S.C.C. File No. 40095

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

B E T W E E N :

HIS MAJESTY THE KING

Appellant

– and –

CHRISTOPHER JAMES KRUK

Respondent

– and –

THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Evidentiary rules are a cornerstone of Canadian criminal trials, designed carefully to protect an accused's constitutional right to a fair trial and to ensure respect for the administration of justice. A fundamental principle of the justice system is that decisions can only be made based on evidence presented at trial.[1] Judicial notice is the singular exception to this principle.[2] Facts judicially noticed are not proven by evidence under oath, nor are they subject to cross-examination.[3] As findings of judicial notice are not subject to the same degree of scrutiny as evidence presented at trial, the threshold for judicial notice is extremely high.[4] It is important to maintain this high threshold, as decisions regarding a person's liberty must be based on a proper evidentiary foundation and must not be based on pernicious reasoning under the guise of 'common sense.'

2. Sexual assault trials pose unique evidentiary challenges for the trier of fact. The vast majority of sexual assault cases turn on issues of credibility and reliability, where a trier of fact must consider circumstantial evidence by drawing on common sense and reasonable inferences.[5] This type of reasoning, referred to in the literature as tacit judicial notice, is subject to the same high threshold for acceptance.[6] While the line between reasonable inferences and improper speculation can be difficult to determine, it is of paramount importance to the fairness of a trial.

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[1] David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence,* 8th ed. (Toronto: Irwin Law, 2020) ("Paciocco"), at 573.
[2] *Ibid* at 573.
[3] *R v Find*, 2001 SCC 32 at para 48.
[4] *Ibid* at para 48.
[5] David M. Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases" in Benjamin L. Berger, Emma Cunliffe & James Stribopolous, eds., To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg (Aurora: Thomson Reuters, 2017) 73 at 92-93 [Tanovich].
[6] S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed., looseleaf (Toronto: Carswell, 2019), at §26.10.

3. As this case shows, the availability of a particular inference is often the determining factor in a sexual assault conviction. At trial the Respondent was convicted of sexual assault. Central to this verdict was the trial judge's finding that, despite the complainant's lack of sobriety, it was "extremely unlikely that a woman would be mistaken" about the feeling of a penis inside her vagina. The Court of Appeal for British Columbia allowed the appeal, holding that the trial judge had improperly taken judicial notice of this fact.

4. The Criminal Lawyers' Association of Ontario ("CLA") submits that the approach advocated by the Appellant (and applied by the trial judge) erodes traditional evidentiary and admissibility rules required to ensure fairness in criminal proceedings. Blurring the lines between proper fact-finding, judicial notice, and speculation risks wrongful convictions, particularly in credibility cases, such as sexual assault trials. In order to ensure that trial fairness is maintained, that verdicts are based on evidence, and that the rule of law is respected, it is necessary to adhere to the requirements of traditional evidentiary rules.

B. Statement of Facts

5. The CLA takes no position with respect to the facts as advanced by the parties and defers to the parties on the factual record.

PART II – QUESTIONS IN ISSUE

6. The Appellant raises two issues on appeal: (1) did the British Columbia Court of Appeal err in concluding that the trial judge relied on speculative reasoning in accepting the complainant's evidence? And, (2) is there merit to the Respondent's alternative argument regarding alleged misapprehensions of the evidence and the related remedy? The CLA submits that the British

Columbia Court of Appeal was correct in concluding that the trial judge relied on conjecture and speculation in accepting the complainant's evidence. The approach advocated by the Appellant waters down the test for judicial notice and fact finding, risking that an accused be convicted on the basis of stereotypical reasoning. The CLA takes no position with respect to the second issue.

PART III – ARGUMENT

A. The Importance of Adherence to Evidentiary Rules

7. It is trite, that a criminal conviction requires the prosecution to meet its burden on the basis of admissible evidence. This evidence may be either circumstantial or direct. At times, however, it may be difficult to draw the line between facts premised on reasonable inferences or pure speculation. In attempting to bridge the gap in circumstantial evidence, triers of fact may draw inferences that can logically and reasonably be deduced from other facts established in the proceeding.[7]

8. Judicial notice is an exception to the general evidentiary rule in criminal proceedings requiring the prosecution to prove through evidence the truth of a particular fact or state of affairs. In the normal course, cases must be decided on the basis of evidence presented by the parties in open court.[8] This ensures that verdicts are based on reliable and accurate evidence, tested in the adversarial process. It also ensures respect for the administration of justice and the court process, as facts underlying a criminal conviction are litigated and determined in a public forum. Judicial notice, on the other hand, involves the acceptance of facts or a state of affairs without proof.[9] Facts

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[7] *R v Morrissey* (1995), 97 CCC (3d) 193 (Ont CA) at p. 209.
[8] Paciocco, supra, at p. 573.
[9] *R v Williams*, [1998] 1 SCR 1128, at para. 54; Sidney N. Lederman, Alan W. Bryant & Michelle

judicially noticed are not proven by evidence under oath; nor are they tested through cross-examination.[10] Since judicial notice dispenses with the need to prove facts, the threshold is strict.[11] As a result, the law permits the use of judicial notice in two limited scenarios: (1) where the fact or state of affairs is so notorious or accepted, either generally or within a specific community, as not to be the subject of debate amongst reasonable people,[12] or (2) where the fact or state of affairs are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.[13]

9. It is submitted that a strict application of evidentiary rules related to the drawing of inferences and use of judicial notice is necessary to protect the fact-finding process. While the drawing of inferences may initially appear to be a straightforward exercise, it is not. As Watt J.A. cautioned "the boundary which separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate."[14] Often, however, triers of fact will rely on their "common sense" to determine what inferences can or cannot be drawn. While there is nothing wrong per se with relying on common sense or human experience, there is a risk that this type of thinking may lead to reasoning based on impermissible stereotypes, thereby distorting the fact-finding process. This is particularly true where the "common sense" that is relied upon is premised on "generalizations about what people usually do, think or feel."[15]

K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) ["Sopinka"] at §19.16.
[10] *R v Find*, supra, at para. 48.
[11] *Ibid* at para 48.
[12] *R v Mabior*, 2012 SCC 47, at para. 71; *Reference Re Alberta Statutes*, [1938] SCR 100, at p. 128; *Sopinka*, *supra* at §19.18.
[13] *Quebec (Attorney General) v. A.*, 2013 SCC 5, at para. 238; Sopinka, *supra* at §19.16.
[14] D. Watt, Watt's Manual of Criminal Evidence, (Toronto: Carswell, 2005) at p. 108.
[15] Appellant's factum, at para 64.

10. Accepting generalized propositions regarding how a person will behave expands the scope of judicial notice, which can lead to a conviction based on speculative and unproven evidence. This issue poses serious consequences for accused persons as it erodes their right to a fair trial and increases the likelihood of a wrongful conviction. Further, it alters the rules that defence lawyers rely upon when advocating for their clients. That is, the test for judicial notice is watered down – trial judges are permitted to draw "common sense" inferences without a factual basis on which to do so.

11. This places defence counsel advocating for their clients in a very difficult position. Defence counsel may be unable to challenge the case to meet as the legal landscape required to support a conviction is unclear, or only becomes clear in a trial judge's reasons when they are drawing such inferences. Drawing inferences not based on evidence makes it very difficult for the defence to make meaningful submissions in support of their clients' interest, particularly if a particular common sense inference is not raised with the parties by the trial judge. With this legal landscape blurred, so are the rules of evidence that provide predictability in the criminal justice system. Without this predictability surrounding how a trial judge is permitted inferences, the ability of an accused person and defence lawyers to fairly defend a case is undermined.

B. A Current Trend in Sexual Assault Cases Regarding the Use of Stereotypes Against the Accused

12. In recent years, the improper use of sex and gender-based stereotypes against sexual assault complainants has received significant media attention.[16] This has led to heightened public interest

[16] See Samantha Beattie, "When Judges Make Sexual Assault Victims Feel Like Criminals" HuffPost Canada (8 August 2019) online: <huffpost.com> [perma.cc/6RMP-6QH3]; Kate Puddister & Danielle McNabb, "#MeToo: In Canada, rape myths continue to prevent justice for sexual assault survivors", The Conversation (5 March, 2019) online:

in the prosecution of sexual offences. Canadian courts have prohibited the use of myth-based reasoning in assessing a sexual assault complainant's credibility.[17] The CLA supports upholding complainants' rights by prohibiting the use of stereotypical and prejudice-based reasoning. However, it is important that trial judges do not "overcorrect" this issue by drawing unreasonable inferences in favor of the complainant, or by making improper inferences against the accused.[18]

13. Academic literature demonstrates that improper judicial reasoning is now operating against accused persons in sexual assault trials.[19] In a recent article Professor David M. Tanovich recognized the "danger that Crowns and judges may rely on stereotypical 'common sense' constructions of truthfulness or innocence in relation to the accused." Judges may have an idea of how innocent people will behave when confronted with serious allegations of sexual impropriety and make adverse findings against the accused when they do not conform to expectations.[20]

14. Additionally, a review of recent jurisprudence demonstrates a growing trend regarding the use of speculative stereotype based reasoning to convict an accused in sexual assault trials. The following six cases are illustrative.

<www.theconversation.com> [perma.cc/H9EB-KPLT]; Jennifer Koshan, Melanie Randall & Elizabeth Sheehy, "Marital rape myths have no place in Canadian law", The Globe and Mail (27 October 2017) online: <www.globeandmail.com> [perma.cc/K5R3-BS4E].

[17] See *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577; *R v Barton*, 2019 SCC 33; *R v Ewanchuk*, [1999] 1 SCR 330; *R v JJ*, 2022 SCC 28 at para 132.

[18] It is an error of law to use a higher level of scrutiny to assess the credibility or reliability of defence evidence than Crown evidence. See *R v JSW,* 2013 ONCA 593 at paras 55-6; *R. v. Kiss*, 2018 ONCA 184 at paras 82-6.

[19] Lisa Dufraimont, "Current Complications in the Law on Myths and Stereotypes" (2021) 99:3 Can B Rev 536. See also: Tanovich, supra at 89-90.

[20] Tanovich *supra* at p. 89-93.

15. First, in *R v Cepic* a male strip club performer was accused of forcing fellatio and sexual intercourse against a female customer. The trial judge reasoned that since the complainant had never had a lap dance before, she would not have touched the accused's penis as he described. The Court of Appeal for Ontario overturned the conviction holding that the trial judge's "repeated use of words like 'implausible' and 'nonsensical' to characterize various aspects of the appellant's testimony is untethered to an evidentiary base" and that it reflected "a conclusion based almost entirely on an assumption about what a young woman would do in this context."[21]

16. Second, in *R v JC* the accused testified that it was his practice to expressly ask for consent from the complainant prior to engaging in sexual activity. The trial judge dismissed this evidence as incredible, stating that it was contrary to common sense and "too politically correct to be believed." In allowing the appeal the Court of Appeal for Ontario noted that the trial judge's reasoning was premised on impermissible stereotyping "that people engaged in sexual activity simply do not achieve the 'politically correct' ideal of expressly discussing consent to progressive sexual acts." The Court went on to describe the trial judge as relying on a "universal truth" that "no one would be this careful about consent."[22]

17. Next, in *R v Quartey*, the accused testified that he did not want to have intercourse with the complainant and that he refused her attempt at fellatio because he did not enjoy it. The trial judge rejected this evidence as unbelievable, based on stereotypical reasoning about male sexual desires. For the dissent, Justice Berger held that "trial judge misconstrued his judicial function and…

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[21] *R v Cepic*, 2019 ONCA 541 at para 23.
[22] *R v JC*, 2021 ONCA 31, at para 97.

impermissibly relied on generalizations about how people behave or are expected to behave in his assessment of credibility."[23]

18. Likewise, in *R v Pilkington* the accused testified that he provided rides to the complainant on multiple occasions as he regularly drove to his friend's farm to feed their horses. The trial judge dismissed this evidence as incredible, stating that it was unlikely the accused's friend would ask a "busy professional" to tend to his horses. The British Columbia Court of Appeal found this reasoning to be speculative and overturned the appeal.[24]

19. Additionally, in *R v Esquivel-Benitez* the accused and the complainant were found engaging in sexual activity by the complainant's husband. The complainant told her husband she had been sexually assaulted only after he had questioned her aggressively about the incident. The defence argued that the interactions with her husband undermined the complainant's credibility. Though this evidence was relevant as it provided a motive to fabricate, it was improperly dismissed by the trial judge on the basis that it was "part of an ongoing myth regarding sexual consent." This finding was overturned on appeal.[25]

20. Finally, in *R v Tsang* (now being heard jointly with the present appeal) the accused was convicted on the basis of what the defence alleged to be multiple instances of stereotypical reasoning. While the Court of Appeal did not accept every instance of alleged stereotypical reasoning, it held that portions of the trial judge's reasoning were based on generalizations about human behaviour not premised on evidence.[26]

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[23] *R v Quartey*, 2018 ABCA 12, aff'd 2018 SCC 59, at para 64.
[24] *R v Pilkington*, 2019 BCCA 374, at para 20-1.
[25] *R v Esquivel-Benitez*, 2020 ONCA 160 at para 12.
[26] *R v Tsang*, 2022 BCCA 345.

21. The above cases and the case at bar show a recent trend in the use of improper judicial notice or speculation against persons charged with sexual offences. This distorts the fact-finding process and risks wrongful convictions. In the context of sexual assault cases this is highly problematic as the prosecution's case is often premised entirely, or at least substantially, on the complainant's testimony and the defence evidence often comes from the testimony of the accused. As credibility findings are subject to the high standard of deference on appeal, endorsing an approach that permits reliance on speculative theories against the accused may lead to convictions that are difficult to correct on review.

22. No new procedure or standard needs to be adopted to ensure trial fairness or the respect for the administration of justice. Rather, adherence to well established evidentiary rules is all that is required. Judicial notice ought to be reserved for highly reliable findings of fact. Reasonable inferences must be premised on primary facts proven during the trial. Relying on these basic rules in the assessment of the evidence ensures that a trial is fair for all parties (the accused and the complainant) and promotes respect for the administration of justice. On the other hand, an approach that allows for convictions on the basis of speculative theories not premised on fact, risks wrongful convictions which in turn will result in public distrust towards the rule of law.

PART IV – COSTS

23. The CLA seeks no order as to costs.

PART V – ORDER SOUGHT

24. The CLA seeks permission to present oral argument at the hearing of the appeal. The CLA takes no position on the proper disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February, 2023.

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PART VI – TABLE OF AUTHORITIES

Case law

Commentary