A REVIEW OF DECISIONS RENDERED BY THE SUPREME COURT OF CANADA BETWEEN JANUARY 1 AND JULY 31, 2021, IN CRIMINAL CAUSES OR MATTERS

JUDGE WAYNE GORMAN
THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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Introduction:

The purpose of this paper is to review those decisions rendered by the Supreme Court of Canada in the time-period of January 1 to July 31, 2021, that involved criminal causes or matters. The key to the use of this paper is the index. It has been cross-referenced so that each decision can be located by a page number based upon the subject matters considered in that decision.

So far, in 2021, the Supreme Court of Canada has considered a multitude of issues involving criminal law, including defences, evidence and procedure. Let us start with the Supreme Court's consideration in this time period of the *Canadian Charter of Rights and Freedoms*.

THE CHARTER

Sections 7 & 15-Youth Criminal Justice Act Appeals-Unreasonable Verdicts:

In ***R. v. C.P.***, 2021 SCC 19, May 7, 2021, the accused, a young offender, was convicted of the offence of sexual assault. He appealed from conviction, arguing that the verdict was unreasonable. He also argued that section 37(10) of the *Youth Criminal Justice Act*, which denies young persons an automatic right to appeal to the Supreme Court of Canada in certain circumstances, a right of appeal which is available to adults, violates section 7 and 15(1) of the *Charter* and is therefore unconstitutional.

The appeal was dismissed. The Supreme Court of Canada held that the verdict was not unreasonable and that section 37(10) *Youth Criminal Justice Act* does not violate section 7 or 15(1) of the *Charter*.

Unreasonable Verdict:

The Supreme Court of Canada indicated that "[w]hen a verdict is reached by a judge sitting alone and explained in reasons for judgment, there are two bases on which a court of appeal may find the verdict unreasonable. First, a verdict is unreasonable if it is not one that a 'properly instructed jury acting judicially, could reasonably have rendered' [and] A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached 'illogically or irrationally'…This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge" (at paragraphs 28 and 29).

The Supreme Court concluded that "there is no basis for finding the verdict to be unreasonable" (at paragraph 38).

Section 7 of the Charter:

The Court noted that two elements "must be established in order to show a violation of s. 7: (1) that the impugned law or government action deprives the claimant of the right to life, liberty or security of the person; and (2) that the deprivation in question does not accord with the principles of fundamental justice… In this appeal, the requirements of the first step are readily satisfied, as a limit on young persons' right to appeal to this Court engages residual liberty interests that are cognizable under s. 7…The outcome thus hinges on whether this deprivation is in accordance with the principles of fundamental justice" (at paragraphs 125 and 126).

The Supreme Court concluded that "denying young persons an automatic right to a hearing in this Court where a court of appeal judge has dissented on a question of law cannot in itself contravene their constitutional entitlement to adequate procedural protection in the youth criminal justice system. This Court has steadfastly affirmed in various contexts that 'there is no constitutional right to an appeal', let alone an automatic one at the apex of the judicial system, including in circumstances that unequivocally engaged liberty interests and principles of fundamental justice that are cognizable under s. 7" (at paragrah133).

Section 15(1) of the Charter:

The Court indicated that "[a] law or a government action will contravene this guarantee: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage… The issue is whether it draws a discriminatory distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates young persons' disadvantage. In this respect, it should also be borne in mind that age-based distinctions are generally a 'common and necessary way of ordering our society' and are 'not strongly associated with discrimination and arbitrary denial of privilege'" (at paragraphs 141 and 142).

The Supreme Court concluded that "[i]n choosing to deny young persons an automatic right to appeal to this Court, Parliament did not discriminate against them, but responded to the reality of their lives by balancing the benefits of appellate review against the harms inherent in that process, in keeping with the dictum that 'there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character'…The fact that one specific feature

of the youth system does not mirror a feature of the adult system is not a basis for a finding of discrimination" (at paragraph 162).

Sections 11(d) and (f)-Peremptory Jury Challenges:

In ***R. v. Chouhan***, 2021 SCC 26, June 25, 2021, the accused was charged with first degree murder. On the day set for jury selection (September 19, 2019), amendments to the *Criminal Code*, which abolished peremptory challenges, came into force. The accused argued that the amendments only operated prospectively, thus they did not apply to his trial. In addition, he argued that the application of the amendments to his trial would violate section 11(d) of the *Charter*. The trial judge rejected these arguments and the accused was convicted.

An appeal to the Ontario Court of Appeal was allowed and a new trial was ordered. The Supreme Court indicated that the Court of Appeal, per Watt J.A., "agreed with the trial judge that the amendments to the *Criminal Code* were constitutional, but he disagreed on their temporal scope. In his opinion, the abolition of peremptory challenges could not apply to accused persons whose right to a jury trial had vested by the time the amendments were proclaimed into force on September 19, 2019. This was the case for Mr. Chouhan, as his first degree murder charge pre-dated September 19, 2019. Accordingly, he was deprived of his substantive right to peremptory challenges under the former rules and a new trial was required" (at paragraph 6).

Appeals were taken to the Supreme Court of Canada. The Court described the issues raised as being the following:

> (a) Does the abolition of peremptory challenges violate the rights of accused persons under ss. 11(d) and 11(f) of the *Charter*?
>
> (b) If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?

The appeal was allowed and the conviction was restored. A majority of the Court held that (1) the abolition of peremptory challenges does not violate sections 11(d) or (f) of the *Charter*; and (2) the amendments apply retroactively.

Does the abolition of peremptory challenges violate the rights of accused persons under ss. 11(d) and 11(f) of the *Charter*?

The majority concluded as follows (at paragraphs 83 and 85):

> In summary, we are of the view that the abolition of peremptory challenges does not infringe the s. 11(d) rights of accused persons. The existing protections of the independence and impartiality of the jury, which we have canvassed above, continue to protect against an infringement of the s. 11(d) right. In appropriate cases, we also highlight the ongoing role of robust and targeted jury instructions, challenges for cause, and judicial stand asides in protecting the integrity of the jury process.
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> … Section 11(f) offers no greater protection of impartiality than the specific guarantee of impartiality enshrined in s. 11(d). With respect to representativeness, the jurisprudence of this Court is clear that the right to a representative jury does not entitle the accused to proportionate representation at any stage of the jury selection process, including the final stage of selecting jurors to serve on the trial jury (*Kokopenace*, at para. 70). Section 11(f)'s guarantee of representativeness requires the state to provide a fair opportunity for a broad cross-section of society to participate in the jury process, by compiling a jury roll that draws from a broadly inclusive source list and by delivering jury notices to those who have been selected (*Kokopenace*, at para. 61). These aspects of jury selection are not affected by the abolition of peremptory challenges.

(b) If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?

The majority concluded as follows (at paragraph 103):

> …the amendments abolishing peremptory challenges are purely procedural and apply immediately to all jury selection processes commencing on or after September 19, 2019. They do not affect any of the accused's relevant substantive rights, namely the right to a fair trial, to an independent and impartial tribunal, or to a jury.

PROCEDURE

Appeals-Inconsistent Verdicts

In ***R. v. R.V.***, 2021 SCC 10, March 12, 2021, the accused was charged with the offences of sexual assault, invitation to sexual touching, and sexual interference. He elected to be tried by a judge and jury. The jury convicted him of the latter two offences, but acquitted him of the offence of sexual assault. He appealed from conviction, arguing that the verdicts were inconsistent and therefore unreasonable. The Supreme Court noted that a "jury renders inconsistent verdicts when it finds an accused both guilty and not guilty of the same conduct…For an appellate court to interfere with a conviction on the ground that it is inconsistent with an acquittal, the court must find that the guilty verdict is unreasonable" (at paragraphs 1 and 28). The Crown argued that "the apparent inconsistency in the verdicts rendered by the jury in the present case could be explained by the erroneous jury instructions [in relation to the sexual assault charge], such that the guilty verdicts could not be considered unreasonable".

The accused's appeal to the Ontario Court of Appeal was allowed. A majority of the Court of Appeal "held that there was no legal error in the jury instructions and that the convictions for sexual interference and invitation to sexual touching were unreasonable, as they were inconsistent with R.V.'s acquittal on the sexual assault charge. The majority quashed R.V.'s convictions and substituted verdicts of acquittal".

The Crown appealed to the Supreme Court of Canada. The Supreme Court indicated that this "case provides us with an opportunity to clarify the approach to be followed when verdicts are alleged to be inconsistent. While the basic principles underlying inconsistent verdicts have been established by this Court, we have yet to explicitly consider the impact of legally erroneous jury instructions on the inconsistent verdicts inquiry. In doing so here, I seek to achieve a just balance between judicial integrity and fairness to the accused, while respecting the role of juries in our justice system" (at paragraph 4).

The appeal was allowed and the convictions were reinstated. The Supreme Court indicated that "the Crown can seek to reconcile apparently inconsistent verdicts by showing, to a high degree of certainty, that the acquittal was the product of a legal error in the jury instructions, that the legal error did not impact the conviction, and that the error reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct. If the Crown discharges its

burden, appellate intervention on the conviction is not warranted because the verdicts are not actually inconsistent and thus not unreasonable on the basis of inconsistency" (at paragraph 5).

The Supreme Court concluded, per Justice Modaver, that "in the present case, I am respectfully of the view that the trial judge misdirected the jury on the charge of sexual assault by leaving the jury with the mistaken impression that the element of 'force' required for sexual assault was different than the element of 'touching' required for sexual interference and invitation to sexual touching. In particular, the failure to instruct the jury in clear terms that the 'force' required to establish sexual assault was one and the same as the 'touching' required to establish the other two offences constituted non-direction amounting to misdirection. The effect of this error on the apparently inconsistent verdicts is significant. A review of the charge to the jury as a whole enables me to conclude, with a high degree of certainty, that the error was material to the acquittal. Equally, I am satisfied that the error did not impact on the convictions; rather, it reconciles the apparent inconsistency in the verdicts. Accordingly, the verdicts are not actually inconsistent and the convictions are not unreasonable on the basis of inconsistency" (at paragraph 6).

The Legal Error:

The Supreme Court noted that sections 151, 152 and 271 of the *Criminal Code* "use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force intentionally to another person, directly or indirectly, in circumstances of a sexual nature… as a legal term of art, the element of force has been interpreted to include any form of touching…Put simply, although the words "touch" or "touching" and "force" are distinct, in some circumstances, including those that apply here, they mean the same thing in law" (at paragraphs 51 and 52).

The Supreme Court concluded, at paragraph 60, that the "trial judge needed to instruct the jury on how the three offences related to each other. She should have either clarified the relationship between the elements of touching and force, or simply used the word "touching" to describe all three offences. Alternatively, since the trial judge chose not to provide a copy of the charge, she could have indicated on the decision tree that force and touching were, in effect, interchangeable terms.

Without any of these clarifications, I am satisfied that the trial judge's non-direction amounted to misdirection".

Appeals-Unreasonable Verdict-Expert Evidence:

In ***R v. Waterman***, 2021 SCC 5, January 22, 2021, the accused was convicted by a jury of the offence of sexual assault. At the trial, the complainant testified that after he had provided a statement to the police, he received counselling and recalled further details.

The accused appealed from conviction, arguing that the verdict was unreasonable. The conviction was overturned by a majority of the Newfoundland and Labrador Court of Appeal (2020 NLCA 18). Three separate judgments were filed.

Justice Welsh concluded that expert evidence was necessary (see paragraphs 23 to 25). Justice White concluded that "the evidence of the complainant was not credible, and could not have been accepted by a fact-finder, acting judicially" (see paragraphs 58 to 67). Justice Butler would have dismissed the appeal. She noted that the issue of the necessity of expert evidence "was not argued on the appeal" (at paragraphs 75 and 76) and concluded as follows (at paragraph 95):

> The identified inconsistencies do not go to the core evidence which established the elements of the offences. The jury decided after considering the evidence as a whole, that it believed the complainant's core evidence. It was open to the jury to conclude that, as between the complainant on the one hand and the appellant and his wife on the other, they believed the complainant. It was open to the jury to decide that the complainant provided an adequate explanation for the inconsistencies and that his demeanor did not give cause to question his credibility. Each of these tasks are the domain of the trier of fact. It is up to them "to determine what effect the passage of time might have had and how vulnerable the witness was in light of his or her age and the factual content" (*R. v. R.P.*, at para. 17). In such a case the accused's guilt would be the only reasonable conclusion available on the totality of the evidence (*Villaroman*, at para. 55).

The Crown appealed as of right to the Supreme Court of Canada. In a brief oral judgment, the Supreme Court set aside the Court of Appeal's decision and reinstated the conviction:

> MOLDAVER J. — The only issue on this unreasonable verdict appeal is whether the inconsistencies in the complainant's testimony are so significant that a conviction registered on the basis of his evidence is unreasonable as a matter of law. Although some of the inconsistencies are troubling, a majority of the Court is satisfied that the jury acted reasonably in believing the complainant.
>
> The complainant accepted that his testimony was inconsistent with his prior statements. These inconsistencies were the focus of vigorous cross-examination, forceful closing submissions and a comprehensive jury charge, which the parties agree was free of errors. For his part, the complainant explained that counselling had helped improve his memory since his initial police statement. In the majority's view, it was for the jury to decide whether this explanation neutralized any reasonable doubt caused by the inconsistencies. In these circumstances, the lens of judicial experience causes us to yield to the wisdom of the jurors who had the advantage of hearing the complainant testify. We decline to second guess this determination.
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> With respect, the majority disagrees that the Crown had to either lead further evidence on the complainant's counselling sessions or adduce expert evidence on the role that counselling can play in refining memory.
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> For these reasons, the majority would allow the appeal, set aside the acquittals and restore the convictions.
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> Justices Brown and Rowe, dissenting, would dismiss the appeal, substantially for the reasons of Justice White.

Trials-Jury Selection-Appeals-Curative Proviso-Section 686(1)(b)(iv), of the Criminal Code:

In ***R. v. Esseghaier***, 2021 SCC 9, March 5, 2021, the accused were charged with terrorism offences. They elected to be tried by a judge and jury. Challenge for cause was allowed. During the selection of the jury, a dispute arose as to how the challenge process should proceed.

The Supreme Court of Canada described what occurred in the following manner:

> At the time, the *Criminal Code* provided two procedures for trying challenges for cause — rotating triers and static triers. Mr. Jaser wanted rotating triers. He also wanted the trial judge to exercise his common law discretion to exclude prospective jurors from the courtroom during the challenge for cause process. If his request could not be satisfied, he wanted static triers.
>
> The trial judge refused Mr. Jaser's request, concluding that trial judges no longer had the authority to exclude unsworn jurors where the rotating triers process was being used. In any event, he would not have exercised the discretion even if he had it. To grant Mr. Jaser's request would be to expose the sworn jurors — members of the jury — to the potentially partial comments of prospective jurors and, thereby, risk undermining trial fairness. The trial judge thus imposed static triers in accordance with Mr. Jaser's alternate position. Mr. Esseghaier, who rejected the authority of the Criminal Code in its entirety, made no submissions as to the appropriate procedure for trying the challenges for cause.

The accused were convicted. They appealed. The Ontario Court of Appeal ordered a new trial, holding that the jury selection process was flawed and that the conviction could not be upheld through resort to the *Criminal Code's* procedural curative proviso in section 686(1)(b)(iv). The Crown appealed to the Supreme Court of Canada.

Section 686(1)(b)(iv) states as follows:

> On the hearing of an appeal against a conviction . . . the court of appeal
>
> (b) may dismiss the appeal where
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby.

The appeal was allowed and the convictions restored.

Jury Selection:

The Supreme Court indicated that it agreed "with the Court of Appeal that the jury for both Mr. Esseghaier and Mr. Jaser was improperly constituted. The trial judge erred in both his primary and alternative conclusions with respect to Mr. Jaser's application…With respect to the trial judge's primary finding, it was not disputed before us that the trial judge erred in concluding that the introduction of static triers in 2008 ousted the common law discretion to exclude prospective jurors while using rotating triers. The discretion existed" (at paragraphs 31 and 32).

Section 686(1)(b)(iv):

However, the Supreme Court also held that error could be cured by applying section 686(i)(b)(iv).

That Supreme Court held that the word "jurisdiction" in the section "is directed solely to the trial court's capacity to try the relevant class of offence, as defined by Parliament" (at paragraphs 47 and 48):

> For the purposes of the proviso, "jurisdiction" is concerned only with the trial court's capacity to deal with the "subject-matter of the charge", as it is only a lack of subject-matter jurisdiction ("ratione materiae") that [translation] "deprive[s] the court *ab initio* of all jurisdiction"…To this end, the jurisdictional question under s. 686(1) □(b)(iv) is directed solely to the trial court's capacity to try the relevant class of offence, as defined by Parliament. It is not concerned with the timing of the procedural error, nor with its consequences for the appellant's trial. Such inquiries into the nature and consequence of the error, including whether it was one of application of the rules of the *Criminal C*ode or an error arising from the application of judicially legislated rules, are best left to the prejudice analysis.
>
> In summary, the phrase "jurisdiction over the class of offence" is to be interpreted in accordance with the jurisdictional provisions established by Parliament in the *Criminal Code*. Jurisdiction can therefore be understood as follows:
>
> > (1) Where the appellant was convicted of an indictable offence listed in s. 469, the jurisdictional requirement will be met only where the trial court was the superior court.

> (2) Where the appellant was convicted of an indictable offence not listed in s. 469, the jurisdictional requirement will be met where the trial took place in either the provincial court or superior court.
>
> (3) Where the appellant was convicted of a summary conviction offence, the jurisdictional requirement will be met only where the trial court was the provincial court.
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> Hybrid offences will fall into categories (2) or (3) once the Crown has made a valid decision as to how to proceed.

Prejudice:

The Supreme Court held that there was "clearly no prejudice to Mr. Esseghaier or Mr. Jaser for two reasons: (1) the static triers procedure used, though incorrect, was enacted by Parliament specifically for the purpose of ensuring a fair trial by an independent and impartial jury; and (2) both the trial judge and static triers performed their duties with the requisite care and attention to protect Mr. Esseghaier and Mr. Jaser's rights under the *Canadian Charter of Rights and Freedoms*. It follows that no substantial wrong or miscarriage of justice has occurred" (at paragraph 53).

OFFENCES

Attempting to Obstruct the Course of Justice:

In ***R. v. Morrow***, 2021 SCC 21, May 19, 2021, the accused was convicted of the offence of attempting to obstruct the course of justice. The accused had been charged with the offence of criminal harassment in relation to his former girlfriend. He was released on a recognizance that included a condition prohibiting him from having contact with her.

The evidence at the trial indicated that after being released, the accused went to the complainant's home and "told her how she could contact the Crown's office to get the charges against him dropped. He also grabbed the complainant and forcibly kissed her. The complainant testified that she felt pressured and scared and did not want to kiss the appellant, but went along with it to get him out of the house" (see 2020 ABCA 407, at paragraph 1).

The accused's appeal to the Alberta Court of Appeal was dismissed. In dismissing the appeal, the majority concluded as follows (at paragraphs 16 and 17):

> The gravamen of this offence is the doing of any act for the purpose of, or which has a tendency to, obstruct justice. Dissuading someone from testifying or from pursuing criminal charges can be such an act. The context of the act, the circumstances under which it occurred, and the relationship between the parties, both past and present, all inform a trial judge's assessment of whether obstruction has been made out. Deference is owed to a trial judge, who had the benefit of hearing the testimony, assessing the credibility of that testimony, and understanding how the alleged obstruction occurred, in his assessment of the intention behind the impugned conduct. See *R v Esau*, 2009 SKCA 31 at para 50.
>
> The appellant submits that there was no criminal intent in providing the complainant here with information as to how she could withdraw the charges. However, it was for the trial judge to determine whether the attempt to persuade the complainant to drop the charges and the provision of information as to how she could go about doing that amounted to improper pressure and therefor represented an attempt to pervert justice. The context clearly supports the inference made by the trial judge. The appellant knew that he had just recently been charged with harassing the complainant and that he had signed a recognizance promising not to contact her. Despite this, he went to her home to pressure her to drop the charges. He was persistent and refused to leave the home for over two hours. He sexually assaulted her. The complainant testified she was afraid. The trial judge inferred that the appellant knew his attendance at the complainant's home would have a significant impact on her and concluded that his actions were undertaken with intent to dissuade the complainant from proceeding with the prosecution. The inference that the appellant applied pressure on the complainant for an improper purpose was available on the record. No palpable and overriding error has been demonstrated.

The accused appealed to the Supreme Court of Canada. The appeal was dismissed. In a brief oral judgment, a majority of the Supreme Court stated:

> A majority of the Court is of the view that the appeal should be dismissed, substantially for the reasons of the majority of the Court of Appeal at paras. 16 and 17 of its judgment. As the majority observed, the record clearly supports the inference drawn by the trial judge that Mr. Morrow's conduct represented

> an attempt to dissuade the complainant, by corrupt means, from giving evidence. Mr. Morrow knew he had recently been charged with criminal harassment and that he was bound not to contact the complainant. Despite this, he attended her home uninvited and engaged her in a prolonged and distressing discussion about the process for withdrawing the charges and her reasons for bringing them. The complainant testified that the exchange made her feel "[p]ressured to please" Mr. Morrow and to get him out of the house (A.R., vol. II, at p. 30). Shortly thereafter, Mr. Morrow sexually assaulted her, which served to exacerbate her concerns. On the basis of this evidence, it was open for the trial judge to find that Mr. Morrow's intention was to apply pressure on the complainant and ultimately to manipulate her into dropping the charges against him. The fact that Mr. Morrow may have also been motivated by a desire to rekindle his relationship with the complainant did not undermine the availability of this finding.
>
> There was also evidence that contradicted Mr. Morrow's position that he was simply responding to a request for information. The complainant made no such request to Mr. Morrow and she did not expect, nor was she interested in, the information he provided.
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> In these circumstances, and having regard to the fact that survivors of domestic abuse are particularly vulnerable to acts of intimidation and manipulation, the trial judge's verdict was reasonable. There is no basis for appellate intervention.

Sexual Assault-Capacity to Consent:

In ***R. v. G.F.***, 2021 SCC 20, May 14, 2021, the accused were convicted of the offence of sexual assault. The primary issue at trial was whether the complainant lacked the capacity to consent to the sexual activity that occurred because of intoxication. In convicting the accused, the trial judge concluded that the complainant "did not consent to the sexual activity".

On appeal, the Ontario Court of Appeal ordered a new trial. It concluded that the trial judge erred in failing "to identify the relevant factors to consider when assessing whether intoxication deprived the complainant of her capacity to consent" and in failing "to consider the issue of consent first and separately from the issue of capacity" (at paragraph 17).

The Crown appealed to the Supreme Court of Canada.

The Issues:

The Supreme Court stated that the appeal raised, among others, the following issues:

1. Did the trial judge err in his assessment of consent and capacity?
2. Were the trial judge's reasons sufficient?

The Supreme Court allowed the appeal and reinstated the convictions.

Consent and Capacity:

The Supreme Court indicated that "where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent…Thus, when a trial engages both the issues of whether the complainant was capable of consenting and whether the complainant did agree to the sexual activity in question, the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity" (at paragraph 24).

The Supreme Court also indicated that "capacity must be understood as a precondition to subjective consent as a matter of logic. Subjective consent requires the complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question…If the Crown proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, or did not agree to the sexual activity in question, then the Crown has proven a lack of subjective consent and the *actus reus* is established" (at paragraphs 43 and 47).

The Supreme Court held that "for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things" (at paragraph 57):

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant's partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.

Appellate Review of Trial Reasons:

Interestingly, the Supreme Court took the opportunity provided by this appeal to be very critical of Courts of Appeal for reversing trial judgments based upon assessments of the evidence. The Court indicated that "[d]espite this Court's clear

guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged…In three recent appeals as of right, this Court reinstated sexual assault convictions that were set aside on appeal, endorsing the reasons of a dissenting justice" (at paragraphs 76 and 77).

THE YOUTH CRIMINAL JUSTICE ACT

Bail-Jurisdiction:

In ***R. v. T.J.M.***, 2021 SCC 6, January 29. 2021, the accused, a young offender, was charged with second degree murder, a section 469 *Criminal Code* offence. The Crown provided notice of its intention to seek an adult sentence. The accused elected to be tried in the Superior Court and sought judicial interim release. An issue arose as to what court had jurisdiction to consider the issue of judicial interim release, i.e., the Superior Court or the Provincial Court.

The Supreme Court of Canada held that "a superior court justice has jurisdiction to hear and decide an application for judicial interim release brought by a young person charged with an offence listed in s. 469 of the *Criminal Code*. Further, that jurisdiction is held concurrently with the judges of the designated youth justice court for the province" (at paragraph 3). The Supreme Court explained that "a superior court justice…has jurisdiction to hear and adjudicate an application for judicial interim release of a young person charged with an offence listed in s. 469 of the *Criminal Code* and who has elected to be tried in the superior court, so does a judge of a court that has been designated by the province as a youth justice court. In other words, the jurisdiction is concurrent, and not exclusive to either of them" (at paragraph 25).

CONCLUSION

As we have seen, during the first half of 2021, the Supreme Court of Canada has considered a multitude of criminal issues. Of particular significance, the Court has clarified the issue of how a complainant's intoxication impacts the capacity to consent.