



SUPREME COURT OF CANADA

CITATION: R. v. B.E.M., 2023 SCC
32

APPEAL HEARD: December 8, 2023
JUDGMENT RENDERED: December 8,
2023
DOCKET: 40221

BETWEEN:

B.E.M.
Appellant

and

His Majesty The King
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario
and Criminal Trial Lawyers' Association**
Interveners

CORAM: Karakatsanis, Côté, Martin, Kasirer and Moreau JJ.

UNANIMOUS Kasirer J.
JUDGMENT READ
BY:
(paras. 1 to 9)

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B.E.M.

Appellant

v.

His Majesty The King

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and

**Director of Public Prosecutions,
Attorney General of Ontario and
Criminal Trial Lawyers' Association**

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2023: December 8.

Present: Karakatsanis, Côté, Martin, Kasirer and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Criminal law — Trial — Closing submissions — Crown counsel recounting anecdote about personal childhood memory during closing submissions at accused's trial — Accused appealing convictions for sexual assault and sexual interference and claiming that trial judge failed to instruct jury to ignore improper submissions made by Crown on matters not in evidence — Court of Appeal dismissing appeal — Crown counsel's improper anecdote did not render accused's trial unfair — Convictions upheld.

Cases Cited

Referred to: *Pisani v. The Queen*, [1971] S.C.R. 738; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Stephan*, 2017 ABCA 380, 61 Alta. L.R. (6th) 26, rev'd 2018 SCC 21, [2018] 1 S.C.R. 633; *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401; *R. v. Abdullahi*, 2023 SCC 19.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, Veldhuis and Schutz JJ.A.), 2022 ABCA 207, 45 Alta. L.R. (7th) 1, 414 C.C.C. (3d) 296, [2022] 9 W.W.R. 569, [2022] A.J. No. 712 (QL), 2022 CarswellAlta 1444 (WL), affirming the convictions of the accused for sexual assault and sexual interference. Appeal dismissed.

Peter Sankoff and Elsa Wyllie, for the appellant.

Cheryl Schlecker, for the respondent.

Monique Dion and Alex Bernard, for the intervener the Director of Public Prosecutions.

Dena Bonnet and Vallery Bayly, for the intervener the Attorney General of Ontario.

Alexandra Seaman and Laura Matalas, for the intervener the Criminal Trial Lawyers' Association.

The judgment of the Court was delivered orally by

[1] KASIRER J. — We are all of the view that the appeal should be dismissed.

[2] It is common ground that, in closing submissions to the jury, Crown counsel should not have recounted an anecdote about a personal childhood memory that had no connection to the evidence (see *Pisani v. The Queen*, [1971] S.C.R. 738, at p. 740). Personal anecdotes have no place in closing submissions and are fundamentally at odds with the role of counsel, and particularly the role of Crown counsel (see *Boucher v. The Queen*, [1955] S.C.R. 16). But the majority of the Court of Appeal was correct to conclude that this error did not result in an unfair trial or a miscarriage of justice in this case (2022 ABCA 207, 45 Alta. L.R. (7th) 1).

[3] Both the majority and the dissent relied on the relevant factors set out in *R. v. Stephan*, 2017 ABCA 380, 61 Alta. L.R. (6th) 26, rev'd on other grounds 2018 SCC 21, [2018] 1 S.C.R. 633, but disagreed on their application.

[4] At issue before the jury was both the veracity and accuracy of the complainant's own memory of the events relating to the sexual assaults she allegedly suffered as a child. The defence argued that these events never took place and challenged the complainant's recollections as

uneven. Insofar as this challenged the complainant's version of events as lacking both credibility and reliability, the improper comments of Crown counsel were potentially serious as they touched on a core issue at the trial.

[5] That said, the context of the anecdote considerably limited its prejudicial effect. First, and unlike *Pisani*, the personal anecdote was not about an offence or about conduct comparable to the substance of the allegations at issue. Moreover, the anecdote was not a prominent feature of the Crown's closing address.

[6] Furthermore, while defence counsel did object to other aspects of the Crown's closing submissions that are not relevant to the appeal, no objection was made to the Crown's personal anecdote. The failure of defence counsel to object to the anecdote is not of course dispositive, but it is a factor to be considered in measuring the impact on trial fairness on appeal (see *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401, at para. 107).

[7] The trial judge did caution the jury not to consider what counsel said as evidence. And while the trial judge did not undertake specific remedial steps to alert the jury to the improper comments of the Crown, the judge's observation that jury members should use their "common sense understanding of how memories operate" (A.R., vol. I, at p. 63) is consonant with the idea that, although improper, the Crown's anecdote should be read in that light. Nothing would suggest that the charge did not achieve its purpose "to properly equip the jury in the circumstances of the trial to decide the case according to the law and the evidence" (*R. v. Abdullahi*, 2023 SCC 19, at para. 72).

[8] In sum, we agree with the view that Crown counsel's improper anecdote did not render the appellant's trial unfair.

[9] The appeal is dismissed.

Judgment accordingly.

Solicitors for the appellant: Sankoff Criminal Law, Edmonton; Wyllie Law, Vancouver.

Solicitor for the respondent: Alberta Crown Prosecutor Service, Appeals and Specialized Prosecutions Office, Edmonton.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Edmonton.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General, Crown Law Office — Criminal, Toronto.

Solicitors for the intervener the Criminal Trial Lawyers' Association: Dawson Duckett Garcia & Johnson, Edmonton; Pringle Law, Edmonton.