NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Finck*, 2019 NSCA 60

Date: 20190618
Docket: CAC 474209
Registry: Halifax

Between:

Matthew Finck

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Section 486.4 of the *Criminal Code*

Judge:	The Court (Beveridge, Oland and Farrar, JJ.A.)
Appeal Heard:	June 17 and 18, 2019, in Halifax, Nova Scotia
Subject:	Ineffective Assistance of Counsel – Miscarriage of Justice – Fresh Evidence
Summary:	The appellant appealed his conviction for sexual assault. He argued that the ineffective representation of his trial counsel had led to a miscarriage of justice. At trial, the defence strategy focussed on undermining the credibility and reliability of the complainant's evidence. Trial counsel failed to use certain Facebook Messenger communications that the complainant sent the appellant after the date of the alleged assault. He did not consider them important or relevant. He also believed that whether the complainant denied or acknowledged the texts, he would then have to call the appellant to refute her testimony. In his view, the appellant would not be a good or credible witness and he recommended that he not testify.

In her statement to the police, the complainant claimed she had contracted a sexually transmitted disease from the appellant's sexual assault. The appellant had told his trial counsel he did not have an STD. Trial counsel started to question the complainant in this regard but did not pursue the matter when challenged by the Crown and the judge intervened.

Issues: Whether a miscarriage of justice occurred due to the ineffective representation of trial counsel.

Result: Appeal allowed, conviction quashed, and new trial ordered. The Facebook communications could be interpreted as contradictory to the complainant's evidence that a sexual assault had taken place. Trial counsel's belief that once he raised them, then unless he called a witness, the onus of proof would shift was fundamentally incorrect. The appellant's decision not to testify was not properly informed due to his trial counsel's flawed understanding of the importance of the Facebook messages and his belief that the judge would shift the focus to the credibility and reliability of the appellant. Trial counsel described the STD matter as relevant, yet did not pursue it adequately when challenged. In these circumstances, the appellant met the burden of showing that trial counsel's acts or omissions amounted to incompetence and that incompetence led to a miscarriage of justice.

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Judges:	Beveridge, Oland and Farrar, JJ.A.
Appeal Heard:	June 17 and 18, 2019, in Halifax, Nova Scotia
Written Release:	July 16, 2019
Held:	Appeal allowed, per reasons for judgment of the Court
Counsel:	Roger A. Burrill, for the appellant Timothy S. O'Leary, for the respondent William Mahody, Q.C., for LIANS

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application
(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography
(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation
(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

[1] Provincial Court Judge Patrick H. Curran found Matthew Finck guilty of sexual assault and sentenced him to two years' incarceration. Mr. Finck appealed from conviction. He said he is innocent, it was the ineffective assistance of his trial counsel which led to his conviction and a miscarriage of justice, and a new trial should be ordered. His appeal included a motion to adduce fresh evidence.

[2] The hearing of the appeal was scheduled for a day and a half. The entire first day dealt with the fresh evidence motion. The Crown cross-examined the appellant on his affidavit. The appellant's counsel then questioned Mr. Robert Rideout, who had represented the appellant at trial, on his affidavit evidence and that of the appellant.

[3] At the outset of the second day the Crown rose, addressed the Court, and conceded the appeal. After hearing from appellant's counsel and recessing to consider the matter, this Court stated that the Crown's concession that there had been a miscarriage of justice was appropriate, and that it would issue an order for a new trial with its reasons to follow. These are those reasons.

Background

[4] On June 2, 2017, the opening day of trial, the Crown called three witnesses: the complainant, H.T.; the investigating police officer, Constable Jason Galloway; and the complainant's father.

[5] It was undisputed that in November 2016, the appellant lived in a trailer in Amherst. The complainant testified that in October 2016, she moved into the trailer. She was 16 years old, was taking drugs regularly, had left home, and was not attending school. While she lived at the appellant's place, B.O. and J.R. (two young male friends) stayed there. During her last week, A.S.G. (a female friend) was also at the trailer. According to the complainant, the appellant gave these young people a place to stay and provided them with drugs and alcohol.

[6] The complainant testified that the appellant had expressed an interest in a relationship with her. She described an incident sometime between 11:00 p.m. and 12:00 midnight on November 19, 2016 after she and the appellant went into her room to talk. She had been "probably drinking vodka … probably like half, maybe, yes, three-quarters … of a 30 or a quart, or a 40, if that's what it's called."

She had also consumed "speed" and "weed" prior to the alleged incident, and "[m]ight have had a popper or two in my room …" afterwards.

[7] According to the complainant, the appellant performed oral sex on her and then had sexual intercourse with her, despite her asking him to stop. The entire encounter lasted about 10 minutes. B.O. banged on the bedroom door, and the appellant left her bedroom and acted like nothing happened. B.O. and A.S.G. came into the bedroom. The complainant's evidence was that she "kicked [B.O.] out", started "freaking out", and told A.S.G that "we had to pack all my stuff." A.S.G. helped her pack. The two girls left the trailer the next morning.

[8] The complainant testified that she told A.S.G. what happened after they packed. She did not tell her parents for a month or so. Nor did she seek any medical intervention at, or shortly after, the time of the alleged incident. According to the complainant, after she left the appellant's home, she never went back.

[9] Constable Galloway testified that when he spoke to the complainant sometime in the first two weeks of January 2017 about an unrelated matter, he asked her about her relationship with the appellant. She told him that nothing had happened. On January 30, 2017, when he was investigating the complainant for theft of jewellery, she brought up the appellant's name. She asked the officer if he remembered asking her about him, and confirmed that she had earlier said that nothing had happened. Then the complainant said, "Something did happen" and that she had not consented. Constable Galloway took her statement. The appellant was arrested.

[10] The complainant's father testified that he had first heard about what had allegedly happened between his daughter and the appellant when she told him at the end of December 2016.

[11] After one day of hearing in early June 2017, the trial was postponed for some six weeks to permit the defence time to prepare for an unanticipated Crown witness, namely A.S.G. She failed to attend court when the trial resumed. A witness warrant was issued for her arrest.

[12] A.S.G. was present in court on August 4, 2017. She testified that she was 16 years old, was the complainant's "best friend," and had lived at the appellant's trailer for about a week prior to the alleged sexual assault. According to her evidence, on the evening of November 19, 2016 the complainant had consumed a

"considerable amount" of alcohol. The appellant told her not to go into her friend's bedroom. A.S.G. testified that when the complainant came out of her bedroom, she looked upset and the girls packed up her things and departed the next morning. A.S.G. left a note for the appellant which in part thanked him "so much" and continued "I'm so thankful for everything you've done." She gave different accounts as to when and why she wrote the note.

[13] A brief recess followed the completion of the Crown's evidence. The defence then advised that it would not be calling any evidence.

[14] Counsel made their submissions on August 30, 2017. The defence emphasized that the complainant's evidence regarding the alleged sexual assault was unreliable because she was highly intoxicated at the time, and she had delayed making any complaint until the police were investigating her for theft.

[15] On September 22, 2017, the trial judge convicted the appellant of sexual assault. He found that, despite her level of intoxication, the complainant had accurately related the incident. He described A.S.G. as "argumentative and petulant" and said she had clearly lied about her thank you note. He didn't "have much faith overall" in her evidence other than her comment about the complainant's condition and manner when she came out of her bedroom. The judge rejected the defence argument that the complainant had concocted the allegation after being investigated for theft, finding that she had told A.S.G. and her father of the incident before that investigation. Her immediate reaction after the incident, which A.S.G. corroborated, convinced him that a sexual assault as described by the complainant had taken place and the complainant had not consented.

[16] On November 29, 2017, the judge imposed a sentence of two years' incarceration, a s. 743.21 no contact order, a ten-year firearms prohibition, a DNA order, a twenty-year SOIRA order, and a $200 victim surcharge.

The Issue

[17] The sole issue was whether a miscarriage of justice occurred due to the ineffective representation of trial counsel.

The Fresh Evidence Motion

[18] The appellant's motion to adduce fresh evidence sought to admit certain affidavits, including one by him sworn on March 14, 2019 and one by Mr. Rideout sworn on December 18, 2018. In his affidavit, the appellant focussed on three matters: (a) certain Facebook Messenger communications with the complainant after the date of the alleged sexual assault; (b) the complainant's claim in her police statement that, because of the alleged sexual assault, she had contracted a sexually transmitted disease (STD) from the appellant; and (c) why he did not testify in his own defence at trial. In response, the Crown filed an affidavit by Mr. Rideout sworn May 6, 2019. The appellant and Mr. Rideout were cross-examined on their affidavits.

[19] This Court has a wide discretion to admit fresh evidence on appeal "where it considers it in the interests of justice": *Criminal Code*, s. 683(1). Generally, there are two kinds of fresh evidence in cases alleging ineffective assistance of counsel: evidence relating to an issue adjudicated at trial and evidence relating to the trial process. These two types correlate to the two main categories of miscarriage of justice—unreliable verdict and unfair adjudicative process.

[20] Cromwell, J.A. (as he then was) in *R. v. Wolkins*, 2005 NSCA 2 at ¶59 explained that the principles governing the admission of fresh evidence on appeal differ according to the type of fresh evidence to be adduced. Generally, where the fresh evidence relates to issues decided at trial, the test set out in *Palmer v. R.*, [1980] 1 S.C.R. 759 at pg. 775 must be met. Those well-known criteria are:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases … .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[21] The due diligence criterion is not applied inflexibly and yields where its application might lead to a miscarriage of justice: *Wolkins* at ¶60. In cases where it is claimed that ineffective assistance of counsel resulted in an unreliable verdict, the due diligence criterion will be met where the reason the evidence was not adduced at trial was counsel's incompetence: (*R. v. Ross*, 2012 NSCA 56 at ¶27

citing *R. v. Appeleton* (2001), 55 O.R. (3d) 321 (C.A.) at ¶23; see also *R. v. G.D.B.*, 2000 SCC 22 at ¶36).

[22] In the second type of case, where the fresh evidence proffered relates to the fairness of the trial process itself, *Wolkins* at ¶61 states that the *Palmer* test "cannot be applied and the admissibility of the evidence depends on the nature of the issue raised." The examples it gave included: "Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see *R. v. G.D.B.*, *supra*."

[23] Here, the fresh evidence the appellant seeks to have admitted is of both types. His affidavit evidence shows that there was evidence available that, if introduced or pursued at trial, may have resulted in an acquittal. This goes to an issue decided at trial so is subject to the *Palmer* test. The second, third, and fourth criteria have been met. The due diligence requirement can and should be relaxed to prevent a miscarriage of justice.

[24] The affidavits of the appellant and his trial counsel relate to the trial process and Mr. Rideout's representation of the appellant at trial. Since that material is not directed to an issue resolved at trial but to trial fairness, the *Palmer* due diligence requirement does not apply. Moreover, without evidence to support an allegation that counsel's incompetence compromised trial fairness, an appellate court could not determine the merits of such an argument: see *Ross* at ¶26.

Analysis

[25] It is helpful to start with the principles relating to claims of ineffective assistance of counsel. In *R. v. Domoslai*, 2018 NSCA 45, this Court wrote:

> [35] As this Court recently reiterated in *R. v. Symonds*, 2018 NSCA 34 at ¶ 22, the principles relating to claims of ineffective assistance of counsel are well-established. Saunders, J.A. in *R. v. West*, 2010 NSCA 16 wrote:
>
> > [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard

> of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, *B.(G.D.), supra*; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and *R. v. M.B.*, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in *B.(G.D.), supra*, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.
>
> [36] To be successful in an appeal based on ineffective assistance of counsel, then, an appellant must establish that his counsel was incompetent (the performance component) and that a miscarriage of justice resulted (the prejudice component). Only when both are established will this Court interfere. If the prejudice component is not demonstrated, it is not necessary to go further and examine the performance component.

The Facebook Communications and Decision Not to Testify

[26] In his affidavit evidence, the appellant denied ever having any sexual contact with the complainant. He faulted his trial counsel for, among other things, failing to use certain Facebook Messenger communications to impeach the complainant's credibility and not allowing him to testify. These two matters were intertwined in the defence strategy and so will be considered together.

[27] The appellant had participated in a number of Facebook communications with the complainant after November 19, 2016, the date of the alleged assault, which he thought contradicted her allegation of non-consensual sexual intercourse. Because of their importance in regard to her credibility and his defence, he arranged for an SD card that contained screenshots of the Facebook messages to be delivered to Mr. Rideout. It was undisputed that his trial counsel received the SD card and that the appellant had asked him to use the messages to cross-examine the complainant. Trial counsel acknowledged that he knew the appellant felt that the messages were important information.

[28] The Facebook messages purportedly from the complainant to the appellant read as follows:

(a) on November 26, 2016 at 15:54: "you know we never did anything sexual right? me and you matt." [Emphasis added]

(b) on November 26, 2016 at 21:08: " … it seemed to me you were just looking for sex and you didn't get it so your with another girl to try again … ." [Emphasis added]

(c) on December 3, 2016 at 23:26: "I need somewhere to go. Please. I'm gonna come home. Please."

(d) on December 4, 2016 at 12:42: "Hey, Are you getting green today … If you are would you buy it off me … I really need the money for food and things."

(e) on December 6, 2016 at 08:47: "is [J.] there with my phone. cause im legit gonna let the cops go everywhere i stayed to get it, starting with your place. hide the drugs lol youll do more time for speed than sleeping with minors."

[29] These messages could be interpreted as contradictory to the complainant's evidence that a sexual assault had taken place. They might also show a willingness to return and stay at the home of someone she testified had sexually assaulted her and she never wanted to go back to, to do business with him, and to manipulate the authorities to get her own way.

[30] None of these messages were put to the complainant on cross-examination. The trial judge did not know of them when he assessed her credibility.

[31] In its factum, the Crown acknowledged that, in regard to the Facebook Messenger communications, the appellant had established the first part of the two-step approach in assessing an ineffective assistance of counsel claim, namely, the prejudice component. It stated:

> 26. This was a case that centered on [the complainant's] credibility. In the circumstances of this case, the impeachment value of the Facebook messages could reasonably have affected the verdict. In other words, there is a reasonable probability the verdict would have been different had trial counsel cross-examined [H.T.] about the Facebook messages.
>
> 27. The real question for this appeal is whether the Appellant has established on a balance of probabilities that trial counsel was professionally incompetent.

[32] In order to assess the performance component, it is necessary to carefully examine why trial counsel decided not to put the Facebook messages to the complainant. As Saunders, J.A. explained in *West*, incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. In *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), the Ontario Court of Appeal reiterated that standard and presumption, and explained why an appellate court's review should be deferential:

> [119] … the appellant must demonstrate that counsel's acts or omissions amounted to incompetence. Incompetence is measured against a reasonableness standard. That assessment is made having regard to the circumstances as they existed when the impugned acts or omissions occurred. Hindsight plays no role in the assessment. Allegations of incompetent representation must be closely scrutinized. Many decisions made by counsel at trial will come to be seen as erroneous in the cold light of a conviction. The reasonableness analysis must proceed upon a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance": *R. v. G.D.B.* (2000), 143 C.C.C. (3d) 289 at 298 (S.C.C.). As this court said in *R. v. White* (1997), 114 C.C.C. (3d) 225 at 247:
>
> > An appellate court's review of trial counsel's performance should be deferential. ... deference is called for because of the broad spectrum of professional judgment that might be considered reasonable. In most cases, even among the most skilled counsel, no two lawyers will defend an accused in the same way. Different defence counsel will use different trial strategies and tactics, different approaches to the examination and cross-examination of witnesses, different styles in opening and closing argument, all of them reasonable. The art of advocacy yields few, if any, absolute rules. It is a highly individualized art. What proves effective for one counsel may be ineffective for another. Most cases, therefore, offer defence counsel a wide scope for the exercise of reasonable skill and judgment. Appellate judges, many of them advocates in their own practices, should not be too quick to conclude that a trial lawyer's performance was deficient because they would have conducted the defence differently.

[33] In *R. v. Ball*, 2019 BCCA 32, the British Columbia Court of Appeal underscored the high threshold and gave some examples of when a trial lawyer's performance might be found to be unreasonable:

> [108] The bar for establishing professional incompetence is high and surpassing it is challenging. It is strongly presumed that counsel's conduct fell within the wide range of reasonable professional assistance, deference will be accorded to

> counsel's strategic and tactical decisions and the "wisdom of hindsight" has no place in the analysis. Nevertheless, unreasonable acts or omissions by counsel might include a failure properly to challenge the Crown's case, bring a necessary application or make duly diligent efforts to adduce relevant defence evidence, any of which could amount to assistance so deficient that it was ineffective. Alternatively, unreasonable acts or omissions might include representing the accused while in a compromised state or failing to comply with instructions, both of which could deny real assistance altogether and thus taint the adjudicative process by which the verdict was reached: *Aulakh* at paras. 46-48; *G.D.B.* at paras. 27, 29.

[34] In *R. v. G.K.N.*, 2016 NSCA 29, this Court commented that the failure to cross-examine may lead to a miscarriage of justice:

> [72] Cases which find a miscarriage of justice arising from a failure to cross-examine, often involve the failure to pursue obvious routes of impeaching the witness, usually from prior inconsistent statements: *R. v. M.B.*, 2009 ONCA 524; *R. v. T.P.*, 160 OAC 118; and *R. v. J.B.*, 2011 ONCA 404. …

See also, for example, *R. v. Fraser*, 2011 NSCA 70 at ¶96.

[35] Mr. Rideout's evidence established that he has practiced for 35 years, doing criminal trials. In 2017, he represented the appellant on four separate criminal matters which involved three different complainants. All three alleged the appellant had sexually assaulted them and were 16 years old or younger.

[36] Trial counsel testified that "the overall theme" of the Crown's case against the appellant seemed to be that the appellant, a man in his 30s, was "with these young girls, supplying alcohol and drugs to basically take advantage of them". Again and again when asked about the Facebook messages and whether the appellant should testify, he returned to the disparity in the ages of the appellant and the complainant, and the damage that additional evidence of the appellant having young girls at his place where drugs and alcohol were available would cause.

[37] In his May 6, 2019 affidavit, trial counsel summarized the defence strategy he developed for the appellant's case:

> 13. Mr. Finck denied the allegations made by [H.T.]. Therefore, that was the defence being put forward.
>
> 14. My strategy at trial in the [T.] matter was to undermine the Crown's evidence, by undermining the credibility of the Crown witness and minimizing evidence and accusations against Mr. Finck.

> 15. My strategy was based on the degree of [H.T.'s] intoxication, the circumstances by which [H.T.] brought the allegations against Mr. Finck forward and the fact that there was no credible corroborating evidence.
>
> …
>
> 18. … I did not believe [H.T.'s] testimony could be found reliable or credible and, accordingly, I did not believe that the Crown's evidence met the test of proof beyond a reasonable doubt.

[38] As to the Facebook Messenger messages, Mr. Rideout explained why he decided not to use them to impeach the complainant's credibility:

> 22. During [H.T.'s] direct examination, she used every opportunity to slander Mr. Finck and to introduce evidence that she was embarrassed and scared of him. In cross-examination she continued to disparage Mr. Finck.
>
> 23. I believed that the longer [H.T.] testified the more damaging her testimony would be to Mr. Finck's case. Accordingly, it was my assessment that further cross-examination would not be helpful to Mr. Finck's case.
>
> 24. It was my opinion that if the Facebook Messenger text messages were put before [H.T.] that she would either deny the messages or lie about the messages.
>
> 25. I anticipated that [H.T.] would deny the messages because she made complaints to the police and the Crown proceeded with the charges. Therefore, in order to avoid being charged with mischief, she would have to deny the messages.
>
> 26. Alternatively, I anticipated that [H.T.] would lie about the messages and testify that she only wrote the messages because she was scared of Mr. Finck and believed by saying nothing happened that he would not hurt her. She would testify that she wrote the messages to protect herself.
>
> 27. In order to deal with [H.T.'s] anticipated responses, it was my opinion that I would have to call Mr. Finck or another witness to testify.
>
> 28. It was my opinion that if I did not call Mr. Finck or another witness to refute [H.T.'s] responses to the Facebook Messenger text messages, the Court would see the defence negatively, which would move the focus of the case to the defence evidence and Mr. Finck's credibility and reliability.
>
> 29. It was my assessment that there were was not much to gain from Mr. Finck testifying, but rather, there would be much to lose if he testified, as it was my opinion that Mr. Finck would not present as a good witness and the Court would not believe him. Further, Mr. Finck was facing a charge of bribing witnesses and interfering with the administration of justice in his bail hearing.
>
> 30. I believed that challenging [H.T.'s] responses to the Facebook Messenger text messages posed problems for Mr. Finck's case. I anticipated that the Judge was more likely to believe that [H.T.] responded as she did for her own safety.

> 31. There were no other witnesses I could call to refute the Facebook Messenger text messages because I did not want further evidence of the drugs and alcohol at Mr. Finck's residence or the events that took place at Mr. Finck's residence to be introduced.
>
> 32. It was my belief that my tactical decisions not to introduce the Facebook Messenger text messages and to recommend to Mr. Finck not to testify were later confirmed in the [C.] matter. … Mr. Finck testified. Mr. Finck presented as a terrible witness. The Judge did not believe him, and concluded that the victim's statements were a consequence of her being scared of Mr. Finck. The Judge gave Mr. Finck the maximum sentence possible.
>
> 33. I believe that the outcome of the [C.] matter shows that my strategic recommendations that Mr. Finck not testify and the decision not to introduce the Facebook Messenger text messages was the correct approach.
>
> [Emphasis added]

[39] In summary, trial counsel believed that whether the complainant denied or acknowledged sending the messages, he would have to call the appellant to the stand to refute her evidence. Since he did not think the appellant would be a good witness and did not want further evidence of whatever went on in his trailer, he did not want him to testify or be cross-examined.

[40] Trial counsel did not accept that, even if the complainant denied sending the Facebook messages and said she knew nothing about them, he would be no further ahead or behind and so would not have to call any evidence because his cross-examination had not advanced the matter. He explained: "I felt that if I brought this stuff up and didn't support it by other evidence, that the judge would say, 'Well, you know, you brought this up, but you didn't prove anything'. I thought that he would see it negatively." His view was that if she contradicted the messages, "I had to call somebody, or I just couldn't leave it there and not somehow address that through a defence witness …". He "had to back it up" or it would be detrimental to the case.

[41] According to trial counsel, even if the complainant had acknowledged sending the Facebook messages, that would not have raised questions regarding her apparently inconsistent allegation that the appellant had sexually assaulted her. He maintained that he thought there were already enough problems with her credibility without that information. Mr. Rideout characterized the "you were just looking for sex and you didn't get it" message as "not relevant" and the plea to return "home" to the appellant's trailer as not important to the trier of fact's assessment of the complainant's credibility. According to trial counsel, if despite

her intoxicated state at the time of the alleged sexual assault, the judge believed the complainant then he would likely believe whatever she said about the messages and the appellant, and that would justify the judge in finding the appellant guilty.

[42] In his December 18, 2018 affidavit, Mr. Rideout addressed the matter of the Facebook communications as follows:

> 14. With regards to Mr. Finck's allegations about pictures on e-mails, my view was that H.T. would say they were not hers and I could not call any witness's [*sic*] to refute them because they would be open to cross examination which would help out evidence of drug, alcohol or underage girls. None of which would have helped with the 2 keys [*sic*] issues of age and consent. So to me they had little evidentiary value and their introduction would have open [*sic*] the defense witness to cross-examination which would have shifted the Judge [*sic*] focus from credibility and reliability of the Crown witness to defense witness which would be fatal to his case. I believe the Crown's case did not amount to proof beyond a reasonable doubt.
>
> [Emphasis added]

Before us, he explained that neither age nor consent had been an issue in this case and he had confused it with another involving the appellant.

[43] What is striking is the emphasized portion of that paragraph regarding the shift of the judge's focus from the credibility and reliability of the complainant to that of the appellant. It foreshadowed two paragraphs in his May 6, 2019 affidavit, which are set out again for convenience:

> 27. In order to deal with [H.T.'s] anticipated responses, it was my opinion that I would have to call Mr. Finck or another witness to testify.
>
> 28. It was my opinion that if I did not call Mr. Finck or another witness to refute [H.T.'s] responses to the Facebook Messenger text messages, the Court would see the defence negatively, which would move the focus of the case to the defence evidence and Mr. Finck's credibility and reliability.

As mentioned earlier, trial counsel had testified to his having to "back up" the Facebook communications.

[44] It was clear from his evidence that trial counsel believed that if he raised the Facebook communications, whether the complainant denied or acknowledged them, then unless he called someone to refute them, the onus of proof would shift from the Crown's witness to the credibility and reliability of the accused. This is

fundamentally incorrect. The onus in a criminal proceeding always remains on the Crown to prove its case beyond a reasonable doubt. It never shifts to the accused.

[45] Because of his discounting of the value of the Facebook messages to the trier of fact in assessing the complainant's credibility and his misunderstanding regarding the onus of proof in this case, Mr. Rideout decided early on that he would not cross-examine the complainant on the Facebook Messenger communications. He did not take the SD card or a copy of its contents to court because he did not anticipate using the messages—quite simply, they were not part of his defence strategy.

[46] Under cross-examination, Mr. Rideout agreed that his decision not to call the appellant to the stand "was made at the front end." He couldn't put the messages to the complainant because he would have had to call the appellant, and he really didn't want to do that. Trial counsel thought he could win the case without him testifying, and was determined that he not do so.

[47] According to the appellant, he had wanted to testify and deny the complainant's allegation of sexual assault, but his trial counsel told him it was unnecessary and that he had credibility problems due to the number of outstanding charges against him. The appellant deposed that he took "Mr. Rideout's strong and clear advice about not testifying. I did not feel I could question his judgment or that I could over-rule his decision." His trial counsel had been "pretty adamant" that he not testify. He acknowledged that he did not insist on doing so.

[48] In his May 6, 2019 affidavit, Mr. Rideout explained what he described as his "strong" recommendation that the appellant not testify:

> 35. I discussed the issue of testifying with Mr. Finck. These discussions occurred in the context of me outlining the overall strategy of the defence. I advised Mr. Finck that it was my opinion that he would be in a better position to win his case if the case was based solely on the Crown's evidence. During these discussions I was clear with Mr. Finck that these were my recommendations, but the decision of whether or not to testify was up to him.
>
> 36. I met with Mr. Finck several times throughout the trial. Near the close of the Crown's case, I met with Mr. Finck to discuss my assessment of the Crown's evidence. I advised Mr. Finck that it was my continued recommendation that he not testify; I was clear that the ultimate decision to testify or not was his. Mr. Finck appeared to understand my assessment of the Crown's evidence and he agreed with my recommendation. At no time during this conversation did Mr. Finck demand to testify.

> 37. It was my opinion that the Crown had not proven their case beyond a reasonable doubt.
>
> 38. During the Crown's case I worked hard to keep out and minimize the evidence of Mr. Finck buying and supplying drugs and alcohol for 16 year old girls and evidence regarding the events that took place at Mr. Finck's residence. I was able to undermine those accusations in my cross-examinations of the Crown witnesses. I did not want further evidence of this nature being introduced during cross-examination of Mr. Finck.
>
> 39. I did not believe that Mr. Finck would be a good witness or that he would be believed by the Judge.
>
> 40. I believed that Mr. Finck testifying would undermine his credibility and likely do more harm than good and therefore it would be better for Mr. Finck's case if the Judge focused on [H.T.'s] inconsistencies rather than on any direct evidence from Mr. Finck.

[49] How did trial counsel assess whether the appellant would be a good or credible witness? He never sat down with his client in his office or at the remand facility, and only met the appellant in the courthouse before or after proceedings. Mr. Rideout didn't think the appellant would be a good witness based on his "hunch from assessing various people and witnesses over the years" and his discussions with him. His assessment did not follow his conducting a mock cross-examination of the appellant. He had not done this, and had not considered doing so because "I was afraid of what he would say when he testified …". Among other things, trial counsel was worried that the Crown would try to get in evidence about the number of charges against the appellant, all of which concerned young girls. While he agreed that it would have been his role to object to such inadmissible evidence, it was clear his concern that the Crown would raise this was a factor in his recommendation that the appellant not testify.

[50] To further support his opinion that the appellant would not be a good witness, Mr. Rideout relied heavily on how poorly he said the appellant did on the witness stand in another of the sexual assault proceedings, the [C.] case. However, that case was heard <u>after</u> the appellant's trial so his performance there could not have been a factor in trial counsel's assessment.

[51] In his evidence, trial counsel stated that the appellant's defence was his denial of any sexual contact with the complainant. Asked how, given the circumstances of this case as he saw them and the defence strategy, the appellant was ever going to get any evidence of his denial before the judge, Mr. Rideout responded that, "He wasn't going to be able to … because I didn't feel he should be called as a witness …".

[52] In its factum, the Crown properly pointed out that the decision of whether to testify at trial belongs to the accused. Counsel should advise on the issue, but the ultimate decision is to be made by the client. See for example *R. v. G.D.B.*, 2000 SCC 22 at ¶34; *R. v. W.E.B.*, 2012 ONCA 776 at ¶5 and 6; *Archer* at ¶139.

[53] Had the appellant testified, he might have helped establish the fact and content of the Facebook communications. That evidence could have impacted the trier of fact's assessment of the credibility of the complainant, which was the foundation of the Crown's case. There was a reasonable probability that it could have affected the verdict.

[54] We agree with the appellant that the decision to testify must be properly informed. In this case, the appellant decided not to do so. However, his decision was informed by his trial counsel's flawed understanding of the importance and admissibility of the Facebook Messenger communications and his fundamentally incorrect beliefs that he would have had to call the appellant to avoid an adverse inference and that, had he called the appellant, the judge would shift the focus from the credibility and reliability of the complainant to that of the appellant.

[55] In our view, in regard to the Facebook messages and the decision not to testify, the appellant has demonstrated both the prejudice and the performance components of the two-step approach in assessing ineffective assistance of counsel.

Cross-Examination on Sexually Transmitted Disease

[56] The appellant attached a copy of the complainant's statement to the police to his affidavit. The complainant claimed she had contracted an STD as a result of the appellant's alleged sexual assault. She stated "he was the only one that it could have been" and later repeated, "I'm sure it was him."

[57] It was undisputed that the appellant had told his trial counsel that that was impossible as he did not have an STD. The appellant's evidence was that he was not advised in advance of the trial to obtain medical confirmation of the absence of an STD. After the trial, he was tested and the test results were "negative." A copy of those results was attached to his affidavit.

[58] Trial counsel reiterated he felt that they had enough to undermine the Crown's case. According to Mr. Rideout, he had viewed the topic of the STD as a relevant issue. While his affidavits were silent on this point, he testified that he

had asked the appellant to get medical evidence. He had done so verbally and not made any file notations about this.

[59] Trial counsel had attempted to cross-examine the complainant on this topic at trial. The transcript shows that he started to raise the STD allegations in her police statement with the complainant. The Crown immediately objected as it was "totally irrelevant" and interrupted his attempted protest that it went to credibility and reliability by stating, incorrectly, that the complainant was "not alleging that against Mr. Finck or anyone else." The trial judge then intervened and, in effect, ruled that there would be no cross-examination of the complainant about any STD without adherence to the process pursuant to s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, which requires that before evidence can be adduced of sexual activity, other than the general activity alleged in the charge, counsel must obtain an order to allow the evidence to be elicited.

[60] Trial counsel did not take further issue with the Crown's objection or the suggestion that s. 276 was applicable, or draw the judge's attention to the police statement and explain why his proposed line of questioning was relevant. He felt the judge did not want him "to go into that" and again emphasized that they were dealing with a 16-year-old girl and "it was a road I really didn't want to go down." To him, it would be a credibility issue and he thought her credibility had already been undermined by her intoxication and how and when she had reported the alleged sexual assault.

[61] Cross-examination of the complainant on her claim of contracting an STD from the appellant went directly to the credibility of her accusation of sexual assault. Trial counsel himself described it as a relevant issue. Yet, he did not pursue this issue. His inadequate or non-response when challenged by the Crown and the court resulted in the loss of an important opportunity to impeach the complainant. His conduct did not fall within the wide range of reasonable, professional assistance and resulted in a miscarriage of justice.

Disposition

[62] In the circumstances of this case, the appellant met the burden of showing that trial counsel's acts or omissions amounted to incompetence and that incompetence resulted in a miscarriage of justice. The Crown's concession was appropriate.

[63] We allow the appeal, quash the conviction and order a new trial. We agree with the appellant and the Crown that, in view of certain complexities which arise from our Order, the matter should be returned promptly to the Provincial Court to set down the new trial and to deal with the issue of bail.

Beveridge, J.A.

Oland, J.A.

Farrar, J.A.