



R. v. Gill

Alberta Judgments

Alberta Court of King's Bench

K.J. Teskey J.

Heard: October 7,8 and 9, 2024.

Judgment: October 25, 2024.

Docket: 230134041Q1

Registry: Edmonton

[2024] A.J. No. 1235 | 2024 ABKB 623

Between His Majesty the King, Crown, and Simranjeet Gill, Accused

(53 paras.)

Counsel

Luke Craggs, for the Crown.

Brij Mohan, for the Accused.

Reasons for Decision

K.J. TESKEY J.

Introduction

1 The Accused is charged with one count of sexual assault, contrary to s 271 of the *Criminal Code of Canada*. While the Crown called four witnesses, the core of its case was led through the complainant. The Accused testified in his own defence. For the reasons that follow, I find the Accused not guilty.

Evidence of the Complainant

2 The Complainant travelled from Slave Lake with a co-worker friend on January 28, 2023, to attend an Oilers game. They checked into a hotel in Downtown Edmonton and started the evening with drinks in the lounge. She recalled having two beers and an orange spritzer. They attended the

game, where she remembered having something in the neighbourhood of 10 drinks, Twisted Tea Tall Cans, which she believed cost \$260.

3 After the game, the pair looked for a pub for drinks and food. They became lost and encountered a homeless man who gave them directions and led them to a pizza place. While in the pizza place, the complainant was on her phone with a friend while paying; she proceeded to hand the phone to the homeless man with the intention that he would continue the conversation with the friend on the other end of the call. The homeless man proceeded to steal the phone and flee the restaurant. While she estimated that she had been about a seven on a scale of 1 to 10 for intoxication, she testified that the shock of losing her phone had the effect of sobering her up. After attempting to find the homeless man, the pair took an Uber back to the hotel.

4 When they arrived at the room, a disagreement arose between the complainant and her friend, which caused her to be upset, and she decided to have a cigarette in the parkade. She changed from her game clothes into more comfortable clothing. She took the elevator to the Parkade, where she encountered the accused, who was on duty as a security guard. She asked him whether or not she could smoke in the parkade. He replied that she could and asked if he could join her. She testified that she had a pleasant conversation for roughly 25 minutes, during which she told him about her evening, including the game, the homeless man, and the argument with her friend. She described him as kind and attentive. Suddenly, the accused moved in for a kiss that she ducked away from. She told the accused that she had a phobia of kissing. After a short period, he tried to kiss her again, and she was caught off guard. They kissed briefly until the complainant put her arms around him and tapped his back to signal him to stop. She testified that she did not consent to either kiss. She told him she should return to the room, and they walked towards the elevator. She was not afraid of the accused at this point but was uncomfortable with what had occurred.

5 They got on the elevator, and she pressed the button for the eleventh floor, and he pressed it for the 2nd floor. When the elevator stopped at the second floor, he got out, grabbed her by the forearm and violently pulled her into the hallway towards a quiet area with big bulky furniture. Initially, in her statements to police, she could not recall how she got off the elevator, believing she might have followed him out. She did not remember this detail when she spoke to a psychologist in April 2023 for a report filed in the civil litigation proceeding. She explained that it had taken a year and a half of therapy to process her memories, and as a result, memories that had been unavailable at the time had now become clear.

6 He began to kiss and fondle her. She told him no on repeated occasions. He put his hands down her pants and cupped her vagina. She tried to move his hands to her chest, which she viewed as better than the alternative. He wanted to get her to touch his penis and ultimately pushed her to his knees, where she was forced to perform oral sex until she ejaculated in her mouth and on her body. She then vomited on the carpet. Together, they went to a bathroom on the floor, where she cleaned up and went to the room.

7 Police were involved that evening and took a statement at the Royal Alexandra Hospital at roughly 4 AM. She then provided a written statement on February 4, 2023.

Assessment of the Complainant's Evidence

8 The testamentary assessment of a witness's evidence raises issues of credibility and reliability. These are two discrete analyses, as discussed by the Ontario Court of Appeal in *R. v Morrissey*, 1995 CanLII 3498 (ONCA),

"Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable."

9 There is no presumption of reliability in a criminal case. As part of its burden, the Crown must establish that its evidence is credible and reliable.

10 I found the complainant to be generally credible in that she was trying to tell the truth as she believed it to be. She answered the questions directly and appeared to be trying to provide a truthful narrative.

11 The defence suggested that the complainant was being dishonest in her allegation to advance a civil claim for sexual assault. I do not accept this submission. Simply because a complainant seeks a civil remedy for an alleged crime does not automatically engage their credibility. I believe the complainant attempted to answer questions truthfully, and I do not believe she was colouring her evidence to seek an advantage.

12 In my view, the central question I must consider is whether she is a reliable witness, and on this issue, I have significant concerns.

13 First, the complainant had consumed significant amounts of alcohol that evening.

14 The complainant testified that she believed that on a scale of 1 to 10 for intoxication, she was about a 7. This is a routine question asked of witnesses in Alberta Courtrooms. In my view, this question usually provides little assistance to a trier of fact in applying the issue of intoxication to testamentary factors.

15 A self-assessment of intoxication is necessarily subjective, but when a witness is asked to provide a 'score,' it asks the witness to place them on an objective scale where one is stone-cold sober, and ten is profoundly intoxicated. To the extent that a witness can accurately assess their sobriety on such a range, I would then ask, what can the trier of fact do with that?

16 Intoxication is a factor that affects a witness's reliability, but it must be assessed contextually on the evidence. A witness may be intoxicated at a relatively high numerical scale, but on their evidence, they may demonstrate a high degree of reliable recall. Similarly, a witness might self-assess themselves as being sober or having sobered up, and yet, the evidence might reveal significant gaps in their memory that engage substantial reliability concerns.

17 That is the case here. The complainant assessed herself as 7 out of 10 when she left the Oilers game, but that she sobered up significantly when her phone was stolen. Neither of these assertions is particularly probative of her actual state of intoxication.

18 It is also the case that the observations of the other witnesses, including the accused, who observed her to be sober, may only give a partial picture of her mental state. Asking a witness whether a person had issues walking or talking does not necessarily provide evidence about their memory, judgment, and cognition.

19 Having over 13 drinks over 6 or 7 hours is significant. But beyond that, I think that her level of intoxication is best understood by two discrete parts of her evidence.

20 First, alcohol significantly affects one's judgment and mood. I am struck by her decision to give her cell phone to a homeless man so he could speak to her friend. In my view, this speaks to an individual who was significantly intoxicated and made a decision that would be utterly unthinkable to someone with a sober mind.

21 Second, there were numerous points in her evidence where the complainant had gaps in her memory. She explained a number of these gaps based on the trauma of the alleged assault. That said, some issues with her memory do not involve the assault, which is more consistent with alcohol intoxication. When speaking about the incident involving the homeless man, her recollection differed substantially from that of her friend. She recalled asking the homeless man for directions and having him lead them to a restaurant. Her friend testified that they were at the pizza shop, at which point she unexpectedly left and returned with the stranger. I prefer his evidence on this point.

22 Similarly, after the event, she testified that she and her friend reported the sexual assault to a front desk staff member at the hotel, who did not take the complaint seriously and proceeded to call the accused over to the desk. This evidence seems incredible, and the friend did not testify to this event. I have concerns as to whether the incident occurred, as she recalled.

The effect of Trauma and the recovery of Memory

23 There were many points where the complainant explained a gap in her memory or inconsistency by reference to the trauma of the alleged event. She also testified that to the extent that her evidence at trial was inconsistent with her statement, it could be a reflection of her memory being revived by the process of therapy.

24 Traditionally, consistency of a witness's testimony over time is a hallmark of credibility and reliability. If the truth doesn't change over time, so too, it is argued, should the evidence of a witness remain consistent.

25 Courts have increasingly recognized that consistency is nuanced as a test for credibility. There are reasons why a narrative might evolve that is explained to the satisfaction of the trier of fact. For example, a child witness might profess fear or shame that caused them to provide incremental or delayed disclosure (*R v D.D.* 2000 SCC 43). This question should be assessed based on the evidence or lack of evidence on this point.

26 There were two significant areas where the complainant's evidence evolved.

27 First, in her initial interview with the Police, the complainant said she wasn't sure if the accused pulled her out of the elevator or if she followed him. A week later, when she provided a written statement to the police, she continued to profess uncertainty on this point. She continued to be uncertain when she spoke to an expert retained by her civil counsel and in an affidavit filed in civil proceedings.

28 At trial 18 months later, she was adamant that she was forcefully pulled out of the elevator and that it was as a result of substantial therapy that she had come to that conclusion.

29 The Crown did not seek to ask any questions in redirect on this issue. As a result, the explanation for the change in this evidence essentially amounts to an assertion that the memory was retrieved through therapy and that she is confident that it is accurate.

30 As the Alberta Court of Appeal noted in *R. v Garford*, 2021 ABCA 338, the assessment of recovered or buried memory lies with the trial judge,

It will be for the trial judge to assess and weigh the explanation for the incremental disclosure, the breadth and scope of new allegations or details, and weigh them individually and collectively, in the overall assessment of the complainant's credibility. A trial judge, who sees and hears the complainant, is in the best position to determine whether the added particulars are of such a magnitude that they leave her with a reasonable doubt, or whether they are adequately explained in the context of all the evidence. (Para 21)

31 This is consistent with the comments of Justice McLachlin as she then was, in *R. v Francois*, 1993 CanLII 52 (SCC), where she wrote:

"[The complainant] denied the suggestion of cross-examining counsel that her recovered "memory" was the product of the pressure she was experiencing. Thus explored, the matter was left to the good judgment of the jury. It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether they believed the complainant's story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth."

32 Marc Rosenberg, before his appointment to the Ontario Court of Appeal, observed:

"Repressed memory challenges the commonsense notion that memories become less reliable over time. These memories come flooding back apparently intact accompanied by powerful emotions appropriate to the event and filled with vivid and realistic detail. The very richness of the detail seems to carry its own confirmation of reliability. And if the memories are untrue, where did they come from and why are they there? If the memory is not true what possible motive does the witness have for remembering? Common sense and experience do not easily inform these questions." M. Rosenberg, "Issues Arising In Criminal Prosecutions for Distant Events." (1995)

33 The challenge for the trier of fact is applying "knowledge of human nature... common sense and experience" to an unusual and largely opaque memory process. I also need to be careful because a credible witness will believe that they are providing reliable evidence and will often be quite compelling in their testimony.

34 I find that this is a significant inconsistency. It is difficult to understand how a witness could be unclear between being violently pulled from an elevator and voluntarily following the accused. This is a drastically different narrative and one that engages fundamental issues of the Crown's theory that the complainant was lured and then physically forced into a private area by the accused to commit a sexual assault.¹

35 I also find that the explanation provided by the complainant is insufficient. She testified that the therapy process had caused her to accurately resolve her uncertainty on this crucial point. I do not doubt that she genuinely believes this to be true. The question is whether I can be satisfied that she recalls this point accurately. On this question of whether her memory is reliable, I am unsure.

36 While the Crown is not required to lead evidence to explain the effect that counselling might have on refining memory (See *R. v Waterman*, 2021 SCC 5), it always bears the onus to establish that the evidence to support a conviction is reliable. Whether one calls it refinement or recovery, where a witness' evidence evolves, a court must be satisfied that this process is reliable. I have nothing more than the complainant's assertion that she believes her trial evidence to be reliable.

The Crown's ultimate burden cannot rest on trust, and I have no evidence to support the reliability of this process.

37 Reliability is a foundational concern in a witness' evidence, so a thorough and probing analysis of the evidence is necessary. This point was powerfully made in the context of eyewitness evidence in *R. v Atfield*, 1983 ABCA 44 at 3,

"The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence...If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous *Adolph Beck* case, twenty seemingly honest witnesses mistakenly identified *Beck* as the wrongdoer."

38 In my view, this caution applies equally to memory reconstruction. While I am mindful that there is no legal requirement of corroboration in a sexual assault prosecution, I share the view of Justice Presser in *R. v Tan*, 2023 ONSC 8549 at 117

"There is no legal requirement that a complainant's evidence be corroborated before a conviction can follow: Criminal Code, s 274. However, where there are concerns about the reliability of a complainant's testimony, "corroboration can provide a basis for resolving those concerns and concluding that guilt has been proven beyond a reasonable doubt": *R. v A.S.*, 2021 ONSC 8549, at para. 63. Consequently, from a practical perspective, the Crown will not be able to meet its burden of disproving the possibility that recovered memories of sexual assault are unreliable unless it can "point to some independent evidence that confirms the reality and accuracy" of the complainant's present memory."

39 In my view, there is no independent evidence that would allow me to resolve this issue. Moreover, it is an issue that goes centrally to the Complainant's core allegation that she was heading to the floor that her room was on and had no reason to get off on the second floor. I have no basis on the evidence to find that the Complainant's recovered memory on this central point is reliable.

40 Second, in her trial evidence, the complainant testified that she pulled the accused's hands out of her pants because she was scared and thought it was better to put them on her chest. In her first statement to police, she told officers that she pulled the Accused's hands out because she hadn't shaved her legs in two weeks. When confronted in cross-examination, she stated that she was traumatized and that she wasn't making sense in her statement.

41 Is it possible that a sexual assault complainant will make a nonsensical remark out of trauma? Yes. But it remains that it is inconsistent with her trial evidence, and inconsistency cannot be insulated from scrutiny out of sympathy for a traumatic experience. Moreover, if I were to accept that part of her first interview was unreliable or nonsensical, on what basis am I to conclude that the rest of her interview, which was consistent with the Crown's theory, ought to be considered reliable?

42 Credible but potentially unreliable witnesses are a challenge for triers of fact. They are inherently compelling because they genuinely believe in the veracity of the evidence they are giving. While I think the complainant was attempting to be truthful with the Court, I have significant concerns about her reliability.

Evidence of the Accused

43 The Accused testified in his own defence. He confirmed that he had been employed as a security guard in January of 2023 and had been posted to this hotel on January 28, 2023. He was approached by the complainant, who asked him if she could smoke in the parkade and offered him a cigarette. They found a quiet area and had a friendly conversation. She expressed shame over having lost her phone earlier in the evening. He described the complainant as doing most of the speaking and testified that he mostly listened. He told her that she was beautiful, and he described the tone of the conversation as flirtatious. After about 25 minutes, they mutually kissed and found a private space to continue their encounter.

44 They took an elevator to the second floor, where the restaurant was located. They went down a quiet hallway to some furniture, where they continued to kiss. He confirmed that he put his hands down her pants, which she removed, and put them on her chest. She proceeded to touch his penis and ultimately performed oral sex on him to the point of ejaculation, which occurred in her mouth and hair.

45 After ejaculation, the complainant vomited on the floor, and they went to a bathroom for her to clean up. She then returned to her room, and he continued his duties. He denied that the incident at the front desk occurred.

46 On his evidence, the incident was a voluntary, consensual and mutual sexual encounter among strangers who had just met. The encounter he described was brief and transactional. English is not the accused's first language. While I found much of his evidence was concrete and, at some level, lacking in detail, I find that some of that related to language proficiency issues rather than his credibility.

47 The Accused maintained his position during cross-examination and remained consistent with his testimony. His evidence was largely unchallenged.

Assessment of Credibility.

48 This case largely comes down to assessing two competing witnesses who have provided diametrically different evidence around a similar overall narrative. It is fundamental to the Crown's burden to prove its case beyond a reasonable doubt that a judge does not simply pick between competing versions of evidence. To convict, I must be sure about the guilt of the accused, notwithstanding his denial under oath.

49 While I believe the complainant was generally credible, that is not the complete analysis. As the Ontario Court of Appeal noted in *R. v Norman*, 1993 CanLII 3387, "The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is paramount."

50 This case engages a wide variety of concerns about the complainant's evidence. The effect of alcohol and the impact of the post-event reconstruction of her evidence cloud my ability to find her testimony reliable. The challenge is that once a Court is confronted with evidence of unreliability on crucial aspects of evidence, the next question is, upon what basis can I find that the rest of her evidence is otherwise reliable? I recognize that the Complainant was trying to be truthful with the Court. I am simply not satisfied that her evidence is reliable enough to prove this case to the criminal standard of proof beyond a reasonable doubt.

51 While the Accused was largely unshaken in his evidence, I must consider his testimony in light of all the evidence, including the complainant's. While I don't reject his evidence, I cannot accept it either.

52 I do not have the requisite confidence in what occurred in this matter. The Crown has failed to prove its case beyond a reasonable doubt.

53 The Accused is found not guilty.

Dated at the City of Edmonton, Alberta this 25th day of October, 2024.

K.J. TESKEY J.

1 I recognize that the Accused offered in cross-examination that he believed that the parkade elevator stopped on the second floor. While this could explain the discrepancy, the complainant was sure that she pressed the button for her floor and was planning to continue in the same elevator.