from presenting evidence to refute the complainant's account on this critical issue.

[43] The Crown points to the high burden for an accused to meet on a s. 276 application. In particular, they note the requirement under s. 276(2)(d) that the evidence sought to be adduced must have “significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”. The accused must be candid about what evidence they seek to have admitted and why: *R. v. Darrach*, 2000 SCC 46 at para. 46. The presumption is that such evidence will not be admitted, and if the accused seeks to adduce evidence of the complainant’s sexual activity outside the scope of the offence charged, they must establish on a balance of probabilities that the evidence supports some relevant inference and satisfies the legislative requirements for admission: *Darrach* at para. 46. For the evidence to be admitted, the accused must demonstrate that it goes to a legitimate aspect of their defence and is integral to their ability to make full answer and defence: *R. v. Goldfinch*, 2019 SCC 38 at para. 83. For a fulsome discussion of the framework, see *Kinamore* at paras. 22–32.

[44] The Crown disagrees with the appellant’s assertion that the judge made an ungrounded assumption about the timing of the purported infidelity. The Crown says it was clear from the judge’s exchange with defence counsel that the time frame of the alleged infidelity was around the time the complainant disclosed the relationship to the appellant—that is December 2020. If the appellant wanted the judge to find otherwise for the purpose of the s. 276 application, it was incumbent on him to furnish particulars acknowledging not only that the conversation about the alleged affair happened but also that the alleged affair itself started and finished within the timeframe of the open relationship agreement. He did not do so, and it was open to the judge to draw the inference that the affair was alleged to have occurred at least in part while the parties were in a monogamous relationship. By failing to furnish sufficient particulars which showed how the evidence of other sexual activity was relevant, the appellant left the judge with no option but to deny the s. 276 application.

Discussion

[45] In *R. v. T.W.W.*, 2024 SCC 19, the Supreme Court of Canada explained that:

[27] ...In order to be potentially admissible, the relevance and probative value of the evidence in each case must go beyond a general ability to undermine the complainant's credibility or to add helpful context to the circumstances of the case; it must respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence (Brown and Witkin, at pp. 379-81).

[46] The appellant's affidavit in support of the application referred to the appellant and complainant's agreement to have a non-monogamous relationship beginning "in about August 2020". It referenced a follow up agreement to resume their monogamous relationship in "autumn 2020".

[47] The accused's evidence on a s. 276 *voir dire* is not compelled, so they can be cross-examined on that evidence if they testify at the trial: *R. v. H.P.*, 2022 ONCA 419 at paras. 40–50. An affidavit from and submissions by the accused at a s. 276 application therefore entail important tactical considerations for the defence.

[48] If the particulars of the application do not establish that the evidence is relevant to an issue at trial, the evidence cannot be ruled admissible. In my view, that is what the judge concluded had happened here in that in the *Seaboyer/s. 276* Ruling, she stated:

[24] In my opinion, the analysis may be resolved by addressing whether the evidence [the appellant] seeks to admit is relevant to an issue at trial. As noted above, [the appellant] seeks to admit the evidence because, counsel submits, it undermines the complainant's anticipated testimony that [the appellant] got angry when she told him she had sexual activity with someone else and that she was afraid of him because of that. As he agreed to an open relationship, he would have no reason to be angry with her.

[25] However, [the appellant's] own evidence negates this reasoning...The alleged sexual assault occurred on December 21, 2020. Thus, by the time the complainant told [the appellant] about the sexual activity with the other person, they were once again in a monogamous relationship. The reason [the appellant] gave to explain why he would not have gotten angry was no longer applicable.

[49] It was the appellant who stated in his affidavit that the monogamous relationship resumed in the general timeframe of "autumn 2020". As a result of this vague timeline, he was unable to explain to the judge how the proposed evidence

could be used to impeach the complainant's anticipated evidence of his angry reaction when she told him of the alleged affair in December 2020.

[50] In the *Seaboyer/s. 276* ruling the judge stated that the primary difference between the two frameworks governing sexual history evidence tendered by the defence and the Crown respectively is that:

[23] ...the *Code* requires the defendant to show that the evidence has significant probative value; while under *Seaboyer*, the Crown is required to show that the evidence has probative value...

[51] *Kinamore* suggests that the particular difference noted by the judge (the presence or absence of the word "significant") does not much matter. Speaking for the Court, the Chief Justice considered the term "significant" in s. 276 (2)(d) of the *Code*, and concluded that:

[39] ...As explained in *Darrach* and recently reaffirmed in *J.J.*, the requirement of "significant" probative value under s. 276(2) "is not a departure from the conventional rules of evidence" and simply acknowledges that there are "inherent 'damages and disadvantages ...'" presented by sexual history evidence (*Darrach*, at paras. 39 and 41, quoting *Seaboyer*, at p. 634; *J.J.*, at para. 131). In other words, the "significant" probative value requirement recognizes that sexual history evidence will need to have more than "trifling relevance" to overcome its intrinsic prejudice (*Darrach*, at para. 41). There is no indication that anything else was meant by the inclusion of the word "significant" in s. 276(2)(d), particularly because the word has no equivalent in the French version of the provision, which simply speaks of "*valeur probante*" (*Darrach*, at para. 39).

[52] In my view, the dismissal of the s. 276 application was a very close call. Notwithstanding the vague language in the appellant's affidavit regarding when the monogamous relationship resumed, it was open to the judge to allow him to call some of the proposed s. 276 evidence. This would have been based on the Crown's theory that there was no consent due to the complainant's fear and that the fear, in part, arose from the appellant's reaction to being advised of the purported infidelity.

[53] The judge's second rationale for dismissing the s. 276 application was that the complainant "had violated Mr. Weatherston's main request that he not be told anything about who she was seeing or what they were doing together.

[54] Respectfully, I do not understand how this alleged violation by the complainant of this request (which the judge also characterized as an “agreement”) would preclude Mr. Weatherston from being able to adduce evidence of an open relationship to challenge the complainant’s assertion that he reacted angrily to her disclosure of infidelity.

[55] Regarding this first ground of appeal, I would conclude that it is not necessary to decide whether the judge committed a reviewable error in dismissing the s. 276 application. This is because the dismissal did play an important role in what later transpired during the trial, which brings me to the second ground of appeal and my conclusion that it should result, on a stand alone basis, in the appeal being allowed.

Issue 2: Did the judge err by not properly managing the trial following the Crown’s improper cross-examination such that the appellant’s right to make full answer and defence was compromised?

[56] The appellant testified at the trial. This ground of appeal arises as a result of what transpired during his cross-examination. The appellant submits that the judge erred in her management of the trial after the appellant was cross-examined in a manner that breached the s. 276 order. As I will explain, the Crown put questions to the appellant that the parties on appeal agreed inappropriately caused him to discuss the alleged agreement to have an open relationship. What the appellant was permitted to say was limited and unconvincing.

[57] This ground of appeal includes whether the judge erred by :

- a) failing to reconsider the s. 276 ruling on the basis there had been a material change of circumstances;
- b) failing to declare a mistrial; and
- c) providing an inadequate mid-trial instruction.

[58] A related question is whether the judge erred in her final instructions to the jury.

Standard of review

[59] In *R. v. Samaniego*, 2022 SCC 9, Justice Moldaver explained:

[25] Trial management decisions and the rules of evidence must generally remain separate issues on appellate review. The standard of review for evidentiary errors is correctness, while deference is owed to trial management decisions. Extricable evidentiary errors are held to a more stringent standard of review than trial management decisions. The trial management power is not a license to exclude otherwise relevant and material evidence in the name of efficiency.

[26] Sometimes trial management decisions will overlap with the rules of evidence. For example, where counsel tries to revive a line of inquiry that the trial judge has previously barred in an evidentiary ruling, the rules of evidence and trial management overlap. Drawing on the previous evidentiary ruling — that the line of questioning is barred by an evidentiary rule — the judge exercises their trial management power to curtail irrelevant and repetitive questioning. As this example illustrates, it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents. Trial management decisions, as the one in this example, engage the judge’s discretion. Absent error in principle or unreasonable exercise, these discretionary decisions deserve deference (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44).

Background

[60] In order to consider these issues, it is necessary to review in some detail what occurred during the trial.

[61] During the direct examination of the appellant on September 18, 2024, he testified that he recalled a conversation with the complainant in mid-December 2020 in which she told him that she had been intimate with another person.

[62] During the appellant’s cross-examination—which commenced later that day—Crown counsel suggested that the complainant had effectively ended the relationship when she told him she had been with another man. Thus, the appellant would have known the complainant did not want to have sex when she came to his house a few nights later. The appellant denied this implication. He testified that, despite the complainant’s disclosure of her infidelity, they were still in a relationship on the night of the sexual encounter and remained together for months afterwards.

[63] I will set out the sequence of the impugned cross-examination in its entirety:

Q So the — the truth is, though, that you knew that that day [the complainant] wasn't coming over for sex, didn't you?

A Can you —

Q That wasn't the purpose of the visit.

A Can you repeat the question, please?

Q Sure.

So you knew on that day that the purpose of [the complainant] was coming over that day wasn't for sex, was it?

A Not solely. That's —

Q Well, you'd said that you invited her for dinner.

A That's correct.

Q Okay. So she was coming over for dinner.

And you knew that she wasn't coming over for sex because she just told you a short time earlier that she'd had sex with someone else, so she wasn't interested in having sex with you.

A How do you know that? That's untrue. You've made that up.

Q I'm just putting that question to you.

A Don't put those — yeah. That's not my words.

So I guess reframe the question so I can understand it.

Q Sure.

So you knew that [the complainant] wasn't interested in having sex with you because she had told you that she'd had sex with another man.

A I did not know that.

Q But you did know she had sex with another man.

A That's correct.

Q Okay. So by implication, then, she's not interested in having sex with you. She's —

A That is untrue.

Q And she didn't want to be with you any more.

A That is untrue.

Q Is it untrue that she didn't want to be with you any more or are you saying it's untrue that you knew that when she came over?

A It's untrue that I knew that when she came over. I don't — I don't know about the first part of your question. I don't — that one was a no, I think.

Q Well, I just — I just wanted to make sure that I understood what you were saying was not true.

- A Okay. Maybe do the — answer the — or ask me the whole question again, then, please.
- Q I had asked whether it was untrue that — because — well, originally I had said that she didn't want to be with you any more and you said that was untrue.
- A Correct.
- Q So I had asked to clarify whether it was untrue that you knew that she didn't want to be with her (sic) or that she didn't want to be with you, in fact — as a matter of fact.
- A You're confusing me here a little bit.
- Q No, that's okay. I think you helped because said that it was — that you didn't know because you don't know what [the complainant] had in her mind; right?
- A How could I?
- Q Yeah, okay.
- A I knew that we were together at that point when she was coming over. I did not know that — I knew that she had slept with someone else. I did not know that she didn't want to sleep with me.
- Q But your — so you've said because she was coming over, you knew that you were together.
- A Not for that reason. We were — I knew we were — we were still together. We didn't break up until August 15th, 2021 — '2 — '1.
- Q So — all right.
So when she told you that she had sex with another man, you didn't interpret from that anything suggesting that your relationship was in trouble, at the very least?
- A No.
- Q So this was just a bump in the road, like nothing at all?
- A What was a bump in the road?
- Q That she'd been sexually involved with someone else? So this didn't seem to suggest to you that there was an issue in the relationship, at the very least, that things were in trouble?
- A There was issue with the relationship, but we had discussed her and her friend, her sexual partner, and I had no problem with it.
- Q You did understand, though, your relationship to be a monogamous relationship at that time.
- A No. That's untrue.
- Q The — I need to be somewhat careful here because, as you know, there were previous litigation regarding what could be discussed in this particular proceeding.

And I have here a copy of an affidavit that was sworn by you on — in April of 2024 that states that you were in a monogamous relationship, from your perspective, anyway, with [the complainant].

So I will show you this, but please review the document and let me know whether you agree with that or not. I'm just being careful here at this point in time. Please don't read out loud any of the content of the document.

A Is the question whether — are you asking me whether [the complainant] and I were in a monogamous relationship? If so, the answer is no.

Q The question is that — and that I've now asked you — I know you answered that question, which I found rather surprising, because I am now going to show you a document, an affidavit that you swore in April 23rd, 2024 that suggests you were in a monogamous relationship with [the complainant].

A It suggests it or it says it?

Q Well, when you read it in its entirety, I would have to say that is the conclusion that is drawn.

So I'm going to show it to you to review

[Emphasis added.]

[64] At this point, the appellant's trial counsel, Mr. Campbell, objected and submissions took place in the absence of the jury.

[65] The Crown having elicited evidence about the nature of the relationship, that is monogamous or "open", the appellant's trial counsel expressed concern about the fairness of the trial. He explained that the purpose for which he had initially sought to adduce the s. 276 evidence was to rebut the complainant's testimony that the appellant was angry when she told him she had been with another man. Without this evidence, the appellant did not appear to be credible. His counsel pointed out that the Crown asked the appellant whether he and the complainant were monogamous in December 2020, despite knowing that he was prohibited from fully explaining his answer due to the s. 276 order. This, the appellant submitted, was fundamentally unfair. The appellant requested that he now be permitted to adduce the s. 276 evidence in order to explain why he was not angry when the complainant disclosed her infidelity.

[66] The judge noted that while she could revisit the s. 276 application, since “[w]ith change of circumstances, that’s not the issue”, she ultimately decided not to do so, in part because the complainant had completed her testimony. Accordingly, the judge suggested that the best approach would be to instruct the jury to ignore the Crown’s question and the appellant’s answer.

[67] The Crown took the position that, in the appellant’s affidavit on the s. 276 application, he had stated that he and the complainant resumed their monogamous relationship in the autumn of 2020. Thus, the appellant was inconsistent when he testified in cross-examination that they were not monogamous in December 2020.

[68] The judge then observed:

My finding was on the 276 that at the time of the alleged assault and the days beforehand, they were back into a monogamous relationship and so the reasoning for him not being angry would no longer apply. The question is, is there a change that has come up in the testimony that reopens the 276. So what is the testimony that changes the analysis?

[69] The judge then said she was of the view that there was no direct contradiction between what the appellant testified to on cross-examination and what was contained in his affidavit, since “autumn” covered a broad time period, including most of December. She went on to say that:

I think — I think my concern — I share Mr. Campbell’s concern that there’s — that Mr. Weatherston has looked to be not particularly credible with regards to not being upset and he now has stated that they were not in a monogamous relationship and so how do we deal with that. But how do we deal with that in a way that’s fair to — the fact that [the complainant]... has already... provided her testimony?

[Emphasis added.]

[70] The judge asked the parties for suggestions as to how to proceed. Mr. Campbell suggested that although “[i]t leaves a big question mark in the jury”, he could, in re-examination, ask the appellant whether there was a reason why the appellant was not angry and devastated when the complainant disclosed her infidelity. The appellant could provide an answer but not get into any explanatory details. The judge could then give the jury a mid-trial instruction explaining that legal

rulings had limited the appellant's ability to state his reasons for not being angry or devastated about the infidelity. The Crown and the judge agreed with this proposal.

[71] At this point, the complainant's counsel, Ms. Bogle, who had been observing the trial, advised the judge that she was concerned that any evidence that would now be put before the jury could impact the complainant's privacy rights. She reminded the judge that if the Court planned to revisit the s. 276 application, or if any such evidence was going to be put to the jury, the complainant had standing to make submissions.

[72] The judge then said:

So I am going to say, subject, of course, to everybody's submissions, including possibly Ms. Bogle's, that it seems to me that we're looking at — we have to look at fairness to Mr. Weatherston. The horse is already out of the barn and so what we're looking at is damage control. And I understand [the complainant's] rights, but in terms of his right to a fair trial, that's going to be—

[Emphasis added.]

[73] The judge acknowledged that evidence of the complainant's monogamy or non-monogamy could impact the complainant's privacy rights and adjourned for the day to consider whether to reopen the application. In so doing, she described the issue before her as "absolutely not a 276 application at this point because, as Mr. Campbell said, it's really a *Seaboyer*, an inadvertent *Seaboyer*, maybe, if all that makes sense".

[74] The next day, the judge ruled that it would not be appropriate to give the complainant standing on any further submissions, partly because the Crown could represent the complainant's privacy interests.

[75] The judge proposed a plan as to how to proceed, stating she would allow submissions from counsel on her proposal. She explained that, in re-examination, defence counsel could ask the appellant a direct question:

The cat is out of the bag, so what — subject to what everybody says, what my suggestion is that Mr. Campbell specifically say — specifically ask him about that under the yes/no basis and state something along the lines of, "On

cross-examination, you denied being overly upset about [the complainant] being with someone else. You also testified that you were non-monogamous. Is that why you were not overly upset; yes or no?".

[Emphasis added.]

[76] The judge also proposed that she would then provide a limiting instruction to the jury about the use they could make of the appellant's evidence that he and the complainant were in a non-monogamous relationship.

[77] The Crown then advised that the parties had conferred and agreed to a different solution than the one suggested by the judge:

MS. LAURIE: So we — this — we had actually spoken — counsel had an opportunity to speak yesterday about this and our proposal was going to be a different one.

THE COURT: Go ahead.

MS. LAURIE: And that was to provide an instruction — a limiting instruction or mid-trial instruction, I should say, that that last portion, so the question and the answer and then I started to begin to frame another question, of course, afterwards, must be disregarded —

THE COURT: Okay.

MS. LAURIE: — and one of the main reasons being is that, otherwise — none of that has been put to the complainant to respond to and also —

THE COURT: And I recognize that.

MS. LAURIE: Yeah. And of course, it does — as Ms. Bogle had raised yesterday, that insinuation that that was the nature of their relationship does, of course, engage her privacy interests.

So essentially, that's what the proposal was going to be so that we were no longer then — so obviously, then, not reopening, you know, the Seaboyer issue or anything of that nature, backing away from.

THE COURT: So the — okay. So the non-monogamy would be completely eliminated at that point.

MS. LAURIE: Right.

THE COURT: It would be disregarded.

And Mr. Campbell, you're on board with that?

MR. CAMPBELL: Yes. And I would — and my friend and I — well, I wrote out a question and reviewed it with — which is essentially the first part of what you said.

THE COURT: Okay.

MR. CAMPBELL: So I'm —

THE COURT: That is fine, then.

MR. CAMPBELL: Okay.

THE COURT: Yeah. My main concern was, what do we do with this evidence of the non-monogamy that's out there, right.

MS. LAURIE: Right. Right.

THE COURT: So if you are all content to — to have the jury disregard that, then we can have you have that question.

Okay. That works for me.

All right. So in terms of the — did you come up with wording for the mid-trial instruction for the — disregard the evidence?

MS. LAURIE: No, we did — we did not go that far. We were more, I think, focused on the wording of —

THE COURT: That's fine.

MS. LAURIE: — Mr. Campbell's question —

[Emphasis added.]

[78] Shortly thereafter, the judge said:

Okay. Well, I thank you very much for coming up with a good solution that works for everybody. I appreciate counsels' work on this issue.

[Emphasis added.]

[79] When the jury returned the judge stated:

Good morning, everyone. So before Ms. Laurie continues her cross-examination, I do have another instruction to provide to you.

You heard testimony yesterday from Mr. Weatherston that he and [the complainant] were in a non-monogamous relationship. Please disregard the Crown's question with regards to that and Mr. Weatherston's answer.

I will also remind you at this point that what counsel says is not evidence. Only what the witnesses say is evidence. (as read).

(the "Mid-Trial Instruction").

[80] The appellant's re-examination concluded this way:

Q Okay. Yesterday in her cross-examination, Ms. Laurie asked you a number of questions about — she had said that you must have felt betrayed, devastated, wronged or you must have felt that the — that [the complainant] had gone behind your back when she was — when this — [the complainant] was having a conversation with you about

being with someone else. And you answered that you were not betrayed or devastated or you did not feel that you were betrayed or devastated or wronged.

Without getting into the reason of why you were not feeling angry or betrayed, et cetera, can you tell us if there was a reason why you did not feel angry, betrayed?

A Yes, there was a reason that I was not upset, angry. Yes.

Q Okay. Thank you.

Those are all my questions.

THE COURT: And just to be clear, was there the expectation of a direction at this point from me on this issue or had you decided that it was not necessary?

MR. CAMPBELL: I believe you gave that at the outset

...

No, I don't believe we were looking for anything.

THE COURT: All right. No direction necessary.

All right. Thank you, Mr. Weatherston. You can stand down.

A You're welcome.

(WITNESS EXCUSED)

[Emphasis added.]

[81] The appellant then closed his case.

The parties' positions

[82] The appellant submits that the Crown's line of questioning regarding monogamy was a clear violation of the order made under the *Seaboyer/s. 276* Ruling. Moreover, the Crown's references—made in the presence of the jury—to “previous litigation” and the affidavit sworn by the appellant were highly prejudicial. These invited the jury to speculate about the nature of the prior litigation and the contents of the affidavit. The Crown's questions implied that the appellant's testimony was inconsistent with the appellant's evidence in a sworn affidavit. The Crown asked the questions with full awareness that the s. 276 order prevented the appellant from giving a meaningful answer.

[83] The appellant argues that the Crown's breach of the order arising from the *Seaboyer/s. 276* Ruling underscores why the evidence of the appellant and

complainant's open relationship agreement ought to have been admitted from the outset. As a result of the *Seaboyer* portion of the order, the complainant was permitted to testify about the appellant's reaction to her disclosure that she had been with another man. The appellant, however, was left in a position where he could do little more than issue a bare denial, without the ability to provide any meaningful explanation in response. During cross-examination, the Crown "effectively cornered" the appellant, suggesting that he would have been angry because he and the complainant had returned to a monogamous relationship by December 2020. Relying on *T.W.W.* at para. 27, the appellant says that in these circumstances, the evidence of the agreement to have an open relationship was clearly necessary "to respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence". This was, he argues, precisely the kind of situation contemplated under the s. 276 regime.

[84] The appellant also argues:

- a) The remedy proposed by the parties and which was accepted by the judge did nothing to cure the prejudice that had already occurred.
- b) Similarly, the re-examination of the appellant did not remedy the prejudice, and arguably exacerbated it.
- c) The Crown spent a significant portion of her closing address on the issue of the appellant's alleged anger upon learning of the complainant's infidelity. The judge's final instructions to the jury did not alleviate the prejudice.

[85] The Crown acknowledges that the impugned portion of the cross-examination of the appellant regarding the monogamous nature of his relationship with the complainant was improper in that it was contrary to the judge's order dismissing the s. 276 application, and could not be elicited without a further application to the court. The Crown notes in its submissions during the hearing of the appeal, that it did not oppose the objection, and upon hearing the objection, immediately discontinued the line of questioning "on the impugned affidavit".

[86] The Crown's position is that, although the appellant's trial counsel initially suggested that he should be allowed to put in the evidence that was the subject of the s. 276 application, he never asked the judge to reconsider the application. Mr. Campbell insinuated, and the judge agreed, that it was a *Seaboyer* issue because the Crown had raised the subject during cross-examination. The Crown did not seek to continue with its line of questioning, and the jury was instructed to disregard the questions and answers about monogamy. The appellant, furthermore, did not seek to elicit evidence concerning the monogamy or non-monogamy of the relationship in re-examination. Nor did he ask the judge to revisit the s. 276 application to allow him to discuss the alleged non-monogamous nature of the relationship.

[87] The Crown submits that the judge also did not decline to revisit the s. 276 order mid-trial. She just asked counsel for their submissions on her proposed solution. It was open to the appellant to make an application or to propose an alternative solution, such as revisiting s. 276, and its application to this case. In fact, he and the Crown proposed an alternative solution which was acceded to by the judge.

[88] The Crown argues that counsels' jointly proposed remedy was reasonable and restored fairness to the trial. Alternatively, the verdict would have been the same even if the s. 276 evidence had been admitted. The open relationship agreement was not probative in any way, and therefore any error in not allowing it is saved by the curative proviso in s. 686(1)(b)(iii) of the *Code*.

Legal framework

[89] The framework which applies to this ground of appeal is well established. Judges have an inherent discretionary trial management power to control the court's process and ensure that trials proceed in an effective and orderly fashion: *R. v. Samaniego*, 2022 SCC 9 at para. 20.

[90] This includes a discretionary power to declare a mistrial where inadmissible evidence is disclosed to the jury in a way that affects trial fairness: *R. v. Chiasson*,

2009 ONCA 789 at para. 14. However, the power to declare a mistrial should only be exercised where there is a “real danger” that trial fairness has been compromised: *R. v. Barra*, 2021 ONCA 568 at para. 147. A mistrial should only be declared in the “clearest of cases” where there has been a “fatal wounding of the trial process” which cannot otherwise be remedied: *R. v. Dueck*, 2011 SKCA 45 at para. 30.

[91] Trial fairness is intrinsically linked with, and derives from the same procedural concerns as the ability for an accused to make full answer and defence: *R. v. J.J.*, 2022 SCC 28 at para. 123.

[92] Under certain circumstances, a mid-trial instruction can be sufficient to dispel the need for a mistrial to be declared when trial fairness concerns are raised: *Chiasson* at para. 19; *R. v. Gill*, 2017 BCCA 67 at para. 30.

[93] As I will explain, the judge’s final instructions to the jury are also relevant to this issue. In reviewing those instructions, I cannot examine the minute details in isolation; it is the overall effect of the charge that matters. *R. v. Araya*, 2015 SCC 11 at para. 39.

Discussion

Introduction

[94] The real issue on appeal is whether the trial could have been saved after the Crown’s breach of the s. 276 order. If not, then the judge should have declared a mistrial. So the question therefore turns upon whether the judge’s attempts to remedy the breach by providing the Mid-Trial Instruction and the limited re-examination were sufficient to safeguard trial fairness by ensuring that the appellant had adequate opportunity to make full answer and defence.

[95] In considering this question, I emphasize that:

- a) the appellant’s alleged anger after the complainant disclosed her purported infidelity on December 18, 2020 was central to the Crown’s theory that he had sexually assaulted her on December 21, 2020;

- b) the appellant's credibility was a key issue for the jury to consider; and
- c) the Mid-Trial Instruction arose as a result of discussions between the judge and counsel and represented a joint proposal by the parties to remedy the Crown's improper cross-examination. In this Court, the appellant says it was "unfortunate" that his trial counsel did not seek a mistrial.

[96] The nature of the relationship between the appellant and the complainant (i.e., monogamous or not) when she told him of the alleged infidelity was never before the jury. Nor was the jury able to consider when the appellant understood the purported infidelity to have occurred, for example, when the parties were in an open relationship and whether he first became aware of the purported infidelity after they had resumed their monogamous relationship. As a result of the Mid-Trial Instruction, the appellant was not provided with the opportunity to explain why he was sad rather than angry on hearing of the complainant's alleged affair.

Analysis

[97] While the circumstances are different in this case than those in *R. v. Avila*, 2025 BCCA 5, Justice DeWitt-Van Oosten's comments, in my view, also apply here:

[77] *I agree with the appellant that the Crown-led evidence of other sexual activity was not properly managed at the trial. After opposing the s. 276 applications, Crown counsel should not have elicited the evidence of other sexual activity that it did and, importantly, seek to use that evidence in support of an inference of guilt without first seeking a Seaboyer voir dire. Furthermore, as the gatekeeper of the trial and having twice rejected a s. 276 application brought by the defence, the judge should have more closely monitored this aspect of the Crown's cross-examination, stopped it when it began to move into other sexual activity, and canvassed the necessity of a Seaboyer inquiry: R.V. at para. 78. The law is clear that the considerations underlying s. 276 of the Criminal Code apply "... irrespective of which party has led the prior sexual activity evidence": Barton at para. 80; R.V. at para. 78. It is the responsibility of the trial judge to independently "... guard against twin-myth reasoning as well as prejudice to the complainant, the trial process and the administration of justice": R.V. at para. 78.*

[Underline emphasis in original; italics emphasis added.]

[98] In my view, the evidentiary landscape had changed significantly from when the s. 276 application was dismissed—which was before the trial proceeded in the presence of the jury—to the point when the Crown’s impugned cross-examination occurred.

[99] At the time of the *Seaboyer/s. 276* Ruling, the nature of the relationship, on the appellant’s own affidavit evidence, was determined by the judge not to be relevant to an issue at trial.

[100] By the time of the appellant’s cross-examination, the complainant had testified and the Crown had closed its case. The complainant had testified to the appellant’s anger when she told him of the affair—her evidence was that, on the evening of the alleged sexual assault, she could see “anger and madness”.

[101] For his part, in direct examination the appellant testified he felt “sad” when the infidelity was disclosed to him.

[102] When one considers the entirety of the transcript of the Crown’s cross-examination leading to the admitted improper questioning, counsel’s ultimate goal in the line of questioning is clear. The Crown was attempting to impeach the appellant’s statement that he “had no problem” with being advised of the affair and to show that he was, in fact, angry or in a rage with the complainant.

[103] The Crown’s attempt to impeach the statement is evidenced by the impugned exchange between Crown counsel and the appellant about the affair. First, she suggested to the appellant that the relationship was monogamous. To this, the appellant answered, “[n]o. That’s untrue”.

[104] Crown counsel then stated that she needed to be “somewhat careful here because, as you know, there was previous litigation as to what could be discussed in this particular proceeding”. It was at this point in the cross-examination that Crown counsel identified the appellant’s affidavit in support of the s. 276 application. She told the appellant that the affidavit “states you were in a monogamous relationship,

from your perspective anyway”. She said she was going to provide a copy to him, and told him not to read it out loud.

[105] Then, the following exchange occurred:

- A Is the question whether — are you asking me whether [the complainant] and I were in a monogamous relationship? If so, the answer is no.
- Q The question is that — and that I’ve now asked you — I know you answered that question, which I found rather surprising, because I am now going to show you a document, an affidavit that you swore in April 23rd, 2024 that suggests you were in a monogamous relationship with [the complainant].

[106] The affidavit was thus referred to not once, but twice by Crown counsel. First, when the nature of the relationship was referenced as “a monogamous relationship, from your perspective anyway”, and on a second occasion within the context of “a document ... that suggests you were in a monogamous relationship with [the complainant]”.

[107] Accordingly, the judge was required to deal with defence counsel’s concerns as raised in his objection. On that basis, the circumstances now differed from how they stood at the time of the s. 276 application. Crown counsel had now made the non-monogamous nature of the relationship relevant to an issue at the trial, that is the appellant’s reaction when advised by the complainant of the affair with the other man. The evidence of non-monogamy was not being advanced for the purposes of twin myth reasoning, but rather to assess the credibility of the parties’ testimony about the appellant’s reaction to being advised of the affair—that is, whether he was “sad” as he had just stated in his direct examination or “angry”, “in madness”, or in a “rage” as stated by the complainant in her evidence.

[108] These factors, in the context of the cross-examination as a whole, provide contextual considerations as to whether the judge “properly managed” the situation she faced following the Crown’s improper cross-examination.

[109] In my view, leading up to the Mid-Trial Instruction, there were several critical inflection points, which, in combination, compromised the appellant’s ability to make

full answer and defence, and therefore could have resulted in a renewed s. 276 application or a mistrial. The remedy that was implemented: (1) did not instruct the jury to disregard the Crown's reference to "previous litigation"; (2) still failed to give the appellant a proper opportunity to respond about why he felt "sad" rather than "angry"; and (3) left the jury with a prejudicial impression of the appellant, which the judge herself had recognized and described as "Mr. Weatherston has looked to be not particularly credible with regards to not being upset and he has now stated they were not in a monogamous relationship...".

[110] To highlight how these issues crystallized, it bears repeating the chronology and particulars of the remedy implemented by the judge.

[111] She began by outlining to counsel "where she was thinking" as to a remedy. Her proposal was that she should provide a mid-trial instruction stating that the jury could only make a limited use of the evidence of non-monogamy, and that the appellant be asked on re-examination:

On cross-examination, you denied being overly upset about [the complainant] being with someone else. You also testified that you were non-monogamous. Is that why you were not overly upset; yes or no?

[112] Then, Crown counsel advised the judge that she and defence counsel were jointly suggesting a different remedy: telling the jury to disregard the line of questioning about non-monogamy. The judge explained that under counsel's proposed solution, "non-monogamy would be completely eliminated at that point... [i]t would be disregarded". Counsel agreed. The judge then stated, "[o]kay. That works for me", and thanked counsel "for coming up with a good solution that works for everybody".

[113] However, the judge had already acknowledged:

- that she shared defence counsel's concerns regarding the appellant's credibility to which I have referred at para. 109 above; and
- "[t]he horse is already out of the barn and so what we're looking at is damage control".

[114] The judge did not explain why, contrary to her initial thoughts on the matter, the parties' proposed remedy alleviated her credibility concerns. She only stated that it satisfied her concerns about the jury hearing about non-monogamy.

[115] And, at this juncture, the Mid-Trial Instruction itself bears repeating:

You heard testimony yesterday from Mr. Weatherston that he and [the complainant] were in a non-monogamous relationship. Please disregard the Crown's question with regards to that and Mr. Weatherston's answer.

I will also remind you at this point that what counsel says is not evidence. Only what the witnesses say is evidence.

[116] Notably, the Mid-Trial Instruction did not specifically instruct the jury to disregard the references to the "previous litigation regarding what could be discussed in this particular proceeding", or to the references to the appellant's affidavit. It only addressed the issue of non-monogamy being before the jury and did not allow the appellant to give evidence that could arguably repair the obvious credibility issues he faced.

[117] Following the Mid-Trial Instruction and the completion of the Crown's cross-examination, the defence re-examination took place. The last impression the jury had of the appellant was the following interaction:

Q ...Without getting into the reason of why you were not feeling angry or betrayed, et cetera, can you tell us if there was a reason why you did not feel angry, betrayed?

A Yes, there was a reason that I was not upset, angry. Yes.

Q Okay. Thank you.

Those are all my questions.

[118] Thus completed the remedy—being the Mid-Trial Instruction and limited question put to the appellant in re-examination. In my view, this fell short of safeguarding the appellant's right to make full answer and defence.

[119] On appeal, the appellant submits that the re-examination did not remedy the prejudice, and arguably exacerbated it. I agree. A simple assertion by the appellant that he had a reason for not being angry—without being permitted to explain that reason—did not enable the jury to properly assess his credibility on this issue. On

the contrary, it may well have invited speculation as to what the reason was and why it had not been disclosed. The jury may have drawn a negative inference against the appellant, concluding that, because he did not provide his reason, it must not be one that could assist him.

[120] In my view, the judge’s initial proposal for the phrasing of the question on re-examination was as unsatisfactory as the question that the appellant was in fact asked on re-examination. Trial fairness would not have been protected even if the appellant were asked the binary “yes or no” question of whether his testimony that he was non-monogamous was the reason he was not overly upset. This is because that phrasing of the question still did not provide the appellant the opportunity to explain why he was not overly upset, which would have entailed describing what he understood to be the nature of the parties’ relationship.

[121] And this all occurred in the context in which Crown counsel’s first mention of the affidavit in her cross-examination revealed to the jury that the appellant apparently had an explanation to give:

And I have here a copy of an affidavit that was sworn by you on — in April of 2024 that states that you were in a monogamous relationship, from your perspective, anyway, with [the complainant].

[Emphasis added.]

[122] Yet, despite the appellant’s perspective being raised by the Crown in cross-examination, the Mid-Trial Instruction and the limits imposed on the re-examination did not provide the appellant with the opportunity to explain what that perspective was.

[123] Had the appellant been permitted to testify as to the nature of the relationship—that is, monogamous or “open”—he would have undergone vigorous cross-examination as to the apparent differences between his evidence on cross-examination and what he had stated in his affidavit.

[124] And yet, as stated by the appellant’s counsel in this Court, the appellant appeared to have an explanation to give. For example, he may have believed the

relationship was monogamous, while the complainant, based on her disclosure of the affair, did not. Another explanation could have been that since the relationship had been “open” a few months beforehand, the appellant may not have considered the complainant’s infidelity to be a necessary end to the relationship, resulting in him being only sad, and not angry. There may also have been other explanations.

[125] Of course, the jury did not have to accept the appellant’s explanation. As the judge correctly instructed them:

Even if you do not accept the evidence of Mr. Weatherston, if it still leaves you with a reasonable doubt that he committed a sexual assault, then you must find him not guilty.

Further, even if you completely reject the evidence of Mr. Weatherston, you may not — you may not simply assume that the Crown’s version of events must be true. Rather, you must carefully assess the evidence you do believe and decide whether that evidence persuades you beyond a reasonable doubt that Mr. Weatherston committed a sexual assault and, if it does not, then you must find him not guilty.

[Emphasis added.]

[126] But the appellant did have the right to provide that explanation, nonetheless. As a result, I would conclude that, in the circumstances, the appellant was deprived of his right to make full answer and defence. His purported anger or rage was central to the Crown’s case. He was not given the opportunity to provide an explanation as to why he was not angry or in a rage and as a result, the jury could not properly assess his credibility on this central issue.

[127] Respectfully, the judge erred in failing to appreciate that the Mid-Trial Instruction and the limits on the re-examination of the appellant would not adequately protect trial fairness. There was a “real danger” to trial fairness such that a mistrial could have been warranted in these circumstances: *Barra* at para. 147.

[128] I say “could have been warranted” because although, according to the judge “the horse was already out of the barn”, “the cat was out of the bag”, and that the issue was therefore “damage control”, a mistrial was not necessarily the only remedy available under the circumstances.

[129] First of all, the judge could and should, in my view, have revisited the s. 276 ruling based on there being, at this stage of the trial, a material change in circumstances. While the judge did refer to a “change in circumstances” (see para. 66 above), she did not consider further the material change of circumstances requirement and apply that framework to the circumstances that existed at the time, being the Crown’s violation of the s. 276 ruling.

[130] As the Chief Justice explained in *Kinamore*:

[57] The judge may, either on their own initiative or at the request of either party, revisit this admissibility ruling when there is a material change in circumstances, such as when a witness’s testimony evolves during the course of a trial (*T.W.W.*, at para. 51).

[Emphasis added.]

[131] Respectfully, I do not understand how the judge could not have appreciated that what she was required to do was to consider “on her own initiative” whether she should revisit the s. 276 ruling.

[132] First, it appears that the judge was influenced by defence counsel’s submission which caused her to say this during the following exchange with counsel regarding the complainant’s privacy rights:

The Court: If there are any submissions to be made about that, then that would be appropriate at that time. You can discuss amongst the three of you whether Ms. Bogle would appear because we're not strictly on a 276. I think that's part of what I'm going to be looking at –

MS. LAURIE: Okay.

THE COURT: - is procedure and revisiting an issue that's - that comes up from the Crown rather than from defence because it's absolutely not a 276 application at this point because, as Mr. Campbell said, it's really a Seaboyer, an inadvertent Seaboyer, maybe, if all that makes sense.

[Emphasis added.]

[133] Second, the judge appears to have deferred from revisiting the s. 276 ruling in that the parties had agreed to a potential solution which she then accepted and implemented.

[134] The reality of what had occurred was this. In response to the Crown's improper questioning of the appellant, he requested that he be permitted to call evidence that he had previously been told in the s. 276 ruling he could not adduce, that is evidence of the open relationship. Logically, in my view, no matter how it was characterized by defence counsel, this was a request to re-open the s. 276 application. As a result of its impugned cross-examination of the appellant, the Crown had opened the door, in the presence of the jury, as to the nature of the relationship between the parties, that is monogamous or "open", which amounted to a material change in circumstances: *Kinamore* at para. 57.

[135] Considering the judge's trial management powers and gatekeeper responsibilities, a remedy may well have been crafted, short of a mistrial, within the context of a renewed s. 276 application, which permitted the appellant to testify about the nature of the relationship and be cross-examined on that evidence. The Crown could then have been permitted to recall the complainant on this issue to answer a carefully selected series of questions, subject to submissions from counsel about her privacy interests on the points raised. An appropriate mid-trial instruction would then have been provided to the jury. This may well have adequately addressed the requisite fairness considerations identified in *Gill* at para. 30.

[136] Similarly, for the reasons I have given, the judge in this case could not rely solely on the Mid-Trial Instruction, which for example, was considered an adequate remedy in *Chiasson*.

[137] I am also of the view that what occurred after the Mid-Trial Instruction and the appellant's re-examination only aggravated the situation in that the trial remained fundamentally unfair.

[138] In her closing address, counsel for the Crown referred in some detail to the issue of the appellant's alleged anger upon learning of the complainant's infidelity:

Mr. Weatherston said that if he ever saw a man at her house, he would beat him for so long that he would never move again, and [the complainant] believed him. She believed him because she got to know him quite well in the

course of their relationship. She'd seen his mood swings. She had seen how quickly he could go from being normal to being extremely angry.

He had told her stories of things he did such as beating a man so badly after he stole a truck that he wound up in hospital. She had no reason not to believe this story and there was no doubt in her mind that he was capable of doing the same thing to any man he suspected she was involved with.

When [the complainant] walked into Mr. Weatherston's home a few days later, he told her to remove her clothes and go to the bedroom. She froze and all those words he'd said about beating people up, beating up any man he saw at her house filled her mind. She felt she had no choice.

...

He asks you to believe that when he found out the woman he loved had sexual relations with another man behind his back he was sad and upset, but not very upset, that he did not feel betrayed, that he did not feel he'd been wronged, that he did not even feel she'd broken his trust, and that aside from being curious as to who the man was, he had no interest in him whatsoever. But this is no honest answer.

Mr. Weatherston was, in fact, furious that [the complainant] had been with another man, but he's covering that up because he's worried that it will make him look bad. He's telling you what he thinks you want to hear, not what is true.

[Emphasis added.]

[139] At no point did the Crown suggest to the appellant during cross-examination that he was lying about his reaction to the infidelity to avoid "look[ing] bad" at trial. Moreover, it was unfair for the Crown to suggest to the jury that the appellant was being dishonest for this reason, while fully aware that he had an explanation he was prohibited from adducing due to the s. 276 order, and the judge's mid-trial attempts to otherwise remedy the situation.

[140] Furthermore, the judge's final instructions to the jury did not assist in alleviating the prejudice caused by the Crown's impugned cross-examination. In her charge, the judge said:

Mr. Weatherston testified that he and [the complainant] were in a romantic relationship. [The complainant] told him a few days before the night of the alleged sexual assault that she had been with someone else. It made him sad and upset.

Mr. Weatherston says there are reasons why his feelings were not more significant. On that point, because of the limits about what can and cannot be said in evidence, Mr. Weatherston could not explain further about why he was not more unhappy about the revelation.

[Emphasis added.]

[141] This reference to the appellant’s “reasons”, which he was not permitted to explain, risked inviting the jury to speculate about what those reasons might have been. As with the earlier re-examination, the jury was left without any context to properly assess the appellant’s credibility on this point. Nor could the jury determine whether the existence of the appellant’s “reasons” raised a reasonable doubt. The charge drew further attention to the gap in the evidence caused by the s. 276 order, and the limitations on the jury from the Mid-Trial Instruction.

[142] Moreover, the judge also instructed the jury that they may consider the impact of the purported infidelity on the complainant’s relationship with the appellant:

You may use the evidence that [the complainant] told Mr. Weatherston that she had been with someone else, but only to help you decide the impact that statement had on the relationship, how Mr. Weatherston reacted at the time of the revelation and afterwards, and Mr. Weatherston’s understanding of the state of the relationship on the evening in which the sexual activity for which he is charged took place.

You may not use this evidence for any other purpose. Specifically, you may not use this evidence to infer that, because of the sexual nature of what happened earlier in the relationship, [the complainant] is more likely to have consented to the sexual activity with which Mr. Weatherston is charged or that [the complainant] is less worthy of belief. These inferences are based on myths on sexuality that have no place in our law.

[Emphasis added.]

[143] The problem with this instruction is apparent. How could the jury consider “the impact that statement had on the relationship” and “how [the appellant] reacted at the time of the revelation and afterwards”, without knowing whether the nature of the relationship was monogamous or not, in whole or in part at the material time?

[144] I would add that the judge’s reference to the “impact” of the relationship without any mention of its “nature” was directly linked to the Mid-Trial Instruction and the limits placed on the appellant’s re-examination.

[145] There is, of course, a presumption that juries will follow the instructions given to them by the judge; to hold otherwise, “undervalues the trustworthiness of the jury”: *R. v. Hoffman*, 2024 BCCA 98 at paras. 230–231, Saunders J.A. concurring. But

despite this presumption, a jury verdict arising from unclear or incomplete instructions may warrant a new trial: *R. v. Whitmore*, 2021 BCCA 302 at para. 36.

[146] The circumstances leading to the jury charge made it unclear to the jury the extent to which they could draw adverse inferences against the appellant based on the events following the Crown's breach of the s. 276 order. Neither the Mid-Trial Instruction, nor the re-examination of the appellant allowed the jury to have the information they needed to properly assess the appellant's credibility. The jury charge exacerbated this issue by improperly instructing the jury that they may determine the impact of the complainant's purported infidelity on her relationship with the appellant but "not...for any other purpose". The instructions were, respectfully, flawed in this respect.

[147] It is telling that, when Crown counsel in this Court was asked during the hearing of the appeal, how the trial could be saved, he answered that a mid-trial instruction was the only appropriate remedy. And yet, notwithstanding the Crown's reliance on the curative proviso (to which I shall return), when counsel was asked the question I pose at para. 143 above, he candidly responded that he did "not have a submission that answer[ed] those concerns".

[148] I acknowledge that the appellant's trial counsel agreed to the proposal that the judge ultimately implemented. The appellant also did not object to the Crown's submissions in which she outlined his theory of the alleged sexual assault. Nor did he object to the Mid-Trial Instruction or the portion of the charge to which I have referred. All this, however, is secondary to the trial judge's overall responsibility to manage the trial and ensure that it remains fair—regardless of whether a party fails to object at trial: *R. v. Khill*, 2021 SCC 37 at para. 144. Nor is a party's consent to a particular jury instruction determinative of whether the charge was appropriate in the circumstances of the case: *R. v. Barton*, 2019 SCC 33 at para. 49; *R. v. Pirko*, 2023 BCCA 120 at para. 67. It remained the judge's responsibility to ensure that trial fairness was restored and preserved.

[149] Accordingly, I would conclude that the judge’s errors—in: (1) failing to revisit the s. 276 application; (2) providing an inadequate Mid-Trial Instruction; (3) allowing a re-examination that did not provide the appellant with the opportunity to give evidence that the jury needed to assess his credibility; and (4) providing a jury instruction that allowed them to consider the impact of the relationship between the parties without having evidence before them as to the nature of the relationship—rendered the trial unfair and prevented the appellant from presenting a full answer and defence to the offence with which he was charged. As Justice McLachlin (as she then was) observed in *Seaboyer* at 608:

The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it:

If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.

(Doherty, *supra*, at p. 67).

In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled.

[150] In my view, the errors in question were ones of principle and resulted from an unreasonable exercise of the judge’s trial management powers. Accordingly, they are not entitled to deference.

The curative proviso

[151] There remains the issue of the Crown’s reliance on the curative proviso.

[152] Not every failure to provide a proper limiting instruction or final instruction to a jury will result in an appeal being allowed: *Code*, s. 686(1)(b)(iii); *R. v. White*, 2011 SCC 13 at paras. 93–95.

[153] Recently, in *R. v. Hussein*, 2026 SCC 2, Chief Justice Wagner summarized the applicable framework:

[141] Under s. 686(1)(b)(iii) of the *Criminal Code*, a conviction can be upheld provided that an error at trial has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of proving that the curative proviso is applicable and that despite the legal error, a conviction ought to be sustained (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34).

[142] The Crown discharges its burden where it demonstrates that an error falls into one of two categories. For the first category, errors must have been so minor or harmless that they could not have impacted the verdict (*R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 81). The second category comprises errors that are serious and would ordinarily warrant a new trial but for the fact that the evidence against the accused is so overwhelming that a conviction was inevitable (*ibid.*). In this case, we are concerned with the second category.

[143] The notion that a conviction may stand in the face of a serious error is not a departure from principle, but a reflection of it. As Justice Sopinka noted in *R. v. S. (P.L.)*, 1991 CanLII 103 (SCC), [1991] 1 S.C.R. 909, “depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction” (p. 916). The justification for upholding a conviction is compelling. Where another conviction is inevitable, ordering a new trial would “result in a waste of time or resources” (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 90).

[144] Nevertheless, appellate courts must approach this analysis with great care because the standard to apply the curative proviso in this manner is high. This Court has previously characterized the threshold as being “substantially higher ... than the requirement that the Crown prove its case ‘beyond a reasonable doubt’ at trial” (*Trochym*, at para. 82). This standard is justified given the inherent difficulty of assessing the strength of the Crown’s case retroactively, without the benefit of observing the trial as it unfolded (*Van*, at para. 36, citing *Trochym*, at para. 82).

[154] In its factum, the Crown relies on both prongs of the curative proviso. It submits that the non-monogamy agreement was not probative in any way, and therefore the alleged errors were harmless. It also says that the verdict would have been the same even if the s. 276 evidence had been admitted.

[155] In my view this is not one of those rare cases where the high standard to apply the curative proviso is satisfied. The errors were not harmless and it cannot be said that, had they not occurred, the evidence of the appellant’s guilt for sexual assault was overwhelming, such that a conviction was inevitable.

[156] The cumulative impact of the Crown’s improper cross-examination in the face of the judge’s s. 276 ruling and the inadequate steps which were taken to remedy

the situation rendered the trial unfair. The appellant was prevented from exercising his right to make full answer and defence, which in turn engendered a miscarriage of justice.

[157] This conclusion is supported in part by Crown counsel’s concession during the hearing of the appeal that he had no submissions to answer the Court’s concerns regarding how the jury—without being able to assess whether the relationship was monogamous or not—could properly assess the impact of the complainant’s purported infidelity on the relationship. The Crown’s statement is particularly meaningful because, as I have outlined, the jury instruction was causally linked to the judge’s Mid-Trial Instruction and the limited right of re-examination on the appellant’s reason for being “sad” rather than “angry”.

[158] This ground of appeal, standing alone, warrants a new trial.

Issues 3 and 4: The disreputable conduct and honest but mistaken belief in communicated consent rulings

[159] Since I would allow the appeal on the second ground, it is not necessary to deal with these issues.

Disposition

[160] On the basis of the second ground of appeal, I would allow the appeal, quash the conviction for sexual assault, and order a new trial.

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Madam Justice MacPherson”

I AGREE:

“The Honourable Justice Gomery”