NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

December 2021

Collusion, Burden of Proof and Proper Analysis

"Inadvertent Collusion" Is To Be Avoided… As A Phrase

On November 16, 2021 the Ontario Court of Appeal ordered a new trial in *R. v. C.G.*, 2021 ONCA 809 on a number of grounds.

The trial judge had accepted the Crown's submission that defence witnesses had "inadvertently colluded" with each other on their evidence. This can happen where people who are friends or family of the accused are witness to some or part of the events.

Writing for a unanimous Court, Justice Nordheimer stated that there is a difference between deliberate collusion, which is usually argued in opposition to similar fact applications. Deliberate collusion affects the credibility of a witness whereas accidental collusion only concerns reliability because evidence can be tainted by hearing how another person recalls events.

Justice Nordheimer went further to say that the phrase was an unfortunate coinage and that "it would be better if the term 'inadvertent collusion' was avoided and replaced by the term "inadvertent tainting" as the word "collusion" implies conspiracy.

In a section titled "The Absence of Analysis of the Competing Evidence," Justice Nordheimer outlined the requirement for trial judges to address defence evidence in sufficient detail to explain why it was rejected.

While it is not necessary to address every piece of evidence, "a trial judge is required to address crucial evidence that bears directly on the credibility and reliability of a witness."

Finally, the Court of Appeal discussed the ongoing issues with the application of burden of proof as laid out in the well known case of *W.(D.)*, especially since the decision in *R. v. J.J.R.D.*, 2006 CanLII 40088 (ON CA).

Though *J.J.R.D.* allows for a conviction without following the *W.(D.)* formula precisely, Justice Nordheimer wrote "what the decision in *D. (J.J.R.)* does not do, however, is provide an answer to the failure of a trial judge to avert to exculpatory evidence that stands unchallenged."

While the Supreme Court of Canada has recently warned appellate courts not to interfere with the findings of a trial judge without sufficient cause, the Ontario Court of Appeal cited the decision in *R. v. G.F.*, 2021 SCC 20 saying that the reasons still had to be "factually sufficient" to explain why there was no reasonable doubt in the face of exculpatory evidence.

In the case of *C.G.*, the defence had raised exculpatory evidence aside from the testimony of the accused which required the trial judge to grapple with the reasons why it failed to raise a reasonable doubt. Simply stating that the appellant was not believed fails to explain how the whole of the evidence was dealt with in reaching the conviction.

J.J.R.D. has continued to cause mischief in the lower courts. The burden proof remains the same and the *W.(D.)* formula has not been replaced. In *J.J.R.D.* the conviction was based on "a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence."

The Trauma of Expert Witnesses

The Nova Scotia Court of Appeal weighed in on expert witness evidence related to "trauma" in *R. v. Kotio*, 2021 NSCA 76, decision issued on November 10, 2021.

A sexual assault nurse had been called to testify about the area of her expertise and, in the course of her testimony, commented that she found "in trauma people remember different things at different times."

The comment would not have been concerning except for the weight placed on it by the trial judge, who referred to "trauma" repeatedly in his decision.

The inconsistencies that arose between the complainant's evidence at trial and her prior statement to the police were discounted on the sole grounds that the trial judge accepted the nurse's evidence about how trauma affects memory. The belief that she was experiencing trauma was then used to bolster her credibility.

The appellant argued that "it also shifted the burden to the appellant because to say 'in trauma people remember different things at different times' requires trauma (guilt) to be

presumed which placed the burden of disproof on the appellant."

Because the comment by the nurse was brief, the question of admissibility of the comment was never discussed during the trial or closing submissions. Though the comment should have been flagged at the time it was said, there was no indication that it would factor into the judge's credibility assessments.

Ultimately, the Court concluded that "the judge should not have relied on [the nurse's] opinion and used it to improperly dismiss inconsistencies in the complainant's testimony."

The trial judge in *Kotio* also made a glaring error by drawing an adverse inference from the accused's refusal to provide the police with the password to his cell phone.

The Court of Appeal noted that if an accused's refusal to provide evidence to the police could be used against him then "the appellant's constitutional right to silence would be rendered illusory."

Based on a combination of material errors, a new trial was ordered.

Honest But Mistaken Belief in Reasonable Steps

The "reasonable steps" requirement has become an area of dispute since the Supreme Court of Canada's decision in *R. v. Morrison*, 2019 SCC 15.

In *R. v. W.G.*, 2021 ONCA 578 the Ontario Court of Appeal laid out some guidelines for how to determine the *mens rea* element where the underage person in a sexual interference charge is not a fictional creation of a police operation.

In the case of *W.G.*, the trial judge concluded that the accused honestly believed that his sexual partner was 18 years old and ended the relationship when it was revealed the boy was only 15 at the time. Nevertheless, *W.G.* was convicted because he failed to take all reasonable steps to determine the boy's age.

At the time of the decision, *Morrison* had not yet been decided. A finding that reasonable steps had not been taken was sufficient to convict.

The appeal focused on whether or not the trial judge had decided that "every" reasonable step had to be taken and if he had further neglected to determine if the Crown had met their burden of proof on all the elements of the charge.

Justice Watt for the Ontario Court of Appeal noted that "As a general rule, the more reasonable an accused's perception of the complainant's age, the fewer steps required of the accused to satisfy the standard of diligence imposed."

Whether or not reasonable steps have been taken is a contextual issue based on the facts of each case and the subjective knowledge of the accused at the time.

Justice Watt further wrote that "there is no magic number or exhaustive list of steps that an accused must take" but that it should be driven by "common sense."

Comparisons were made to the defences of self defence, alibi or provocation in a murder charge. If the Crown disproves any of those defences they still must carry on to prove the elements of the murder charge were met. Similarly, according to *Morrison*, in a sexual interference charge, if the defence of honest belief in age is in play, and the Crown proves beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain the complainant's age, the defence is unavailing. But it does not mean that, on this basis alone, the offence charged has been proven beyond a reasonable doubt. Whether the offence charged has been proven depends on whether the trier of fact concludes that the Crown has proven beyond a reasonable doubt that the accused believed that the complainant was underage.

At paragraphs 68 and 69, Justice Watt notes:

"Where the Crown has disproven the honest belief in age defence in s. 150.1(4), the trier of fact is left with three possible states of mind. The accused may have believed or have been wilfully blind to the fact that the complainant was under 16. The accused may have appreciated that there was a risk that the complainant was under 16 but decided to go ahead anyway despite that risk. Or the accused may never have adverted to the complainant's age and chose to proceed with the touching: *Carbone*, at para. 122.

"The fault element under s. 151 may be proven by establishing that the accused believed that the complainant was under 16, or that the accused was wilfully blind to the fact that the complainant was under 16. The Crown may also establish the fault element by proving beyond a reasonable doubt that the accused believed that there was a risk that the complainant was under 16, but went ahead anyway, choosing to do so despite the risk. In other words, the accused was reckless as to the complainant's true age. And the Crown may also demonstrate that the accused never turned their mind to the complainant's age as they proceeded. This too may establish recklessness on the accused's part with respect to the complainant's age. Reckless indifference is a subjective state of mind bespeaking a choice on the part of an accused to treat the complainant's age as irrelevant and to assume the risk associated with their choice: *Carbone*, at paras. 123, 126-127."

Ultimately, although they are separate considerations, when a reasonable steps defence fails, it will usually result in a conviction.

Overzealous Prosecution

In *R. v. Clyke*, 2021 ONCA 810 the Crown conceded that the trial prosecutor had engaged in improper conduct and the Ontario Court of Appeal determined that, despite the appellant being acquitted of some of the charges, the trial judge's corrective instruction was not sufficient.

The conduct subject to the appeal included an invitation for the jury to engage in propensity reasoning, finding that the accused was more likely to be guilty because of his drug habits and lifestyle.

The jury was also invited to speculate on how drugs had gotten into the complainant's body where there was a lack of evidence on the subject and the prosecutor injected her own personal opinion on matters of credibility.

The Court of Appeal found that " the propensity reasoning invoked by the trial Crown is one of the most problematic aspects of her closing submissions" inviting both moral prejudice and reasoning prejudice.

Though the trial judge recognized the problem and gave corrective instruction, it was determined that it "did not adequately respond to the Crown's improper appeal to propensity reasoning" and was "compounded by passages in the jury charge."

Though the Crown has the right to act as a vigorous advocate, in this case she "directly sought to 'inflame the passions' of the jury, appealing to their emotions." Though some of the errors were overcome by the jury instructions the cumulative effect rendered the trial unfair.

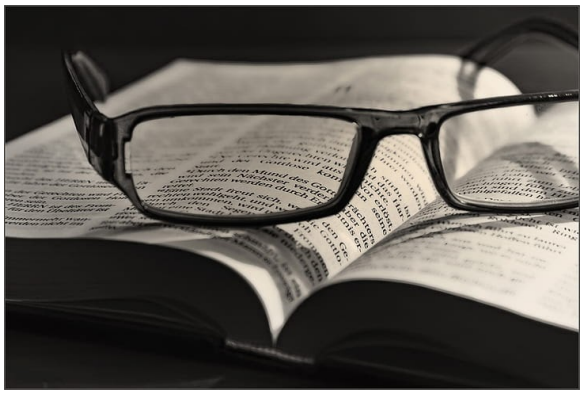
Despite being acquitted of half the charges, the Court ordered a retrial on the remaining convictions. This remains a caution to ensure that the prosecution must not step beyond their role in a trial and for the Court to immediately address submissions to a jury that are beyond the purview of the role of either the Crown or defence.

Don’t Try This At Home

In the strange case of *R. v. D.Q.*, 2021 ONCA 827 the accused was asked to leave the courtroom while the Crown and defence discussed whether the accused could be cross-examined on his previous sexual history.

The trial judge had agreed and the accused was briefly removed from his own trial. Although this was a clear violation of his absolute need for an accused to be present for his or her trial, the appeal was dismissed because the ruling was in his favour and it was obvious that “there was nothing egregious about the single brief mistake that was made during the appellant’s trial.”

Though the appeal was dismissed it would be wise not to try this at home in future trials.



Air of Reality

In the case of *R. v. Effert*, 2021 ABCA 388 the female accused had argued self-defence to an assault charge, claiming she was fending off a sexual assault at the time.

The trial judge had determined there was no “air of reality” to that defence and the Alberta Court of Appeal disagreed.

Citing *R. v. Cinous*, 2002 SCC 29:

“The leading case from the Supreme Court of Canada on air of reality is *R v Cinous*, 2002 SCC 29, where the majority of the SCC stated at paras 53-54:

In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See Osolin, supra; Park, supra. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. **There is no requirement that the evidence be adduced**

by the accused. See *Osolin*, supra; *Park*, supra; *Davis*, supra.

The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta*, supra; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, 1987 CanLII 56 (SCC), [1987] 1 S.C.R. 782; *Park*, supra. **Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.** [Emphasis added.]

Although *Effert* is in relation to an argument of self-defence, the legal concept of "air of reality" is very much tied to sexual assault case law and the principles remain the same.

All too often, in sexual assault cases, the Crown attempts to thrwart 276 applications related to honest mistaken belief in consent by foisting upon the defene a far higher standard to reach for "air of reality" when in law, the standard is much lower and can come from evidence other than that of the accused.

Other Cases To Watch

Decisions are reserved in the following cases:

R. v. J.J, 2020 BCSC 349 SCC File # 39133
Constitutional challenge of the new regime for evidence in an accused's possession.

R. v. Kirkpatrick, 2020 BCCA 136 SCC File # 39287
Interpretation of the Supreme Court decision in *Hutchinson* as it relates to consent being dependent on condom usage.

Upcoming cases:

R. v. Ndhlovu, SCC File # 39360
Whether or not mandatory SOIRA order is unconstitutional. There are numerous intervenors in this case.

Kerry Alexander Nahanee v. Her Majesty the Queen SCC File # 39599
On a guilty plea the judge gave an 8 year sentence when the Crown was only asking for 4-6 years. BCCA dismissed the appeal.

Contributors:
Joseph A. Neuberger, LL.B, LL.M., C.S.
Diana Davison, Legal Researcher