In the Court of Appeal of Alberta

Citation: R v SSF, 2026 ABCA 350

Date: 20261030
Docket: 2401-0064A
Registry: Calgary

Between:

His Majesty the King

Respondent

- and -

SSF

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim or the witness must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Corrected judgment: A corrigendum was issued on November 4, 2026; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Anne Kirker
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Assistant Chief Justice E.J. Tolppanen
Convicted on the 16th day of May, 2023
(Docket: 210853388P1)

Memorandum of Judgment

The Court:

I. Overview

[1] The appellant, SSF, appeals his conviction for sexual assault contrary to s 271 of the *Criminal Code*, RSC 1985, c C-46. Additionally, the appellant originally sought to admit new evidence on a claim, now withdrawn, of ineffective assistance of counsel. The application to admit fresh evidence was not formally abandoned.

[2] For the reasons below, the application for new evidence is dismissed. The appeal is also dismissed.

II. Background Facts

[3] At trial, the complainant was the only witness. The appellant did not testify.

[4] At the time of the offence, the appellant and the complainant were in an on-and-off-relationship.

[5] On August 27, 2021, the appellant and complainant met to discuss their relationship. Later that day they went to the complainant's apartment to continue the discussion. The discussion was confrontational and emotional, and at one point the complainant admitted to pushing the appellant, after which he pulled her close to him, calling her names. The complainant agreed that at one point during the evening, she smoked a marijuana cigarette. She denied being impaired or feeling any effects from the marijuana.

[6] At some point in the evening, the complainant and the appellant engaged in consensual vaginal intercourse. The complainant's evidence was that she then withdrew her consent and asked the appellant to stop, but he did not. She estimated she told the appellant to stop 15 times before she elbowed him in the stomach and he ceased sexual activity.

[7] In her report to police, the complainant said the passage of time between the first time she told the appellant to stop and the end, was one and a half to two minutes. At trial, her evidence was that this activity "lasted a further 15 minutes".

[8] After cessation of sexual intercourse, there was considerable yelling and verbal fighting, and the complainant testified that before falling asleep, she cried "because he didn't stop, he didn't listen to me and I was really scared. I thought I did something wrong". The complainant suffered multiple bruises, her vagina hurt and took a day to heal.

[9] The complainant's evidence was that the next morning they continued to fight, there was mutual pushing, calling each other names, and at one point the appellant said he wanted to hurt her because she had hurt him. The complainant called the police as soon as the appellant left. There was considerable evidence about the complainant's text messaging and telephone calls to the appellant, after he was released on bail on October 1, 2021.

[10] The complainant admitted that on October 2 and 3, 2021, she telephoned the appellant over one hundred times and sent him hundreds of texts messages. An e-mail exhibit admitted at trial showed 12 messages encouraging the appellant to talk and meet with her on October 2. On October 6, 2021, the complainant texted the police saying she did not want the appellant to be around her or talking to her, and she was afraid of him. The content of these messages was a major focus of cross-examination at trial.

III. Decision of the Trial Judge

[11] The trial judge summarized the complainant's evidence. He reviewed the law on burden of proof, credibility and reliability, the *actus reus* or guilty act, and *mens rea* or guilty mind, and mistake of law in sexual assault cases. The trial judge's statements of the law are not in issue on this appeal.

[12] On the facts, the trial judge found that despite some inconsistencies in her evidence, both external and internal, the complainant was "both a credible and reliable witness" who "provided a fairly detailed chronology of the sequence of events", and was able to recall what she and the appellant spoke about during the events of August 27 and 28, 2021. He said her description of the sexual assault was very detailed, both as to the parties' words and actions and as to their bodily positions. He said her descriptions were individually and collectively entirely plausible. He acknowledged that at times during cross-examination, she was frustrated and became argumentative with counsel, but said "for the most part [she was] a careful witness, appropriately disagreeing with, correcting, or seeking clarity from counsel during her examination". He concluded that her testimony was "candid and balanced and was fair to the accused".

[13] In reviewing the complainant's post-incident conduct, the trial judge said that while her messages to the appellant reflected inconsistencies with her statements to police, he did not regard those as diminishing the complainant's credibility. He found the communications of October 2 and 3, 2021 were an attempt to "neutralize what she feared was the accused's anger towards her". Alternatively, "even if the messages of October 2 and 3 to the accused reflected [her] true feelings on those dates", the trial judge considered it plausible that she later "became fearful of the accused and wished no contact with him", as reflected in her message to police on October 6, 2021. The trial judge recognized that the complainant had denied sending some messages or could not recall sending some messages, but said she used several messaging platforms and it was unclear whether in exchanges with counsel she was responding about different messaging platforms or at different times. He said he did not believe she was attempting to deceive the Court.

[14] The trial judge examined the defence's argument that the complainant had a motive to fabricate as a result of the appellant wishing to end their relationship. He did not find there was any evidence supporting the assertion. As to inconsistent statements to the police, the trial judge did "not find the impugned aspects of [her] police interviews regarding whether she initiated contact and the frequency of her contact with the accused to be so clearly an attempt to deceive the police or to be of such significance that it materially impacts her credibility".

[15] The trial judge acknowledged the complainant's admission that she had smoked marijuana on the evening in question, and that during testimony her evidence was at sometimes combative and argumentative. He did not find these concerns significantly diminished her credibility or reliability. He said: "I do not discount her credibility because, at times, her nervousness and discomfort may have manifested itself with her becoming a frustrated and challenging witness".

[16] The trial judge made detailed findings of fact, based on the testimony of the complainant, held that the *actus reus* of the sexual assault was proven by the admitted touching and sexual nature of contact and that the complainant, while originally consenting to the sexual activity, revoked that consent, and thereafter did not subjectively consent to the sexual acts. He found, as to *mens rea*, that the appellant "had actual knowledge that [the complainant] was not consenting to the ongoing sexual act", and that the appellant "knew she was not consenting, but he intended to persist in the sexual intercourse, nonetheless". The trial judge commented on the potential defence of honest but mistaken belief in communicated consent, but found it had no air of reality. The trial judge concluded the Crown had proven the elements of sexual assault beyond a reasonable doubt and found the appellant guilty.

IV. Preliminary Application to Admit New Evidence

[17] It is unclear whether there is anything left of the appellant's application to admit new evidence following the withdrawal of his allegation of ineffective assistance of counsel, particularly relating to the decision that he would not testify at trial. The appellant submitted an affidavit asserting that he wanted to testify and outlining what his evidence would have been. In response, the Crown tendered an affidavit from trial counsel.

[18] In oral submissions, the appellant withdrew the argument on ineffective assistance. Both parties acknowledged that the main relevance of the proposed new evidence was in respect of the ineffective assistance of counsel argument. But it was left that what the appellant would have said had he testified, or the responding affidavit of trial counsel, may still be relevant.

[19] To the extent the application to admit new evidence remains live, it would generally be inappropriate for an accused, after he did not testify at trial, to attempt to put in evidence on appeal as to what he would have said had he taken the stand, absent an argument of ineffective assistance of counsel or that he was otherwise deprived of the opportunity to testify. For example, such evidence does not meet the first criterion in ***Palmer v The Queen***, [1980] 1 SCR 759, 775, 106

DLR (3d) 212; it could clearly have been adduced at trial. As to the third ***Palmer*** criterion, admission of his evidence now means it cannot be tested through cross-examination as would have occurred at trial. The trial judge had no opportunity to assess the appellant's credibility and reliability.

[20] The appellant's new evidence application is dismissed and the Crown's request to adduce the responding affidavit from trial counsel is similarly dismissed.

V. Apprehension of Bias

[21] The test for reasonable apprehension of bias was articulated in ***R v S(RD)***, [1997] 3 SCR 484, paras 109, 111, 151 DLR (4th) 193 quoting from ***Committee for Justice and Liberty et al v National Energy Board et al***, [1978] 1 SCR 369, 394, 68 DLR (3d) 716: "the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information". The test is what an informed person, viewing the matter realistically and practically, and having thought the matter through, might conclude: ***Nazarewycz v Dool***, 2009 ABCA 70, para 64, [2009] 7 WWR 636; ***R v Favel***, 2024 ABCA 243, paras 2, 3.

[22] A trial judge is in control of process and procedure in the courtroom and has authority to manage the court process: ***R v Crawford***, 2015 ABCA 175, para 7, 322 CCC (3d) 528; ***R v WG***, 2024 ABCA 396, para 56; ***R v Hamilton***, 2011 ONCA 399, para 47, 271 CCC (3d) 208; ***R v Felderhof***, (2003) 68 OR (3d) 481 (CA), para 40, 180 CCC (3d) 498.

[23] The presumption of judicial impartiality is strong; the burden of rebutting it lies with the party alleging apprehension of bias, and that burden demands cogent evidence sufficient to rebut the presumption: ***Nazarewycz***, paras 63, 64; ***R v Colling***, 2017 ABCA 286, para 36, 356 CCC (3d) 417; ***R v Wilson***, 2019 ABCA 502, para 27; ***S (RD)***, paras 113, 114, 117.

[24] The appellant says there is an apprehension that the trial judge was biased against him as a result of his disruptive behaviour in Court, the trial judge's admonishment of him for that behaviour, and because of the trial judge's invitation to Crown counsel to speak to the complainant, who was not in the courtroom during one of the warnings from the trial judge, to explain to her what his position was on the appellant's outbursts, as he was "concerned about her feeling intimidated because of what just happened".

[25] The appellant interrupted the evidence of the complainant on 10 occasions. He said for example: "could I like run for two seconds here, I've been sitting here gagging for the last two minutes and no one said shit". Contradicting the evidence of the complainant during her testimony, he said "no I didn't"; "throw it the fuck out of court"; "my phone was fucking disconnected", again "did not"; and "What are you (INDISCERNIBLE)". At this point, the trial judge offered defence counsel an opportunity to speak to the appellant "about the noise and the words that are spoken

while [the complainant] is testifying". Counsel advised that he had "admonished him at least once, but it seems to continue", to which the appellant repeated "You and I both know my phone –". And after another discussion off the record, "bipolar and schizophrenic does not help (INDISCERNIBLE)".

[26] Even after having been counselled on his interruptions during the examination of the complainant, the appellant's attempt to intimidate the complainant continued:

> THE ACCUSED: Can I say something?
>
> ...
>
> THE ACCUSED: If we're all saying something, can I say something? Like –

Once again, the court interjected to address these comments.

> THE COURT: [The appellant], please, just -- if you need a moment to speak with your lawyer, that is fine --
>
> THE ACCUSED: No, and she does –
>
> THE COURT: -- but you cannot interrupt --
>
> [DEFENCE COUNSEL]: [The appellant].
>
> THE COURT: [The appellant]. [The appellant], that is enough.

[27] Even that further warning did not help. The appellant continued:

> THE ACCUSED: She's making up all fabrications.
>
> …
>
> THE ACCUSED: These aren't (INDISCERNIBLE).

Later, the following occurred after the appellant had apparently stood up in the prisoner's dock:

> [DEFENCE COUNSEL]: Please sit down, [the appellant].
>
> THE ACCUSED: I was going to ask if I could go pee, 'cause this guy keeps cutting in and the whole point is fabricating --

> THE COURT: [The appellant], please. If you need a break, you can simply say so without the editorializing.
>
> THE ACCUSED: I'm just sick of this guy interrupting.
>
> …
>
> THE COURT: So your client seems to want a break which is, you know, we can take a break.
>
> THE ACCUSED: Oh, we can continue. But if he stands up one more time –
>
> ...
>
> [DEFENCE COUNSEL]: It's 3:20, perhaps a break is of benefit to all parties.
>
> THE COURT: And please speak to your client, [counsel].

[28] By this time the appellant had left the prisoner's dock and was approaching Crown counsel:

> THE ACCUSED: Speak to the client? This guy doesn't know his fuckin' job. (INDISCERNIBLE). (INDISCERNIBLE) –
>
> ...
>
> THE ACCUSED: -- that's fuckin' (INDISCERNIBLE)

[29] This is when the Court determined to have the complainant leave the courtroom and court adjourned. After the adjournment, the trial judge addressed the complainant:

> THE COURT: ... I know this is frustrating for you, I do want to talk to the lawyers before we recommence, can you just wait outside, please?

[30] After the complainant had left the courtroom, the Court said:

> THE COURT: So, throughout this trial, particularly during the cross-examination of [the complainant], [the appellant] has been disruptive. He has been warned at least twice by me, once by you, and I imagine during the break as well, [counsel]. The last outburst clearly upset the witness and I am not going to have it. I am not going to have the accused embark on behaviour that has the potential to intimidate the witness and disrupt the proceedings. So we have had the sheriff brought in, and I am saying this for your benefit, [the appellant], and I have inquired of madam clerk as to whether there is a separate room where [the appellant] can sit on his own

> and hear the proceedings and perhaps even see the proceedings, but not disrupt the proceedings. That is the next step that I will take. One more disruption of any sort, whether it is making a face or the gasping that you have been doing, or something worse, you will be removed from the courtroom. Do you understand that?
>
> THE ACCUSED: Understood. I just have issues breathing –
>
> THE COURT: No, you do not have an issue that requires you to swear the way you did as you left the courtroom.

[31] The trial judge then addressed Crown counsel, indicating that despite the "state of disruption" he was not prepared to invoke the contempt powers of the Court. But again, he cautioned the appellant: "that sort of behaviour in the face of the Court can give rise to contempt proceedings which are separate and apart from the trial but can result in a remedy ... [the appellant], you are on notice that the next disruption of any sort will result in me having you removed from the court and put in a separate room, do you understand that?"

[32] Then follows a comment of the trial judge which the appellant says shows an apprehension of bias. The trial judge said:

> I did not want [the complainant] to be here for that, but perhaps you could get [the complainant] to come in and because I am concerned about her feeling intimidated because of what just happened, perhaps you [the Crown prosecutor] can explain to her what my position is on this.

[33] The Crown says the tone and physical conduct of the appellant was far more intimidating than the record alone suggests, and the judge's decision to summon a sheriff and issue an admonishment was reasonable. The Crown says the judge never did invoke s 650 (2) of the *Criminal Code*, but even if he had resorted to removing the appellant from the courtroom and placing him in a separate room to watch the proceedings, that would have been appropriate "to preserve trial integrity, reflect[ing] prudence, not prejudice". The judge was required to step into a "hostile environment" deliberately created by the appellant, and act "to prevent intimidation and safeguard trial integrity". The Crown says nothing in these circumstances would lead a reasonable observer to doubt trial fairness.

[34] The appellant's claim of bias is unsupported. He has not overcome the strong presumption of judicial fairness. The trial judge's interventions were fair, reasonable, and necessary to preserve courtroom order and decorum. A reasonable, informed observer would view these measures as appropriate, necessary, and in order. This ground of appeal is dismissed.

VI. Credibility of the Complainant

[35] The appellant challenges the trial judge's assessment that the complainant was credible and reliable. He says the trial judge's conclusions on the complainant's credibility were influenced by his disruptive behaviour in court, causing the trial judge to improperly excuse the frailties in her evidence.

[36] Credibility is concerned with the witness's sincerity or honesty, and reliability is concerned with the witness's accuracy, ability to observe, recall and recount events accurately: ***R v HC***, 2009 ONCA 56, para 41, 241 CCC (3d) 45; ***R v Delmas***, 2020 ABCA 152, para 25, 64 CR (7th) 71; ***R v GF***, 2021 SCC 20, paras 81, 82, [2021] 1 SCR 801; ***R v Buonincontri***, 2025 ABKB 264, para 21.

[37] A court's determination of credibility and reliability can include evaluation of endemic credibility factors, situational credibility factors, demeanour, plausibility, supporting or contradictory evidence, external and internal consistency, whether the evidence is presented in a balanced way, endemic reliability factors, ability to observe, and the witness's conditions, memory and communication ability: ***Buonincontri***, para 24. It is "more of an art than a science" and relies on "common sense ... [and] well-established principles": ***R v Ewanchuk***, [1999] 1 SCR 330, para 30, 131 CCC (3d) 481; ***R v AM***, 2014 ONCA 769, paras 12-14, 123 OR (3d) 536; ***R v Kruk***, 2024 SCC 7, paras 73, 81, 433 CCC (3d) 301.

[38] The appellant says that despite the high threshold for an appellate court to overturn a determination on credibility, in this case, it is warranted. He says there was inconsistency in the complainant's evidence as to the time elapsing between when she allegedly told the appellant to stop and when intercourse ended: a minute and a half to two minutes, or 15 minutes. He says there was inconsistency in the location where she allegedly withdrew consent, whether in the living room or in the bedroom, and what each of them was wearing at various times.

[39] Additionally, the appellant says the complainant's credibility was undermined by the change in tone of her text messages between October 2 and 3, 2021 and October 6, 2021. In the earlier text messages, she was apologetic, said she wanted to talk and meet with the appellant again, and had helped him get out of jail. On October 6, 2021, the tone changed; the complainant told police she was afraid of the appellant and did not want contact with him because she was afraid he was "going to do something to her".

[40] The trial judge examined at length each of these challenges to the complainant's credibility. On the passage of time between revocation of consent and the cessation of sexual intercourse, the trial judge acknowledged there was inconsistency. He accepted the complainant's explanation that "it felt longer" than the minute and a half to two minutes that she told police.

[41] As to the location of the sexual activity, the trial judge accepted that it had begun in the living room, but that they went into her bedroom to continue the discussion about their relationship.

[42] As to the messages from the complainant to the appellant, the trial judge said that "while seemingly inconsistent, ... I do not regard this as diminishing [the complainant's] credibility". He said the messages of October 2 and 3, 2021 were "an attempt to neutralize what she feared was the accused's anger towards her" and that by October 6, 2021 "it [was] entirely plausible ... she became fearful of the accused and wished no contact with him, as she expressed to the police"; particularly since her text to police on October 6, 2021 said "I'm scared for my life *now*" [emphasis added].

[43] While the appellant argued the complainant lied to police about initiating contact with him and the frequency of their contact, the trial judge accepted that she used several messaging platforms, was prolific in her use of messaging platforms, and that it was "plausible that [the complainant] was recalling other exchanges with the accused using a different messaging platform or at different times." He did not believe the complainant was attempting to deceive the Court as to the messages or deletion of messages.

[44] The appellant also says the complainant had a motive to fabricate her evidence because he had told her he was going to go to Paris, without her, and end the relationship. The trial judge said as to that allegation: "I do not find that there is any evidence supporting the assertion that [the complainant] was motivated to fabricate the allegations". He noted that the complainant denied the accused intended to go to Paris without her and denied she threatened him if he left her. She agreed that their relationship was ending but added that she was the one who kept running from him. The trial judge said that while the complainant's feelings for the accused and her upset about his non-responsiveness to her messages were clear, "this is a far cry from supporting the theory that she was motivated to fabricate the allegation of sexual assault". On the other hand, the trial judge was not prepared to consider the absence of a motive to fabricate as a factor in favour of the complainant's credibility. He said that the issue of motive to fabricate was a neutral factor in his assessment of the complainant's credibility.

[45] The Crown says the trial judge addressed each of the inconsistencies that were argued by defence at trial and the appellant is simply asking this Court to reweigh peripheral inconsistencies. On motive to fabricate, the Crown says the trial judge correctly instructed himself on the law set out in ***R v Gerrard***, 2022 SCC 13, paras 3-5, [2022] 1 SCR 279.

[46] The threshold for overturning a trial judge's determination on credibility and reliability is high, particularly when the trial judge has addressed each of the issues raised by the defence in attacking that credibility and reliability, as in the present case. It is not the role of this Court to retry or reweigh issues of credibility and reliability that have been fully and properly addressed by the trial court. This ground of appeal is dismissed.

VII. Conclusion

[47] The appellant has not established any basis for this Court to interfere with the trial judge's conclusion. The appeal is dismissed.

Appeal heard on September 8, 2026

Memorandum filed at Calgary, Alberta
this 30th day of October, 2026

Feehan J.A.

Kirker J.A.

Grosse J.A.

Appearances:

A. Beland
for the Respondent

D.W. Fedorchuk, KC
for the Appellant

Corrigendum of the Memorandum of Judgment

The appellant's name has been anonymized for consistency with prior decisions in this matter.