In the Court of Appeal of Alberta

Citation: R v Schmaltz, 2015 ABCA 4

Date: 20150113
Docket: 1401-0039-A
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Joshua Michael Schmaltz

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4. By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any manner.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Mr. Justice Russell Brown

Memorandum of Judgment of the Honourable Mr. Justice Brown
Concurred in by the Honourable Mr. Justice Wakeling

Dissenting Memorandum of Judgment of the Honourable Madam Justice Paperny

Appeal from the Conviction by
The Honourable Judge D.J. Greaves
Dated the 12th day of December, 2013

(Docket: 081056319P1)

Memorandum of Judgment of the Honourable Mr. Justice Brown

[1] Joshua Michael Schmaltz was convicted after a trial for sexual assault, contrary to section 271 of the *Criminal Code*, RSC 1985, c C-46.

[2] Before the conclusion of his trial, defence counsel applied for a mistrial, arguing judicial bias. The trial judge dismissed the application, then heard submissions on the merits of the case and convicted the appellant. The appellant now appeals the mistrial ruling, and asks this Court to set aside his conviction and order a new trial.

[3] The main issue in this appeal is whether the trial judge struck an appropriate balance between allowing the appellant to present his defence and test the evidence of the Crown, while also acknowledging his role to protect the complainant in a sexual assault case from being subjected to illegitimate and irrelevant questions based upon discredited "rape myths". Although in the context of this case the trial judge appreciated these competing imperatives and was well-motivated, his interjections throughout the trial would lead a reasonable, well-informed and right-minded observer to conclude that the accused was unable to make full answer and defence to the charges by testing the Crown's evidence and, therefore, that he did not receive a fair trial. For the reasons that follow, a new trial is necessary.

Facts

[4] The appellant pled not guilty to the charge of sexual assault against the complainant. The Crown called the complainant and her daughter, JR, as witnesses. The appellant also testified. In the course of defence counsel's cross-examination of the complainant witness, the trial judge frequently intervened in her questions. After hearing all the evidence, the trial judge adjourned the matter to a later date for final submissions.

[5] On that date, the appellant applied for a mistrial, on the basis that the trial judge's interjections revealed a reasonable apprehension of bias. In particular, the appellant submitted that the trial judge had made premature findings that the complainant was credible: Transcript, 170/16-19.

[6] The trial judge had not received notice of this application. He expressed frustration with defence counsel, and adjourned the application to a later date – when, after hearing brief submissions, he dismissed the application for a mistrial: Transcript, 183-195.

The Decision Below

[7] With respect to the mistrial application, defence counsel argued that the trial judge had pre-judged the complainant witness's credibility (Transcript, 183/4-6, 185/29-32), and that his

comments while hearing the application demonstrated bias against defence counsel (Transcript, 186/2-24).

[8] As to the allegations of pre-judgment, the trial judge held that his interjection during defence counsel's cross-examination of the complainant was necessitated by defence counsel being "unnecessarily confrontational": Transcript, 183/33. He added that he thought that the cross-examination overall was getting "out of hand" (Transcript, 184/23), explaining that he had observed that the appellant "smiled" during an emotional part of the complainant's testimony, and that the defence counsel's tone in cross-examination of the complainant suggested that she thought the complainant was contradicting herself: Transcript, 184/19-27. He further explained that in his view defence counsel had not followed proper procedure in putting the alleged contradictions to the witness (Transcript, 184/29-41, 185/1-27) and that his comments aimed to educate her.

[9] The trial judge emphasized that sexual assault trials require attention to the "sensitivity" of complainants, and that complainants should not be subjected to "unfounded scorning": Transcript, 187/25-29. Defence counsel's cross-examination about contradictions was, he said, improper and often irrelevant to the issue of consent, prompting his interjections designed to "placate the witness", not to prematurely assess her credibility: Transcript, 187/37-41, 188/1-41, 189/1-7. He added that his statements about the complainant's credibility were not final or conclusive determinations of her credibility, but rather to convey to defence counsel that her line of questioning on supposedly contradictory statements was not effective: Transcript, 194/22-28.

[10] As to the allegations of bias against defence counsel, the trial judge explained that he expressed frustration with the mistrial application because he had no notice of it: Transcript, 186/11-21. He denied any bias against defence counsel: Transcript, 186/23-41, 187/15-23.

[11] Having dismissed the mistrial application, the judge heard submissions on the merits of the case, and delivered reasons for convicting the appellant of sexual assault: Transcript, 214-227.

Grounds of Appeal

[12] The appellant appeals on two grounds:

1. The comments and interjections of the trial judge created the appearance of an unfair trial.

2. The conviction constitutes a miscarriage of justice because the comments and interjections of the trial judge raise a reasonable apprehension of bias.

Standard of Review

[13] Trial fairness is a question of law, reviewable for correctness: *Schmidt v The King*, [1945] SCR 438 at 439, [1945] 2 DLR 598.

[14] The Court reviews a finding on apprehension of bias for correctness, although the view of the trial judge is entitled to some weight: *Kretschmer v Terrigno*, 2012 ABCA 345 at paras 1, 43, 539 AR 212.

Analysis

[15] The appellant submits that the trial judge's interjections in the defence counsel's cross-examination of the complainant "sabotaged" her strategy and prevented defence counsel from testing the complainant's evidence in several material areas.

[16] The appellant has treated trial fairness as a distinct ground of appeal from bias. And, a complaint that a trial judge's interjections during cross-examination of a Crown witness created unfairness for an accused is certainly distinct from a complaint that a trial judge was biased against the accused or against his or her counsel. A biased judge may conduct himself or herself impeccably during cross-examination, while an unbiased judge may interject during cross-examination in ways that create unfairness. An allegation of bias (or of reasonably apprehended bias) impugns the judge's impartiality (whether by reason of the judge's motive, preference or other state of mind), while an allegation of unfairness arising from judicial interjections during cross-examination impugns how the trial was conducted.

[17] Yet, these two concepts – trial unfairness and bias – are related. Properly understood, the right to an independent and impartial court is *an aspect of* trial fairness: *R v RDS*, [1997] 3 SCR 484 at para 92, 151 DLR (4th) 193; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Fredoms* (Irwin Law, 2012) at 236. As the Supreme Court observed in *R v Teskey*, 2007 SCC 25, [2007] 2 SCR 267 at para 20 [*Teskey*], judicial impartiality is essential to achieving trial fairness. (See also *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 12, [2013] 2 SCR 357 [*Cojocaru*].) A trial before a biased judge is *per se* an unfair trial.

[18] There are, of course, other aspects to trial fairness, including the aspect implicated by the ground of appeal relating to the trial judge's interjections during cross-examination – being the right to make full answer and defence, an essential component of which is the right of an accused to cross-examine Crown witnesses without significant and unwarranted constraint: *R v Lyttle*, 2004 SCC 5, [2004] 1 SCR 193 at 196, 206 [*Lyttle*]. Both aspects of the overarching right to trial fairness at issue here – the right to test the Crown's evidence by cross-examination, and the right to an unbiased judge – are guaranteed by the common law (*Re White and the Queen* (1976) 1 Alta LR (2d) 292 at para 18, 73 DLR (3d) 275 (SC)), and each enjoy constitutional status under section 7 (*R v Osolin*, [1993] 4 SCR 595 at para 160, 109 DLR (4th) 478) [*Osolin*] and section 11(d) of the *Canadian Charter of Rights and Freedoms*.

Interjections during Cross-Examination

[19] In this case, where trial unfairness is said to arise in part from the trial judge's interventions in defence counsel's cross-examination of a witness, several principles ought to be borne in mind:

(1) The right of an accused to present full answer and defence by challenging the Crown's witnesses on cross-examination flows from the presumption of innocence and the right of the innocent not to be convicted: *R v Seaboyer*, [1991] 2 SCR 577 at para 39, [1991] SC J No 62 (QL); *Osolin* at para 25. This is particularly so when credibility is the central issue in the trial: *Osolin* at para 27, citing *R v Giffin*, 1986 ABCA 107, 69 AR 158 at 159.

(2) The trial judge may intervene in certain instances, including to clarify an unclear answer, to resolve misunderstanding of the evidence, or to correct inappropriate conduct by counsel or witnesses. This would extend to protecting complainant witnesses – especially complainants to a sexual assault – from questions tendered for an illegitimate and irrelevant purpose designed to demean, particularly where those questions are random shots at the complainant's reputation or groundless questions directed to discredited "rape myths" to the effect that the complainant's unchaste or aroused state made it more likely that she would have consented to the sexual activity in question: *Lyttle* at 208-09; *R v Valley*, (1986) 26 CCC (3d) 207 at para 53, 13 OAC 89, leave to appeal refused [1986] SCCA No 298 (QL) [*Valley*]; *R v Regan*, 2002 SCC 12 at para 85, [2002] 1 SCR 297; *R v Shearing*, 2002 SCC 58 at para 76), [2002] 3 SCR 33.

(3) When the trial judge does intervene, he or she must not do so in a manner which undermines the function of counsel, that frustrates counsel's strategy, or that otherwise makes it impossible for defence to present the defence or test the evidence of Crown witnesses: *Valley* at para 55; *R v Brouillard*, [1985] 1 SCR 39 at 44-47, 1985 CanLII 56; *R v Konelsk*y, 98 AR 247 at 248, 68 Alta L R (2d) 187 (CA).

(4) If a trial judge "enters the fray" and appears to be acting as an advocate for one side this may create the appearance of an unfair trial: *R v Switzer*, 2014 ABCA 129 at para 7, 572 AR 311 [*Switzer*].

(5) In determining whether the trial judge's interventions deprived the accused of a fair trial, those interventions should not be considered separately and in isolation from each other, but cumulatively: *R v Khan*, 2001 SCC 86 at para 77, [2001] 3 SCR 823 [*Khan*]; *R v Stucky*, 2009 ONCA 151 at para 72, 303 DLR (4th) 1, *R v Watson* (2004), 191 CCC (3d) 144 at para 14, 192 OAC 263. The

> concern here is that incidents which, considered in isolation, might be viewed as insignificant might combine to lead a reasonably minded person to consider that the accused had not had a fair trial: *Khan* at para 76; *R v Stewart* (1991), 62 CCC (3d) 289 at para 46, 1991 CarswellOnt 1317 (CA) [*Stewart*].

[20] The test for considering a ground of appeal citing trial unfairness depends on the kind of unfairness alleged. Here, the question to be answered is whether the appellant's right to make full answer and defence was breached by significant and unwarranted constraints imposed by the trial judge upon defence counsel's cross examination of the complainant: *Lyttle* at 196.

[21] As to the standard by which this question is to be answered, before us both the appellant and the Crown were agreed that the standard is stated by this Court in *Switzer*, which (at para 5, citing *Valley*) considers whether the accused or an observer present throughout the trial might reasonably consider that the accused had not had a fair trial. In its factum, however, the Crown referred to the reasons for judgment reserved of this Court in *R v Hodson*, 2001 ABCA 111, 92 Alta LR (3d) 262 [*Hodson*]. There, while a dissenting judgment articulated (at para 56) a standard virtually identical to that later stated in *Switzer*, the majority (at para 31) held that a declaration that the trial judge had impermissibly "entered the arena ... should be reserved to the clearest of cases." *Hodson* was, however, not a case where objection was taken to the trial judge's entry into the arena took the form of interjections during cross-examination *per se*. Rather, the appellant in that case had put in issue the trial judge's disparagement (some of which occurred during interjections during cross-examination) of studies on the frailties of dock identification and the use of lineups as "imaginary psychobabble". The question presented by *Hodson* was whether the trial judge's comments revealed that he had closed his mind to, and was therefore no longer impartial on, the issue of identification. In short, the complaint in *Hodson*, rejected by this Court, was one of reasonably apprehended bias. I deal below (under "Reasonable Apprehension of Bias") with that aspect of trial fairness as it pertains to this case.

[22] In *Brouillard v The Queen*, [1985] 1 SCR 39, [1985] SCJ No 3 (QL) [*Brouillard*], the trial judge's interjections during questioning of the accused and (among others) another defence witness led the accused to complain (*inter alia*) that the judge was biased. The Supreme Court concluded (at para 27) that those interjections were so extensive as to give the impression of assisting the Crown, thus raising a reasonable apprehension of bias. The objective standard by which the Court determined the complaint of bias was, however, stated so broadly as to apply to another aspect of trial unfairness raised (at para 6) by the appellant in that case, which was that the interjections prevented him from making full answer and defence to the charges against him:

> The role of a trial judge is sometimes very demanding, owing to the nature of the case and the conduct of the litigants (parties). Like anyone, a judge may occasionally lose patience. He may then step down from his judge's bench and assume the role of counsel. When this happens and, *a fortiori*, when this happens to the detriment of an accused, it is important that a new trial be ordered, even when

> the verdict of guilty is not unreasonable having regard to the evidence, and the judge has not erred with respect to the law applicable to the case and has not incorrectly assessed the facts.
>
> The reason for this is well-known. It is one of the most fundamental principles of our case law, the best known formulation of which is to be found in Lord Hewart's judgment in *R. v. Sussex Justices; Ex parte McCarthy,* [1924] 1 K.B. 256, at p. 259:
>
> > … [it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[23] As I shall discuss below, the requirement that justice be seen to be done – which necessarily entails adopting the standpoint of an objective observer – is applied to assessing grounds of appeal based on an allegation of bias or the reasonable apprehension thereof. *Brouillard* demonstrates, however, that it also describes the standard to be applied generally to appeals based on a denial of trial fairness, and more particularly to appeals based on the denial to an accused of the right to make full answer and defence by subjecting the Crown's evidence to cross-examination. While, therefore, in a case involving reasonably apprehended bias, the Supreme Court (in *Teskey*, at para 21) required *not only* that impartiality be "objectively determined to the informed and reasonable observer", but that *fairness* also be so objectively demonstrable. See also *Cojocaru* at para 13: "[t]o determine whether a defect relating to reasons for judgment is evidence of procedural error negating a fair process, the alleged deficiency must be viewed objectively, through the eyes of a reasonable observer, having regard to all relevant matters ...."A reasonable observer is a well-informed and right-minded observer. The question to be asked in assessing whether interjections during defence counsel's cross-examination of a Crown witness generated trial unfairness is, therefore, whether a reasonable and, as such, well-informed and right-minded observer would consider that the trial judge's interjections during defence counsel's cross-examination of the complainant deprived the appellant of his right to make full answer and defence.

[24] Unlike (as I discuss below) where the trial fairness concern involves bias or the reasonable apprehension thereof, there are no presumptions. While I recognize the Ontario Court of Appeal has said otherwise (*R v Hamilton*, 2011 ONCA 399 at para 29, 279 OAC 199), there is no good reason to *presume* that a trial judge has not unduly intervened in cross-examination. The reason a presumption of impartiality in cases of bias makes sense is that a reviewing court cannot know the trial judge's mind or motivations for deciding the way he or she did. That uncertainty is resolved by presuming, subject to cogent evidence otherwise, the trial judge's fidelity to his or her oath to administer justice impartially and independently: *Cojocaru* at para 69. Interventions in cross-examination, however, can be objectively viewed and assessed, without the aid of presumptions in one direction or another. The reasonable observer test itself makes this plain.

[25] Applying this standard, the appellant argues the trial judge's interventions during defence counsel's cross-examination of the complainant created trial unfairness because he impaired the

defence strategy of demonstrating inconsistencies as among the complainant's statement to the police, her testimony at the preliminary inquiry, and her trial testimony. In short, he says the trial judge unfairly disrupted the defence's strategy of testing the complainant's credibility. He points in particular to interjections during cross-examination of the complainant on whether she smoked marijuana, whether she had flirted with the appellant, whether she was wearing a bra when the incident occurred, and her sobriety.

[26] Conversely, the Crown says that the trial judge's interventions were appropriate in the circumstances and fell within his discretion to control the trial process.

[27] While the trial judge's interventions should be considered cumulatively and in the context of the whole trial, I will first review each of the material points complained of by the appellant.

Marijuana

[28] The appellant says the trial judge "commandeered the questioning" about whether the complainant had consumed marijuana, thereby preventing the defence from exploring a potential contradiction between the complainant's evidence in chief that she had not consumed any drugs (Transcript, 26/41-27/1) and a medical report which indicated the presence of marijuana in the complainant's system (Transcript 82/28).

[29] In the course of cross-examination on this point, the trial judge intervened to state that there was no expert evidence about how long traces of THC can remain in the blood: Transcript, 82/31-32:

> The Court: Okay. Well, then, give it to her and, fine, it may say THC but, like I said, I require expert evidence before you can prove that it was that night.

[30] He also took judicial notice that the traces could remain in a person's blood for weeks after exposure to marijuana: Transcript, 82/21-23:

> The Court: I mean, they can find alcohol and THC in your blood for weeks after you have had it, and now this is a common issue with job employment.

[31] The appellant submits that, with this interjection, the trial judge inappropriately signalled an answer to the complainant that explained away any potential contradiction. I agree. The trial judge's suggestion that the report saying the complainant's blood contained THC was inconclusive because she might have been exposed to marijuana at a different time amounted to advocacy on behalf of the Crown. It also provided the witness with an answer to counsel's questions that removed any contradiction, thereby preventing effective cross-examination*: R v Watson*, 191 CCC (3d) 144 at para 18, 192 OAC 263 (CA).

[32] The crux of the problem is that the trial judge appears to have assumed that the purpose of this line of questioning was to determine whether the marijuana use had caused the complainant to pass out: Transcript, 82/33. This was not, however, the question's purpose. Rather, defence counsel's evident objective was to demonstrate a contradiction between the medical report and the complainant's evidence-in-chief. The trial judge's intervention at this point prevented him from understanding the potential contradiction and, just as importantly, it deprived the appellant of the possibility of using this point to test it the complainant's credibility. It accordingly tends to support a finding of trial unfairness.

Flirting

[33] The appellant also argues that the trial judge interfered in defence counsel's cross-examination of the complainant about flirting with the appellant. The complainant testified in chief as follows: Transcript, 43/15-16:

> Q Had there been any flirting going on --
> A No.

[34] During cross-examination, defence counsel drew the complainant's attention to her previous statement to the police where she answered "Yeah. Yeah, he's a young guy" when asked if there was flirting going on: Transcript, 86/27-35:

> Q At any time in the evening, did you flirt with Mr. Schmaltz?
> A No.
>
> Q And I'm reading from page 13 of 22, that's from the statement to the police, and Constable Guerard asked, "All right. And was, um -- was there flirting happening?", to which you respond, line 310, "Was there what?" Constable Guerard says, "Flirting?". You indicate, at line 312, "Yeah. Yeah, he's a young guy."

[35] Defence counsel tried to cross-examine the complainant on this prior statement to explore a potential contradiction as to whether she had been flirting with the appellant. The trial judge intervened, stating that the police statement "clearly" meant that the appellant, and not the complainant, had been flirting: Transcript, 87/25-30. The trial judge asserted there was no contradiction between the complainant's testimony that she had not flirted with the appellant, and her statement to the police that the appellant had flirted with her. Defence counsel stated that the police statement answer was not so clear to her, but moved on from that line of questioning: Transcript, 88/12-38.

[36] This intervention was also inappropriate. The passive language adopted by the questioning in chief and by the police ("[h]ad there been any flirting?" and "[w]as there flirting happening?") left open the question of who was flirting – the complainant, the appellant, or both. The trial judge

asserted an interpretation that the appellant was the only one flirting, leaving defence counsel little choice but to abandon that line of questioning.

[37] What happened next illustrates the sort of difficulty that can arise when trial judges enter the fray during cross-examination by, in this case, asserting one particular interpretation of a statement that is capable of supporting more than one interpretation. The Crown revisited the statement during re-examination of the complainant, receiving from the complainant the very answers which the trial judge had suggested during his earlier interjection: Transcript, 99/41-100/5, 100/11-19, 100/36-39, 101/14-15:

> Q The police statement, or the statement to police in August 2008, pages 13 and 14, there was a discussion about flirting.
>
> A OK.
>
> Q So defence counsel have read into the record the questions from Constable Guerard to you about, "Was there any flirting happening?"
>
> ...
>
> And you said "Yeah. Yeah, he's a young guy." It had been read into the end, "did he say anything?"
>
> "No, not – not in the way of – he said, oh well, you know, You're pretty cool. You're a pretty cool mom, stuff like that."
>
> In that reference, ... who were you talking about was doing the flirting?
>
> A See, I didn't really take it as flirting. I mean, he's a young guy but it was Josh talking to me.
>
> ...
>
> Q Okay. So I – but I'm going even basic – more basic than that. When you said "Yeah" to Guerard's question of, "Was there any flirting?", who did you mean was flirting?
>
> A Josh flirting with me.
>
> ...
>
> Q Was there any flirting going on by you?
>
> A No.

[38] The intervention of the trial judge here not only effectively shut down cross-examination by defence counsel on a potentially critical ambiguity in the complainant's statement to police, it

suggested a resolution to that ambiguity that Crown counsel was able to exploit. This also tends to support a finding of trial unfairness.

Whether complainant was wearing a bra

[39] The appellant also argues that the trial judge improperly interfered in defence counsel's cross-examination about an apparent inconsistency between the complainant's trial testimony that she was wearing a bra when the incident occurred, and her police statement that she was unsure about whether she was wearing a bra.

[40] These interventions were appropriate. In this instance, the witness did not adopt the written police statement as an accurate transcription of what she told the police. The trial judge was correct to point out to defence counsel that she would need to prove the veracity of the police transcript in order to use it as the basis for a contradiction in these circumstances: Transcript, 76/14-28; *Canada Evidence Act*, RSC 1985, c C-5, s 11.

The complainant's sobriety

[41] The appellant says the trial judge improperly interfered with defence counsel's cross-examination on the complainant's sobriety. The appellant states the strategy was to explore a possible contradiction between the complainant's testimony that she was not drunk at the time of the alleged sexual assault, and her daughter's later testimony that the complainant was drunk.

[42] Defence counsel had also attempted during cross-examination to point out that (1) the complainant's preliminary inquiry evidence was that she drank three bottles of beer from the first 24-pack of Canadian; and (2) that she had denied in her trial evidence that this had been her preliminary inquiry evidence: Transcript, 56/9-15:

> Q: So what I'm suggesting to you is at the preliminary inquiry you gave evidence that you had consumed three out of the first twenty-four bottles of beer; is that correct?
> A Out of two cases of two-four beer, I consumed five or six beers.
>
> Q Okay. And my question is specific to the first 24-pack?
> A Then, no, that would not be correct.

[43] The trial judge intervened, however, cautioning her that she had to be clear if she was putting the complainant's preliminary inquiry evidence before her: Transcript, 55/39-41. Defence counsel then put the preliminary inquiry evidence to the complainant: Transcript, 56/20-32. The complainant then agreed her evidence at the preliminary inquiry was that she had consumed three of the first twenty-four bottles of beer: Transcript, 57/21. The contradiction was then put to the complainant between her now agreeing that drinking three bottles of beer out of the first case had

been her evidence at the preliminary inquiry, and her moments-earlier denial that this was accurate: Transcript, 57/27-30.

[44] After pointing out (correctly) that defence counsel's question was initially unclear (prompting defence counsel to try to rephrase it – Transcript, 58/24-37), the trial judge said that he did not see a contradiction, did not understand the question, and that defence counsel should move on: Transcript, 58/1-40, and 59/1-18. His understanding appears to have been that the purpose of the question was to show inconsistency between the preliminary inquiry evidence and the trial evidence about the amount the witness had to drink (Transcript, 59/7-8), and he did not think that a small variance in the amount was relevant: Transcript, 59/10-18. Defence counsel's actual objective, however, appears to have been to show an inconsistency between the witness's preliminary inquiry evidence and what she now stated her preliminary inquiry evidence to have been. The trial judge jumped to a mistaken conclusion about defence counsel's objectives and his interjections prevented her from getting this line of questioning out.

[45] Defence counsel also referred to the complainant's statement to the police during her questions about sobriety. Her stated purpose with this line of questioning was to show that at the time of offence, the complainant said nothing to police about her alcohol consumption, but then gave evidence at the preliminary inquiry about consuming alcohol: Transcript, 60/10-21. While the trial judge evidently understood this line of questioning (Transcript, 60/25-29), he said that it was not established that the police statement was an accurate recording of what the complainant had said, and could not be used to establish a contradiction: Transcript, 60/35-39. In this instance, the trial judge again appeared to enter the fray and act as a Crown advocate by advancing an interpretation of the evidence that removed any hope of defence counsel exploring that potential contradiction.

[46] While his reasons reveal that he was alive to the contradiction between the evidence of the complainant and that of her daughter regarding the complainant's sobriety (ARD F002/26-41), the point of defence counsel wishing to pursue these other avenues appears to have been lost on the trial judge, who effectively prevented that pursuit or, alternatively, rendered it futile.

Trial Fairness Conclusion

[47] It bears emphasizing that, in sexual assault cases, trial judges must be alert to their important role of protecting complainants from questions tendered for the purpose of demeaning and pointing to discredited, illegitimate and irrelevant factors personal to the complainant. The trial judge clearly understood this role, and took it seriously. His concern was not without foundation, since at least one line of defence counsel's questioning of the complainant was in this regard highly objectionable (Transcript, 85/21-23 and 31-32) although, for reasons I cannot discern from the transcript, during that line of questioning the trial judge remained silent. He did, however, correctly suggest in his reasons for judgment that it was improper, and further observed that it did not operate to discredit the complainant or to otherwise prove consent: ARD F005/36-F006/30. In any event, and as he explained in his ruling on the mistrial application, his

concern about such questioning motivated some of his interjections (Transcript, 187/41 and 188/1-25), including those on whether she was wearing a bra and on her alcohol consumption. The difficulty however is that, while these issues may have been irrelevant to whether the complainant consented *per se*, defence counsel's strategy was to show inconsistencies between the complainant's trial testimony on these topics and her earlier statements. On these lines of questioning, defence counsel was not propagating rape myths. They were directed not to the issue of consent, but to the issue of credibility, which was central to the accused's defence.

[48] The trial judge frustrated this strategy by interjecting and preventing defence counsel from forming questions to probe these potential inconsistencies. During defence counsel's questions about flirting, consumption of marijuana, and disclosing alcohol consumption in the police report, he appeared to enter the fray. In more than one instance, he interjected to ask leading questions or to suggest the most favourable interpretation to the complainant before she had a chance to answer the question. He also demonstrated that he was not listening to or understanding some of the inconsistencies presented by defence counsel. The cumulative effect of the trial judge's interventions was that he frustrated, to a significant and unwarranted degree, defence counsel's strategy to test the complainant's credibility. This would lead a reasonable, well-informed and right-minded observer to conclude that the appellant was not able to make full answer and defence. The interventions therefore led to trial unfairness.

Reasonable Apprehension of Bias

[49] The test for reasonable apprehension of bias is well-settled:

> [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

(*RDS* at para 31, citing de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, 68 DLR (3d) 716. See also *Bizon v Bizon*, 2014 ABCA 174 at paras 76, 89, 572 AR 49 [*Bizon*].)

[50] While the threshold for finding reasonable apprehension of bias is similar to that for finding trial fairness, the burden on the appellant here is higher, since that threshold is to be measured against a strong presumption that judges discharge faithfully their oath to deliver justice impartially: *Wewaykum* at para 59; *RDS* at para 32; *R v JLA*, 2009 ABCA 344 at para 17; *Bizon* at para 34. "Cogent evidence" demonstrating that the judge has done something to give rise to a reasonable apprehension of bias is necessary to displace that presumption: *RDS* at para 117; *Bizon* at para 62. As the Supreme Court explained in *RDS* (at para 113):

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived

> bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.

This is consistent with the Court's statement in *Hodson* that a finding of bias is reserved to the "clearest of cases".

[51] The appellant argues that a reasonable apprehension of bias arises here in two respects: first, that the trial judge pre-judged the complainant's credibility before hearing all the evidence; and, secondly, that he made disparaging remarks about defence counsel. The Crown argues that the trial judge did not pre-judge the complainant's credibility, but simply directed defence counsel away from irrelevant lines of questioning. The Crown also argues that the trial judge's statements about defence counsel do not establish a reasonable apprehension of bias.

Comments about Defence Counsel

[52] The standard for showing judicial bias based on critical comments of defence counsel is high. In *Valley* (at para 64), the trial judge "severely admonished" defence counsel during cross-examination. The Ontario Court of Appeal found this to "unsatisfactory", but falling short of showing reasonably apprehended bias (at para 65). In *Scheidt v Scheidt*, 2014 ABCA 24 at para 3, 566 AR 303, this Court viewed the trial judge's censure of counsel in front of his client to be "ill-considered" but also shy of the high threshold for establishing a reasonable apprehension of bias.

[53] In this case, the trial judge introduced defence counsel to both the complainant and her daughter as a "good person" before defence counsel started her cross-examinations: Transcript 51/41, 129/1. Obviously, such statements demonstrate respect for, and not bias towards, for defence counsel. The trial judge did express frustration at defence counsel when she brought the mistrial application without having given advance notice, and did so in terms which – while not exhibiting bias – were ill-considered, disrespectful to counsel and as such unfortunate. He also expressed frustration at defence counsel when she attempted to cross-examine the complainant on prior statements without first properly putting that statement to her. In those instances, however, the trial judge's motive appears to have been to educate an obviously inexperienced defence counsel on such matters more generally, and his comments would not lead a reasonable person to conclude that he would not decide the case fairly because of some animus towards her.

Pre-judgment about complainant's credibility

[54] The test for pre-judgment is whether a reasonable observer would conclude that the trial judge was engaged in premature decision-making: *R v Parmar*, 2005 BCCA 187 at para 33, 195 CCC (3d) 112. This does not preclude a trial judge from identifying his or her concerns to counsel. This extends to stating tentative conclusions – including conclusions on the credibility of witnesses – so long as the trial judge avoids suggesting before hearing all the evidence that he or she has reached "firm, unalterable" conclusions: *Stewart* at 42.

[55] The appellant points to the trial judge's statement that "I do not think that she is missing a cog or lying to me... I do not want this witness to think that we are declaring her testimony contradicted or false." He says this demonstrates that the trial judge had pre-judged the complainant's credibility prior to hearing the appellant's evidence.

[56] The trial judge's full comments were as follows:

> I get the sense in no uncertain and no limited way you keep declaring to her that she is making something up or that, you know, her version today is completely inconsistent. It's not inconsistent. There are certain variances and I am not saying that they lack materiality, but I want to appease her to this point. You know, you are a long way from persuading me that this witness is absent memory or lying. ... And I want to assure her right now, I do not think that she is missing a cog or lying to me. ... You have not got within a country mile of that yet and so explore, use, touch, feel, the issue of reliability and accuracy as you will but, you know, to this point in time I do not want this witness to think that we are declaring her testimony contradicted or false. We are working on reliability. We may get to contradictory or false" (Transcript, 80/26-41).

[57] The Crown argues that the trial judge did not pre-judge the complainant's credibility, but was simply correcting defence counsel's cross-examination style to ensure that she focused on relevant issues and avoided being unnecessarily confrontational with the complainant. The trial judge did not approve of the tone defence counsel was using with the complainant, and wanted her to focus on the real issue in the trial, namely consent or lack thereof to the appellant's act.

[58] These comments – while imprudent and unwise when made during the cross-examination of a witness – do not reveal that the trial judge had closed his mind on the subjects of the complainant's credibility or the proper outcome of the case. Significantly, he qualified his statement by saying "[w]e may get to contradictory or false", which showed a subsisting openness to considering credibility in reaching his decision. The comments here were intended to convey disapproval of defence counsel's manner of questioning. Expressing such disapproval would not lead a reasonable person to conclude that the trial judge had prematurely judged the overall issue of credibility by reaching a firm and unalterable conclusion on that subject or any other subject pertinent to the accused's guilt.

[59] There is no merit to this ground of appeal.

Conclusion

[60] The appeal is allowed. Regrettably, and mindful of the further imposition this result imposes upon all concerned including the complainant, my conclusion regarding the trial judge's interventions having created the appearance of an unfair trial necessitates a new trial. An unfair trial is a miscarriage of justice (*Khan* at para 27; *R v Karas*, 2007 ABCA 362 at para 53, 422 AR

344; *R v Pompeo*, 214 BCCA 317 at para 80, 13 CR (7^{th}) 420), and the curative proviso in section 686(1)(b) of the *Criminal Code* has no application here.

Appeal heard on December 3, 2014

Memorandum filed at Calgary, Alberta
this 13th day of January, 2015

Brown J.A.

I concur: Authorized to sign for: Wakeling J.A.

Paperny J.A. (dissenting):

[61] I have had the benefit of reviewing my colleagues draft judgment in this appeal. I agree with his disposition regarding reasonable apprehension of bias. I am unable, however, to reach the conclusion that the interventions of the trial judge during the complainant's cross-examination resulted in trial unfairness warranting this court's intervention.

The law

[62] I agree generally with the law on trial fairness as stated by my colleague. Where I take issue with his analysis is in the application of that law. The law is clear that a trial must not only be fair but appear to be fair in the mind of the reasonably informed observer. However, in my view, that observer, and likewise an appellate court reviewing trial conduct, must look beyond mere appearances and consider whether, in fact and in law, interventions by the trial judge deprived the appellant of his right to make full answer and defence.

[63] The right to make full answer and defence is fundamental to our criminal justice system and, as has been pointed out, "the right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence": *R v Lyttle*, [2004] 1 SCR 193, 2004 SCC 5 at para 41. The right to cross-examine is not, however, absolute. Its parameters are governed by the rules of evidence and rules of criminal law and procedure. The Supreme Court in *Lyttle* discussed some of those restrictions, noting that "[c]ounsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value.": *Lyttle* at para 44; see also *R v Meddoui*, [1991] 3 SCR 320; *R v McLaughlin*, [1974] 2 OR (2d) 514, 15 CCC (2d) 562 (CA). With respect specifically to charges of sexual assault, the accused's right to cross-examine a complainant is circumscribed by common law rules and by provisions of the *Criminal Code*, which prohibit evidence of, among other things, a complainant's sexual history, reputation, and irrelevant questions directed to discredited "rape myths".

[64] It is the right and duty of the trial judge to enforce these rules and restrict cross-examination in an appropriate manner. The question of when and how to intervene in cross-examination is discretionary, and the trial judge's discretion must be exercised in a judicial manner. The exercise of discretion must be based on legal considerations and on the facts and circumstances of each case: see *R v Fanjoy*, [1985] 2 SCR 233 at para 9. Although the exercise of discretion is subject to review, the reviewing court must be cognizant of the advantageous position of the trial judge in assessing the demeanour of witnesses and the conduct of cross-examining counsel: *R v McLaughlin*. When an appellate court is tasked with assessing trial fairness on the basis of a trial judge's intervention in cross-examination, the application of the various legal rules that restrict the right to cross-examine come into play. In other words, an assessment of trial fairness does not end with a broad question of whether justice appears to have been done, but must

also consider whether it has been done within the confines of the law and the context of the case. For appellate interference to be warranted, there must be a deprivation of the right to full answer and defence; there must be an injustice, actual or reasonably perceived.

[65] Moreover, there is always a strong presumption of impartiality and a presumption that a trial judge has not unduly intervened in a trial: *R v Hamilton*, 2011 ONCA 399 at para 29. The Ontario Court of Appeal has referred to three situations where interventions by a trial judge have been found to lead to an unfair trial:

1. Questioning an accused or defence witness to such an extent or in such a manner that it conveys the impression that the trial judge has placed his authority on the side of the prosecution;

2. Interventions that effectively made it impossible for defence counsel to advance the defence; and

3. Interventions that effectively preclude the accused from telling his or her story in his or her own way.

   See *Hamilton* at para 31; *R v Stucky* (2009), 240 CCC (3d) 141 (ONCA); *R v Valley* (1986), 26 CCC (3d) 207 (ONCA).

[66] These situations all share an element of injustice and a deprivation of the accused's ability to make full answer and defence. That type of deprivation will not always be present. As was pointed out in *Hamilton*, there are many proper reasons why a trial judge might intervene by making comments, giving directions or asking questions during the course of a trial. While my colleague formulates the test somewhat differently, this Court has made it clear that it is only in the clearest of cases that a new trial is ordered: *R v Hodson*, 2001 ABCA 111. The fundamental question is whether the trial judge's interventions led to an unfair trial, as assessed from the perspective of a reasonable observer present throughout the trial. But the reasonable observer must give the trial judge the benefit of the presumption, viewing the interventions through that lens and with some knowledge of the law. Interventions on their own, even if there are many, do not in and of themselves render a trial unfair. Rather, it is the effect on the trial as a whole, and in particular on the accused's right to make full answer and defence, that must be assessed. In my view, when the interventions in this case are assessed in their factual and legal context, no injustice warranting a new trial is revealed.

Application of the law to these facts

[67] The complainant testified at trial that she had been sexually assaulted by the appellant in her daughter's home. The appellant did not deny the sexual activity, but testified that the complainant consented to it. Thus, the core issue at trial was whether the appellant's testimony was accepted and, if not, whether it nevertheless raised a reasonable doubt, or whether on the whole of

the evidence that was accepted a reasonable doubt as to the appellant's guilt was raised. In this judge alone trial, the trial judge was clearly aware that his role was to assess the evidence in its entirety. The complainant's credibility was front and centre in that assessment.

[68] As my colleague fairly acknowledges, the trial judge was alert to the unique challenges faced by complainants in sexual assault cases. In some instances, vigorous cross-examination may have the impact of re-victimizing the witness and adversely affecting personal integrity. It falls upon trial judges to ensure that witnesses are treated fairly, and that cross-examination does not go beyond the scope permissible in law. In my view, this is not a matter of balancing the rights of the accused to make full answer and defence against proper treatment of a witness, but rather of ensuring a fair trial. Sometimes interventions by a trial judge accrue to the benefit of the accused, sometimes not. The test is not who benefits, but what impact the intervention has on the trial.

The appellant's specific complaints

[69] The appellant submits that the trial judge's interventions at various points during the cross-examination of the complainant created trial unfairness because they prevented defence counsel from demonstrating inconsistencies that went to the complainant's credibility. The assessment of the specific complaints, taken individually and together, is twofold: were the interventions proper, and if not, did they thwart the defence strategy of demonstrating inconsistencies in the complainant's testimony and deprive the appellant of his right to make full answer and defence?

[70] A review of the transcript as a whole reveals that defence counsel wished to challenge the veracity of the complainant. There were several legitimate reasons for the trial judge's interventions in the cross-examination of the complainant. Some interventions, as noted by my colleague, were intended to limit irrelevant or inappropriate questioning. On other occasions, the trial judge intervened not to assist the complainant but to assist defence counsel in properly formulating questions that could lay the ground work to put prior inconsistent statements to the witness, in compliance with s 10 of the *Canada Evidence Act*, RSC 1985, c C-5. Other interventions were not appropriate, but the question remains as to whether they had the effect of depriving the appellant of making full answer and defence. Each of the specific complaints raised by the appellant is considered below.

Marijuana use

[71] The complainant testified that she woke up to find the appellant moving his finger inside her vagina. She was cross-examined on how she could have slept through the appellant pulling her pants down. In her cross-examination, she too rhetorically asked, "… how did I possibly sleep so tightly through this"?

[72] The cross-examination continued as follows:

Q: And so let's back up to that for a moment. Did the doctor mention anything else that was found in your system?
A: No.
Q: Well, I'm going to put it to you that marijuana was found in your system.
A: Very well. You got that from a doctor's report?
Q: Yes.
A: Can I see the doctor's report please?
Q: If my friend is agreeable to that.

[73] The trial judge interjected at this point. It was apparent that the complainant had not seen the report and its relevance at that stage was entirely unclear. No foundation for its introduction had been laid. The report, which had not yet been tendered in evidence, could only have gone to the complainant's credibility or to her reliability to recall events from that evening. The trial judge's intervention was as follows:

THE COURT: Well, okay, but is somebody going to enter evidence? I mean, they can find alcohol and THC in your blood for weeks after you have had it … It has got THC. Now, are you going to prove to me – the question should be whether or not she had any and how can she account that it is in her, but I mean, you know, before you have this aspect of THC, do you have the report?

COUNSEL: I do, and it was provided in disclosure.

THE COURT: Okay. Well, then, give it to her and, fine, it may say THC but, like I said, I require expert evidence before you can prove that it was that night. Now, the question to her is that – whether or not she had marihuana that night, and then the next question is whether or not marihuana causes you to pass out. I have not heard of it but I have not got any expert evidence, and I – you know, who knows what marihuana does? It certainly is not notoriously known to be drink – a date rape drug. Okay? And it is not crack cocaine or a hallucinatory like LSD. Now, that much I can take notoriously from the community, so she may have had some marihuana.

[74] The trial judge then put the following questions to the witness;

THE COURT: Did you have marijuana that night?
A: Not that night, Your- honour, no.
. . .
THE COURT: … I accept counsel's submission that apparently you have had some marijuana. Do you challenge that?
A: I challenge the fact that I used it. I was around people using, yes, smoking marijuana. Yes, so I'm not going to say it wasn't - but I- that's why I wanted to know if there would a be a quantity, a level.

> THE COURT: Well, I do not know that, either. I mean, I guess there was, at some point, in time, someplace, whether that evening or some time previous, whether secondhand or firsthand, apparently-
> A: Yes
> THE COURT: there had- you had had some form of association with marijuana.?
> A: Yes.

[75] As the Crown correctly points out, a trial judge is permitted to ask questions about a relevant topic which ought to have been, but was not asked by counsel: *Valley*; *R v Brouillard*, [1985] 1 SCR 39. Where, as here, the questioning by counsel is confusing and the foundation improperly laid for the introduction of the report, the trial judge is entitled to ensure that the appropriate legal procedure is followed. At least part of the trial judge's intervention on this topic falls within that category.

[76] The appellant argues that the trial judge's intervention improperly suggested an answer to the complainant to defence counsel's questioning. However, the answers provided by the complainant were that she did not consume marijuana that night, and that she was around people that were consuming marijuana. Her testimony, in answer to the trial judge's questioning, suggested that the marijuana may have entered her system by way of second hand smoke. The suggestion by the trial judge, that marijuana can stay in the human body for extended periods of time, was not taken up by the complainant.

[77] Looking at the transcript as a whole, defence counsel's objective in demonstrating inconsistencies in the complainant's evidence with respect to her consumption of marijuana was achieved. The point had been made: the complaint denied smoking marijuana but it was found in her blood. Defence counsel later asked the complainant whether she had been around people who smoked marijuana that night and whether she was part of that. The complainant denied it.

[78] On the other hand, the appellant testified that he passed marijuana to the complainant on the deck, without intervention by the trial judge. The theory that the complainant may have been lying on this issue was clearly advanced by the defence. The trial judge's intervention did not affect the complainant's testimony and did not impede the appellant's ability to challenge the complainant on her use of marijuana. This intervention had no impact on trial fairness.

Flirting

[79] The appellant's second complaint is that the trial judge improperly interfered in defence counsel's cross-examination of the complainant regarding whether she and the appellant had been flirting earlier in the day. The Crown submits that the trial judge's intervention on this point was proper and done to allay any confusion.

[80] The complainant testified that she did not flirt with the appellant. Defence counsel then put an interview transcript with the police to the complainant to allege a contradiction. The transcript

stated that "flirting happened". The trial judge expressed concern that the contradiction counsel was attempting to put to the complainant was not necessarily a contradiction at all, positing that the transcript said that the appellant, but not the complainant, had been flirting. This, says the appellant, deprived him of an important line of questioning. I disagree. First, defence counsel could have continued her cross-examination to make clear whether the complainant herself had been flirting with the appellant. Indeed, she did so later in her cross-examination, at which time the complainant denied flirting with the appellant. Defence counsel could have, at that later point, confronted the complainant with the alleged contradictory statement to the police. She did not do so.

[81] In his testimony, the appellant testified that the complainant was flirting with him. The transcript read as a whole makes clear that the he was able to put forward his story that the complainant was flirting with him, and that she may have given a somewhat different version at trial compared to what she earlier said to police.

[82] My colleagues disagree and conclude that the intervention shut down cross-examination on a potentially critical ambiguity in the complainant's statement to police. This assumes two things: that there was an ambiguity and that the ambiguity could have been important. Neither assumption is borne out by the record. But, assuming that the cross-examination was improperly limited, the question of materiality must be considered. Could it be considered material to the appellant's case whether or not the complainant had been "flirting" with him? It does not go to the ultimate issue at trial, namely whether the complainant consented to being digitally penetrated by the appellant, and could not serve as a defence or as a fact to bolster a defence of consent. It could only tangentially go to the complainant's credibility - did she give a somewhat different version of their interaction to the police. In my view, the "ambiguity" was collateral at best and irrelevant on the ultimate issue of consent.

Complainant's sobriety

[83] The appellant submits that the trial judge interfered with the defence counsel's cross-examination on the complainant's sobriety, thereby "sabotaging" her entire strategy. That strategy was to explore a contradiction between the complainant's testimony that she was not drunk at the time of the assault and her daughter's testimony that the complainant was drunk. During cross-examination defence counsel sought to highlight that the complainant's evidence at the preliminary inquiry was that she drank three bottles of beer from a pack of 24, and that she denied at trial that this was her evidence at the preliminary inquiry. Her evidence at trial was that she had consumed five or six beers out of two cases of 24.

[84] The interaction between the trial judge and defence counsel reveals that the trial judge properly intervened at the outset of the questioning because the question was unclear. He then stated he did not see a contradiction, and did not understand the question. The purpose of this

intervention was, as the Crown points out, to ensure that defence counsel complied with s 10 of the *Canada Evidence Act* in presenting a contradictory statement to the witness.

[85] It was not lost on the trial judge that the complainant may have had more beer than she said she had, and may have contradicted herself on that point in her testimony at the preliminary inquiry. His comment that a small variance in the amount of beer the witness consumed was of questionable relevance makes clear that he was well aware of the fundamental contradiction between the views of the complainant and her daughter regarding the complainant's sobriety. It cannot be said that the interventions on the issue of sobriety, some warranted and others less so, fundamentally sabotaged the defence strategy.

Conclusion

[86] Judicial intervention in cross-examination of a complainant by definition interrupts the flow of defence counsel's cross examination. But judicial intervention in cross-examination does not rise to the level of injustice warranting a new trial where the interventions were proper, or even if improper, immaterial. In this case there are examples of both. There were many interventions by this trial judge. Some were a response to defence counsel's inappropriate approach to cross-examination. Others were less helpful and sometimes inappropriate. However, it cannot be said that they deprived the appellant of his right to make full answer and defence. The defence case was clear: he maintained that the complainant was a liar, a possible drug user, was drunk at the time of the assault, and consented to the sexual activity. All elements of his defence were clearly put forward. There is no suggestion that the accused himself was prevented by the trial judge from setting out his side of the story in his own way.

[87] In all the circumstances, the high threshold required to establish an injustice warranting a new trial has not been met. I would dismiss the appeal.

Appeal heard on December 3, 2014

Memorandum filed at Calgary, Alberta
this 13th day of January, 2015

Paperny J.A.

Appearances:

M. Dalidowicz
for the Respondent

K.B. Molle
K. Arial
for the Appellant