



CA48145
Vancouver Registry

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA,
FROM THE JUDGMENT OF THE HONOURABLE JUDGE DENHOFF,
PRONOUNCED ON THE 25th DAY OF FEBRUARY 2022

REX

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

BAN ON PUBLICATION CCC 486.5 (1)

RESPONDENT'S FACTUM

The Appellant:

PATRICK HENRY FOX
c/o North Fraser Pretrial Centre
1451 Kingsway Ave
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IN-PERSON

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. In 2017, the appellant, Patrick Fox, was convicted by a jury of criminally harassing his ex-wife. Underlying the conviction was the appellant's creation of a website in the name of his ex-wife, designed to denigrate, humiliate, and intimidate her. On November 10, 2017, Justice Holmes (as she then was), sentenced the appellant to a period of incarceration followed by three years' probation. As a result of the appellant's subsequent creation and publication of another website with similar content and his failure to remove that website, the appellant was convicted of multiple breaches of probation orders.

2. The appellant (self-represented) now appeals his conviction by Judge Denhoff, on February 25, 2022, for failing to comply with a condition of a probation order that directed him to "take all necessary steps" to remove the website, contrary to s. 733.1 of the *Criminal Code*.

3. The appellant raises several grounds of appeal, including that the judge incorrectly interpreted the probation order, the probation order suffered from vagueness, the judge misapprehended the evidence, the judge made unreasonable findings of fact and credibility, a miscarriage of justice resulted from the non-disclosure of evidence, and the verdict was unreasonable. The appellant also alleges that this prosecution was motivated by improper purposes, amounting to an abuse of process. In support of his abuse of process argument, the appellant seeks to adduce transcripts from his related criminal proceedings as fresh evidence.

4. The respondent's position is that none of these grounds have any merit, and the appeal should be dismissed. The trial judge correctly interpreted the probation order, the probation order was drafted with sufficient clarity and specificity to give the appellant fair notice of his obligations, the record shows that the appellant's ability to make full answer and defence was not impaired by non-disclosure, the appellant has not met the stringent test for a misapprehension of the evidence, the judge's findings of fact and credibility were reasonable, and the verdict was amply supported by the evidence. With respect to

the abuse of process allegation, there is no evidence of improper Crown motives and the appellant's application to adduce fresh evidence should be dismissed.

A. Procedural History

i. Criminal Harassment Conviction

5. On June 28, 2017, a jury convicted the appellant of criminally harassing his ex-wife, as well as possessing firearms at a place other than where he was authorized to possess them (*R. v. Fox*, 2017 BCSC 2361 [*"Fox (Sentencing)"*], ¶1). The criminal harassment conviction arose from the appellant's campaign to, "as he put it, make [D.C.]'s life as miserable as possible, hoping to drive her to suicide ..." (*Fox (Sentencing)*, ¶5). This campaign involved creating a website in his ex-wife's name. The website contained a very large amount of private information about her, as well as other content designed to humiliate, degrade, and intimidate her (*Fox (Sentencing)*, ¶5, 12-18, 35).

6. On November 10, 2017, Justice Holmes (as she then was) sentenced the appellant to three years in prison for the criminal harassment, plus a 10-month consecutive jail term for the firearms offence. After accounting for pre-sentence custody, the prospective sentence was about 20.5 months, allowing Justice Holmes to impose a three-year probation order following the appellant's eventual release from custody (*Fox (Sentencing)*, ¶95). In order to prevent further harassment, the probation order included a condition prohibiting the appellant from disseminating, distributing, publishing, or making publicly available any information about his ex-wife (*Fox (Sentencing)*, ¶108).

ii. Conviction for Breaching Judge Holmes' Probation Order

7. In March 2019, the police became aware of a new website (the "Website") that replicated the content of the appellant's earlier website and added allegations of corruption in relation to the appellant's criminal harassment trial (*R. v. Fox*, 2022 BCCA 404 [*"Fox (Appeal)"*], ¶4). As a result, the appellant was charged with breaching the probation order imposed by Justice Holmes and he was convicted of this offence by Judge Phillips on August 19, 2020 (*Fox (Appeal)*, ¶7-9). On November 25, 2022, this Court dismissed the appellant's appeal from this conviction (*Fox (Appeal)*).

8. Judge Phillips sentenced the appellant to 6 months' incarceration, followed by a 6-month probation order. The probation order included a condition that required the appellant to take the Website down within 48 hours of his release from custody (*Fox (Appeal)*, ¶14).

iii. Conviction for Breaching Judge Phillips' Probation Order

9. The appellant was released from custody on August 20, 2020. As the Website remained online after 48 hours had passed, the appellant was subsequently arrested and charged with breaching the probation order imposed by Judge Phillips. On November 26, 2020, Judge Rideout convicted the appellant of breaching the probation order by failing to take down the Website (*Fox (Appeal)*, ¶16-23). On November 25, 2022, this Court dismissed the appellant's appeal from this conviction (*Fox (Appeal)*).

10. Judge Rideout sentenced the appellant to one year in prison, followed by a one-year probation order (*Fox (Appeal)*, ¶24).

11. Condition 6 of Judge Rideout's probation order stated:

Within 48 hours of your release from custody, you shall take all necessary steps to ensure that any website, social media page, or any other publication which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict by name or description [D.C.], or any of her friends, relatives, employers or co-workers, including the websites published under the domain [...] and [...] are no longer available via the internet or any other means.

(Reasons for Judgment ["RFJ"], AB, p. 12, ¶1)

iv. Charge for Breaching Judge Rideout's Probation Order

12. The appellant was released from custody on the morning of August 12, 2021 (T, 33/1-28). On August 15, 2021, (over 48 hours later), the Website remained active. Accordingly, on August 17, 2021, the appellant was arrested and charged with failing to comply with Condition 6 of Judge Rideout's probation order (T, 34/28-35/13; Information, AB, p. 1).

B. Evidence At Trial

13. The trial took place in Provincial Court before Judge Denhoff on February 23 and 25, 2022. The appellant was self-represented at trial. The Crown called three witnesses: Catherine Meiklejohn; Detective Janine Tanino; and Detective Kyle Dent. The appellant testified on his own behalf.

i. Catherine Meiklejohn

14. Ms. Meiklejohn is a crime data analyst with the Vancouver Police Department. She testified that she checked if the Website was still on line on August 12, 13, 14, and 15, 2021. She found that it was still online on those dates (T, 3/27-4/14). She further testified that the last post was a blog post made on April 12, 2021 (T, 4/46-5/3).

15. On cross-examination, Ms. Meiklejohn confirmed that she checked the Website one time on each day between August 12 and August 15, 2021, and she did not verify that the Website remained publicly available in the time between her checks. She agreed that she did not know if the Website remained online *continuously* during that period of time. She admitted that it was possible that the Website could have been taken offline briefly and then put back on line in the time between her checks (T, 5/19-42; 6/3-10).

ii. Detective Tanino

16. Detective Tanino interviewed the appellant after his arrest on August 17, 2021. The appellant told her that he had transferred ownership and control of the Website to a third party so that he would not have the authority to take the Website down, with the hope that when the probation ended, he would take back control. The appellant also stated that even if control was not given back to him, it would be "easy enough to just create another – another copy of it" (T, 13/29-45; 15/1-36).

17. When Detective Tanino asked the appellant who had access to the Website, the appellant responded "Yeah, that, I'm not going to answer" (T, 19/2-7). The appellant went on to tell Detective Tanino :

Umm, partially because I can 't answer it right now. I don't know and that was done very deliberately before the probation began in 2018 and I've been over all of this before, but before the probation began, I transferred ownership and control to another party, so that way, I couldn 't be compelled to take it down or do anything with it, with the understanding that once I'm no longer on probation, then I would take back the website.

(T, 19/11-21)

18. With respect to efforts to remove the Website, the appellant told Detective Tanino that he sent an email to the Website's editor. He found the email address on the Website. However, he did not receive a response (T, 22/25-23/5). Detective Tanino asked the appellant if he could provide a copy of that email, and the appellant responded that he would be able to forward a copy of the email once he was released from custody "in three years or so" as he did not have access to his email in jail (T, 28/41-29/7). The appellant never provided a copy of that email.

iii. Detective Dent

19. Detective Dent agreed on cross-examination that he had no evidence about whether the Website was taken offline and then quickly put back online in the time between Ms. Meiklejohn's daily checks (T, 36/25-33). He also confirmed that he did not know who owned the Website or who had access or control over it (T, 62/47-63/8). However, Detective Dent explained that during his interview of the appellant in September 2020 (prior to the trial before Judge Rideout), the appellant made a number of statements that he had transferred access of the Website to a third party, that he would regain access and control, and that he was monitoring the IP addresses of people who had logged on to the Website. These statements indicated that the appellant still had access to the Website (T, 63/44-65/2).

20. When asked by the appellant whether the police had made any efforts to obtain a copy of the email he sent to the Website editor, Detective Dent confirmed that they obtained a search warrant for the appellant's laptop and phone. However, the police could not break the encryption on the phone and no emails were found on the laptop (T, 72/30-73/10).

iv. Appellant's Evidence

21. During his testimony at trial, the appellant contradicted his earlier statements to Detective Tanino about transferring ownership and control of the Website. Instead, he claimed that he *never* had ownership or control of the Website. The appellant explained that the original website went offline in 2018 because his hosting plan expired while he was serving his sentence for criminal harassment at Fraser Regional Correctional Centre. His friend in Los Angeles, L.M., was responsible for paying for the hosting plan and she had forgotten to make the payments during that time. At some point thereafter, the Website was put online with the same content as the old website. In November or December 2018, L.M. told the appellant that she had taken care of that. The appellant clarified that L.M. could not have put the Website on line herself because she did not have the required technical expertise; someone else would have had to do it for her at her request. The appellant emphasized that he did not ask L.M. to put the Website online and he told her that he did not want to know any information about it, as his probation conditions prohibited him from having any involvement with the Website and "as long as I don't know, then I can't be compelled to say who it is that's running it" (T, 99/46-102/22).

22. On cross-examination, the appellant confirmed that he was now saying that he had no direct involvement in putting the Website online, and that was evidenced by the fact that he was in custody at Fraser Regional Correctional Centre with no internet access at the time the Website was published (T, 119/39-120/1). He explained that he previously said he transferred ownership or control of the Website "because it's much simpler than giving the full explanation" (T, 124/23-35).

23. The appellant also agreed that he wrote Detective Fontana a letter on June 6, 2019, asking how she and the Crown could explain not pursuing another criminal harassment charge "since, by publishing the new website, I have engaged in exactly the same conduct which Justice Heather Holmes declared formed much of the basis of the guilty verdict in 2017". The appellant agreed that the letter indicated that he published the Website, but suggested that he was lying to the police because he wanted to be prosecuted for criminal harassment (T, 112/38-114/1 0; emphasis added).

24. The appellant further testified that he was released from custody on August 12, 2021, and he sent an email to the email address on the Website on August 13, 2021, requesting that the Website be taken offline (T, 102/37-45). On cross-examination, the appellant confirmed that this was the only step he took to remove the Website, but disagreed that he could have taken further steps (T, 123/25-33; 124/15-22).

25. The appellant also clarified that he did not refuse to give the police the email. Instead, he refused to provide the *passwords* for his phone and laptop. However, the appellant confirmed that, at his request, Detective Dent brought the appellant's laptop to court and it would have been possible to ask for access to the laptop in the courtroom to show the court the purported email. Yet, the appellant did not do that (T, 127/19-128/26). The appellant explained that he was concerned that if he accessed the laptop in the courtroom, it would become evidence and that "could potentially open the entire laptop up to being scrutinized or investigated" (T, 128/43-129/8).

C. Reasons for Conviction

26. On February 25, 2022, Judge Denhoff convicted the appellant of failing to comply with Condition 6 of Judge Rideout's probation order.

27. First, the judge found as a fact that the appellant published the Website and retained control over it. This finding was based on : 1) the appellant's clear admission in the 2019 letter to Detective Fontana that he launched and controlled the Website; and 2) the appellant's statements to both Detective Tanino and Detective Dent that he would take the Website back when his probation ended (RFJ, AB, p. 16-17, ¶¶18-21).

28. Second, the judge rejected the appellant's argument that the Crown failed to prove that the Website was *not* taken down by him within 48 hours of his release and then reposted by someone else.. The judge noted that the appellant retained control over the Website and could have taken back the management of the Website at any time (RFJ, AB, p. 17, para. 22). Further, the probation order placed the appellant under a positive obligation to take all necessary steps within 48 hours of his release to ensure that the

Website was "no longer" available, meaning "not continuing to be available" (RFJ, AB, p. 17-18, ¶¶22, 27-28).

29. Finally, the judge concluded that the appellant did not take "all necessary steps" to ensure that the Website was no longer available. The judge rejected the appellant's evidence that he sent an email to the editor of the Website, as the appellant refused to produce the email to the police when asked and failed to produce the email when his laptop was available in court during the trial. And in any event, there were further steps the appellant could have taken. For example, he could have contacted L.M. to regain control of the Website and ensure it was no longer available. If he was not successful in persuading L.M. to take down the Website, he could have provided her name and contact information to the police and the police could have made a request to L.M. (RFJ, AB, 17-18, ¶¶23-26).

PART II – RESPONDENT'S POSITION ON ISSUES ON APPEAL

30. The appellant raises the following issues on appeal:

- i. The judge erred in interpreting Condition 6 of Judge Rideout's probation order (AF, Error 01);
- ii. The wording of the probation order is vague (AF, Error 14);
- iii. The verdict is unreasonable because there was insufficient evidence that the appellant was capable of complying with Condition 6 (AF, Error 05);
- iv. Non-disclosure of important evidence resulted in a miscarriage of justice (AF, Error 08);
- v. The judge erred in admitting the appellant's 2019 letter to Detective Fontana (AF, Error 09);
- vi. The judge misapprehended the evidence (AF; Errors 02-04, 06);
- vii. The judge erred in finding the appellant had sufficient opportunities to present the email (AF; Error 07);
- viii. The judge erred in assessing the appellant's credibility (AF, Errors 10-12); and
- ix. The prosecution amounted to an abuse of process (AF, Error 13).

31. The respondent's position is that none of these grounds have been established so as to require a new trial, and that this appeal should therefore be dismissed.

PART III – ARGUMENT

A. The Judge Did Not Err in Interpreting Condition 6 of the Probation Order

32. The appellant says that the judge erred in interpreting Condition 6 of the probation order as requiring him to take all necessary steps to ensure the Website was no longer available *for the entire duration of the probation order*. The appellant claims that if the Website was taken down for any duration of time, no matter how brief, then he would have been in compliance with Condition 6. The appellant argues that this point is significant because the witnesses admitted that they could not say whether the Website had been taken down and then reposted in between Ms. Meiklejohn's daily checks from August 12-15, 2021 (AF, ¶¶36-37).

33. However, the appellant's interpretation of Condition 6 is contrary to the plain wording, context, and purpose of that condition.

34. A probation order must be interpreted in its entire context, and in its grammatical and ordinary sense, harmoniously with the purpose of probation orders both generally and in the circumstances of the particular case (*R. v. Allaby*, 2017 SKCA 25, ¶¶21-28; 35-36). In this case, Condition 6 required the appellant to "take all necessary steps to ensure" that the Website was "no longer available via the internet or any other means" (RFJ, AB, p. 12, ¶1; emphasis added). The plain meaning of the phrase "no longer available" clearly indicates that the appellant was required to ensure that the Website was not available *during the entire probation period*.

35. Further, Condition 6 must be interpreted in light of the offences that led to its imposition and the underlying purpose of the successive probation orders. The appellant criminally harassed his ex-wife using a website that contained information that humiliated, degraded, and intimidated her, causing substantial harm (*Fox (Sentencing)*, ¶¶5, 12-18, 35, 44-48). The appellant's ex-wife made various attempts to have the website removed, but was unsuccessful. At one point, the appellant moved the website to a different server

to thwart her efforts (*Fox (Sentencing)*, ¶¶32-34). Justice Holmes imposed a jail sentence low enough to permit a three-year probation order that would protect his ex-wife from continued harm. (*Fox (Sentencing)*, ¶95). The appellant subsequently breached that probation order by creating and publishing a new website (*i.e.*, the Website) that contained the same information (*Fox (Appeal)*, ¶¶7-9). He then breached a subsequent probation order by failing to remove the Website (*Fox (Appeal)*, ¶23). The conviction in this case is the appellant's *third* conviction for breaching a probation order in relation to the Website.

36. In light of the appellant's continued defiance of court orders seeking to protect his ex-wife from the continued harm caused by the Website, the only reasonable interpretation of Condition 6 is that it required the appellant to take all necessary steps to ensure the Website was no longer available during the entire currency of the probation order. indeed, the interpretation of Condition 6 advanced by the appellant would permit him to take the Website offline for as little as one second and then allow the Website to be immediately reposted – an absurd result that would be entirely inconsistent with the purpose of protecting the victim in this case.

37. The appellant's interpretation is also inconsistent with this Court's interpretation of an *identical* condition in Judge Phillips' probation order. On appeal from his conviction for breaching Judge Phillips' probation order by failing to remove the Website, the appellant advanced the same argument he is now making. This Court rejected that argument and interpreted the relevant condition as requiring the appellant to take all necessary steps to ensure that the Website was not available *during his entire period of probation* (*Fox (Appeal)*, ¶28). As the appellant himself recognizes, the same condition imposed on subsequent probation orders should be interpreted consistently (AF, ¶38.5).

38. Alternatively, even if the trial judge erred in rejecting the appellant's interpretation of Condition 6, the error caused no substantial wrong or miscarriage of justice and the *curative proviso* in s. 686(1)(b)(iii) of the *Criminal Code* applies. A conviction was inevitable under the appellant's interpretation of Condition 6 because, given the evidence at trial, it would have been entirely speculative to base a reasonable doubt on the

possibility that the appellant took the Website down for a brief duration in between Ms. Meiklejohn's daily checks from August 12-15, 2021. In light of the following evidence, the only reasonable inference was the Website was never taken down :

- i. Ms. Meiklejohn accessed the Website once each day from August 12-15, 2021, and found that it was active at each of those times;
- ii. the appellant *never* testified that he took the Website down - instead, he testified that the only step he took was to send an email to the Website editor (T, 123/25-33);
- iii. the appellant told Detective Tanino that he never received a response to his email and that, in any event, it was unlikely that the Website would be taken offline (T, 22/40-32/5);
- iv. the appellant previously stated that the Website was not going to come down when he was released from custody, (T, 109/1-110/21).

B. Condition 6 is Not Vague or Ambiguous

39. The appellant argues that the wording of Condition 6 is vague because it required him to "take all necessary steps to ensure" that the Website was no longer available, without articulating the *specific steps* he was required to take (AF, ¶123-125). This argument should be rejected. In the context of this case, there is nothing vague or ambiguous about the requirement to take "all necessary steps" to remove the Website.

40. Probation conditions must be drafted with sufficient clarity and specificity to give an accused fair notice of the conduct required or prohibited by the conditions. A probation condition is considered vague where an accused cannot determine when he is at risk of breaching that condition (*R. v. Traverse*, 2006 MBCA 7, ¶34-36). In the context of a breach of probation, vagueness negates the required intent (David Berg, "Vagueness and Impossibility in Probation Conditions" (1996), 38 Crim. L.Q. 472).

41. In this case. Condition 6 gave the appellant fair notice of the conduct required. It explicitly expressed *what* was required (that he ensure that the Website was no longer

available via the internet or any other means) and *when* he was required fulfill this obligation (within 48 hours of his release from custody). While Condition 6 did not detail precisely *how* the appellant should take the Website offline, the condition must be interpreted in its entire context (*Allaby*, ¶¶21-28, 35-36). That context includes the fact that the appellant created, published, and maintained control over the Website. Indeed, Condition 6 was imposed after Judge Rideout convicted the appellant for breaching Judge Phillips' probation order by failing to take down the Website, and in doing so Judge Rideout concluded beyond a reasonable doubt that the appellant was involved with the Website (*Fox* (Appeal), ¶¶23). In these circumstances, the appellant could reasonably be expected to know what steps were required to ensure that the Website was no longer available.

C. The Verdict was Reasonably Supported by the Evidence

42. The appellant argues that there was *no* evidence that he had any control over the Website at the relevant time, and therefore no evidence that he was capable of taking the Website offline, as required by Condition 6 (AF, ¶¶79-82). This amounts to an argument that the verdict was unreasonable. The respondent submits that this ground of appeal should be rejected on the basis that the verdict was reasonably supported by the evidence.

43. A conviction will only be overturned as unreasonable, in the sense that it is not supported by the evidence, if it is one that no properly instructed trier of fact could reasonably have rendered (*Criminal Code*, s. 686(1)(a)(i); *R. v. Biniaris*, 2000 SCC 15, ¶¶36-42).

44. In the context of a breach of probation, contrary to s. 733.1 of the *Criminal Code*, the Crown must establish beyond a reasonable doubt that the accused: (a) committed the act or omission prohibited by the probation order (the *actus reus* of the offence); and (b) knew of the conditions in the probation order and either knowingly or recklessly failed to act according to those conditions (the *mens rea* of the offence) (*R. v. Blaney*, 2022 BCCA 98, ¶¶43-44; *R. v. Zora*, 2020 SCC 14, ¶¶50-51, 109-120). If it is *impossible* for the accused to comply with the probation order, the *actus reus* and *mens rea* are negated (*R. v. Sugg*,

1986 CarswellINS 247 (NSCA); David Berg, "Vagueness and Impossibility in Probation Conditions" (1996), 38 Crim. L.Q. 472).

45. In this case, contrary to the appellant's assertion, there was evidence that the appellant had control over the Website. A trier of fact could reasonably conclude that the appellant was capable of removing the Website, as required by Condition 6, given the following:

- i. In his letter to Detective Fontana dated June 6, 2019, the appellant admitted that he published the Website (T, 110/38-114/8). The appellant made similar statements during his interview with Detective Tanino (T, 17/5-18/10).
- ii. The appellant told Detective Tanino that before the probation period began, he transferred ownership and control of the Website to another party so that he could not be compelled to take it down, "with the understanding that once I'm no longer on probation, then I would take back the website" (T, 19/2-21). The appellant also told Detective Tanino that "even if control of it wasn't given back to me after the probation is finished, it would be easy enough to just create another – another copy of it" (T, 30-36). Similarly, the appellant admitted to stating, on more than one occasion, that he would take back control of the Website after his probation period ended (T, 125/4-30). These statements by the appellant strongly support the inference that the appellant *retained* some measure of control over the Website and was able to comply with Condition 6 (i.e., he could have resumed management of the Website at any time and then taken it offline).
- iii. The content of the Website also strongly supports the inference that the appellant had control over it. The Website is entirely related to the appellant's harassment of his ex-wife and his criticisms of his legal processes, and the appellant testified that it had been updated over the past year (RFJ, AB, p. 16, ¶18; T, 102/46-103/3) It simply would not make sense for an independent third party to maintain and update the Website, without any involvement of the appellant.

46. Accordingly, there was a reasonable basis in the evidence to find that the appellant had the ability to take the Website offline, as required by Condition 6. The judge reasonably rejected the appellant's suggestion that it was impossible for him to comply with Condition 6. The verdict is not unreasonable.

D. No Impairment of Full Answer and Defence Arising from Non-Disclosure

47. On cross-examination, the appellant agreed that he wrote Detective Fontana a letter on June 6, 2019, essentially admitting that he published the Website (T, 112/38-114/10). The letter was made an exhibit at trial and the judge relied on it to find that the appellant published the Website, contrary to his testimony (T, 114/11-32; RFJ, AB, p. 16-17, ¶¶20-21). On appeal, the appellant raises a disclosure issue in relation to his 2019 letter to Detective Fontana. While the appellant admits that he was aware of the existence of the letter and that it had been used in a previous matter, he argues that it was not included with the disclosure *in this case* (AF, ¶¶92-93).

48. This ground of appeal cannot succeed because the appellant has failed to establish that the non-disclosure of the letter in this particular matter caused him any prejudice. Where non-disclosure is raised on a conviction appeal, the appellant must do more than simply show that the Crown breached its disclosure obligations. The appellant must also show that his right to make full answer and defence was impaired as a result of the non-disclosure. This burden is discharged by demonstrating that there is a reasonable possibility that the non-disclosure affected the outcome at trial or the overall fairness of the trial process (*R. v. Dixon*, 1998 1 S.C.R. 244, ¶¶31-34; *R. v. Yumnu*, 2012 SCC 73, ¶74).

49. Here, the Crown 's failure to provide the appellant's 2019 letter to Detective Fontana as part of the disclosure in this case had *no impact* on the result or the fairness of the trial for the following reasons.

50. First, the appellant was in possession of the letter prior to the trial in this case. Not only was the letter an exhibit in one of his previous trials (T, 111/30-36), but the letter was also included in the Appeal Book for the appellant's appeal from his conviction for

breaching Justice Holmes' probation order (Appeal File No. CA46979, Appeal Book filed on October 25, 2021). In effect, the appellant is seeking a remedy on appeal based on the Crown 's failure to disclose a document that the appellant already had : "[t]hat is not a solid foundation for claiming that non-disclosure by the Crown impaired the verdict and the fairness of the trial" (*R. v. P.B.*, 2019 ONCA 13, ¶¶9).

51. Second, the critical admission contained in the appellant's 2019 letter to Detective Fontana was already before the judge. Detective Tanino testified that the appellant told her that he had been demanding to be prosecuted for criminal harassment based on the current website because an acquittal would bring the justice system into disrepute. Importantly, the appellant said to Detective Tanino: "How could I be convicted of something the first time and do the exact same thing and be acquitted" (T, 17/5-18/10; emphasis added). T his statement is very similar to the statement made in the appellant's 2019 letter and similarly amounts to an admission that he launched and controlled the Website. The appellant also told Detective Tanino that he had *transferred ownership and control* of the Website to another party, clearly suggesting that he initially had ownership and control of the Website (T, 19/2-21). Accordingly, the judge would have concluded that the appellant created and published the Website, even if the Crown had not relied on the 2019 letter.

52. Finally, for the same reason, the non-disclosure of the letter could not, as the appellant contends, have impacted his decision to testify (AF, ¶¶93, 95). The appellant's similar admission to Detective Tanino and his statements that he had transferred ownership and control of the Website to a third party had already been introduced as evidence, and yet the appellant still decided to testify.

E. The Judge Did Not Err in Admitting the 2019 Letter to Det. Fontana

53. The appellant further argues that the judge erred in admitting his 2019 letter to Detective Fontana as an exhibit. The appellant says that the judge did not allow him to state his objection to the admissibility of the letter and that the letter should not have been admitted because it was not relevant (AF, ¶¶96-100). This argument cannot succeed for the following reasons.

54. First, the record does not support the appellant's claim that he was not allowed to state his objection. After the judge stated that the letter would be the next exhibit, the appellant requested a copy of the exhibit. Once the Crown had provided a copy, the judge had the following exchange with the appellant:

THE COURT: So, you have no objection to that being Exhibit 1? Mr. Fox?

A: Oh, yes, yes, I just marked it as –

THE COURT: Okay, thank you.

(T, 114/17-115/6).

55. Accordingly, the transcript makes it clear that the judge gave the appellant an opportunity to object to the admissibility of the letter, and the appellant *confirmed* that he had no objection by responding affirmatively to the statement, "you have no objection".

56. Second, in any event, the appellant's 2019 letter to Detective Fontana was clearly relevant and therefore properly admitted.

57. The general rule is that, barring the application of an exclusionary rule, evidence is admissible if it is relevant to a live issue in the case. The relevance threshold is a low one that will be met where the evidence has some tendency to make the proposition for which it is advanced more likely than it would be in the absence of the evidence (*R. v. Clayton*, 2021 BCCA 24, ¶¶56-58).

58. In this case, the letter was relevant, and therefore admissible, because it contained a statement by the appellant that was inconsistent with his testimony at trial. In the letter, the appellant admitted to Detective Fontana that he published the Website, contradicting his evidence at trial that the Website was launched by his friend. The letter was therefore critical to the assessment of the appellant's credibility. Further, one of the live issues at trial was whether the appellant had control of the Website, such that he was able to comply with Condition 6. The letter was relevant to this issue, as it contained an admission by the appellant that he published the Website.

F. The Judge Did Not Materially Misapprehend the Evidence

59. The appellant points to several areas of the reasons for judgment where he says the judge "misconstrued" the evidence or made "erroneous assumptions and/or inferences" (AF, ¶¶43-78; 85-87). The appellant says that the conviction was based on false or erroneous information, resulting in a miscarriage of justice (AF, ¶¶63, 68, 78). This is essentially an argument that the judge misapprehended the evidence.

60. Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, a miscarriage of justice occurred and a new trial is warranted. However, the standard for demonstrating a misapprehension of evidence is extremely stringent. The appellant must establish "an actual mistake" on a matter of substance, not merely suggest a different interpretation of the evidence or point to other evidence that might weigh against the trial judge's finding. Further, even if this hurdle is overcome, the error must: 1) go to substance rather than detail; 2) be material rather than peripheral; and 3) be essential to the judge's reasoning process (*R. v. Lohrer*, 2004 SCC 80, ¶¶2; *R. v. Osinde*, 2021 BCCA 124, ¶¶17-20). One way to assess whether the misapprehension played an essential role in the reasoning process is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on "unsteady ground" (*Osinde*, ¶¶20).

61. In this case, the appellant has failed to meet this high bar. Many of the alleged errors are not "actual mistakes" about the substance of the evidence, but are instead complaints about minor details (see: AF, ¶¶45, 49-51, 53, 58, 60) or disagreements with the judge's assessment or interpretation of the evidence (see: AF, ¶¶44, 46-48, 52, 54-56, 72-75). That is not sufficient to satisfy the stringent test for misapprehension of evidence.

62. Three of the specific alleged misapprehensions are addressed below.

i. Alleged Misapprehension Regarding the Appellant's Failure to Produce the Email

63. The judge rejected the appellant's evidence that he sent an email to the Website editor, noting that "Mr. Fox refused to produce the email to the police when asked and

also failed to offer to produce the email when his laptop was available in court during the trial" (RFJ, AB, p. 17, ¶23; emphasis added). The appellant argues that this was a mistake, because when the appellant was asked by Detective Tanino to provide the email, the appellant did not refuse but instead indicated that he would forward the email at a later date, after he was released from custody (AF, ¶59; T, 14/22-26; 27/45-30/3).

64. When the reasons are read as a whole, it is clear that the judge did not misapprehend the evidence. Earlier in her reasons, the judge correctly stated that "[a]lthough Mr. Fox said he would provide a copy of that email at a later date, he did not ever do so, even though his laptop was made available in the courtroom during the trial and he could have accessed the email" (RFJ, AB, p. 13, ¶7). It is therefore apparent that the judge understood that the appellant did not refuse to provide the email to the police. It is more likely that the judge was referring to the evidence that the appellant refused to provide his *phone and computer passwords* to the police so that they could obtain the email (T, 127/19-29).

65. In any event, even if the judge was mistaken about the evidence, this error did not play an essential role in the judge's reasoning process in convicting the appellant and therefore does not satisfy the test for a misapprehension of evidence. In the end, the judge's rejection of the appellant's claim that he sent an email to the Website editor made no difference to the verdict, because the judge found that, in any event, further steps were required to comply with Condition 6 (RFJ, AB, p. 18-17, ¶23-26). Indeed, this was a reasonable conclusion. In light of the judge's finding that the appellant had control of the Website, simply sending an email to the email address listed on the Website clearly fell far below the requirement to "take all necessary steps to ensure" that the Website was no longer available.

ii. Alleged Misapprehension Regarding Internet Access

66. During sentencing submissions, the judge asked the Crown and the appellant if it was possible to impose a probation condition requiring the appellant to remove the Website within 48 hours of the sentencing hearing, instead of within 48 hours of his release. When the appellant explained that he did not have access to the internet in

custody, the judge stated that she was not aware of that fact (T, 144/13-43). The appellant now relies on that comment to argue that the verdict was based substantially on the judge's false belief that he had internet access while he was in custody. Specifically, the appellant submits that the judge's erroneous belief on this point led her to reject: 1) his testimony that he was not involved in putting the Website on line; and 2) his testimony that he was unable to forward the email he sent to the Website editor to the Crown or police (AF, ¶¶64-69).

67. This argument cannot succeed because the judge's incorrect understanding about internet access in custody did not play an essential role in her reasoning process in convicting the appellant. The appellant's lack of internet access was not "critical to the case" (AF, ¶¶67).

68. The judge's finding that the appellant published the Website was based on the content of the Website, the appellant's own statements admitting that he published the Website, and the appellant's statements that he transferred control of the Website to another party (RFJ, AB, p. 15-17, ¶¶15-21). The judge did not rely on her assumption that the appellant had internet access while he was in custody.¹

69. Indeed, knowing that the appellant did not have internet access in custody would not have impacted her conclusion that the appellant was involved in the creation and publication of the Website, because: 1) there was no admissible evidence that the Website was published while the appellant was in custody;² and 2) even accepting that the Website was published in 2018 while the appellant was in custody without internet

¹ The reasons for conviction only reveal a single instance in which the judge assumed that the appellant had internet access in prison: in noting the appellant's testimony that the Website had been updated in the last year and a half, the judge inferred that "he must have been accessing it during that time" (RFJ, AB, p. 15, ¶¶14). Not only was this a reasonable inference based on the appellant's evidence, but also this finding did not play a role in the judge's reasoning process in convicting the appellant.

² The only evidence that the Website was put online in 2018, while the appellant was in custody, was the appellant's hearsay evidence that his friend, L.M., told him about the Website in November or December of 2018. The appellant testified that he had "no idea" when the Website was actually put online (T, 100/44-1 01/20).

access, it is possible that the appellant had someone else publish the Website on his behalf – a possibility that the judge implicitly accepted when she found that *even if* she were to believe that the appellant was lying when he said he launched the Website, he "clearly maintained control over the website" (RFJ, AB, p. 17, ¶25).

70. Similarly, the judge's rejection of the appellant's claim that he sent an email to the Website editor was not based on an assumption that he could have forwarded the email to the police and Crown while he was in custody (AF, ¶69; RFJ, AB, p. 17, ¶23). Instead, the primary reason the judge rejected the appellant's evidence on this point was that his laptop was made available in the courtroom during the trial, and yet the appellant did not offer to produce the email (RFJ, AB, p. 13, 17, ¶7, 23). And in any event, as set out above at paragraph 65, the judge's rejection of the appellant's claim that he sent an email to the Website editor made no difference to the verdict, because the judge found that further steps were required to comply with Condition 6 (RFJ, AB, p. 18-17, ¶23-26).

***iii. Alleged Misapprehension Regarding the Appellant's Statements
that He Would Take Back Control of the Website***

71. Finally, the appellant argues that the judge misapprehended his testimony about taking back control of the Website after his probation expires. The judge relied on the appellant's repeated statements about taking back control to infer that the appellant retained control of the Website (RFJ, AB, p. 17, ¶21, 29). The appellant takes issue with that conclusion, pointing out that he testified that he would take back control of the Website "if the current owner will release it to me OR if not then I would start a new website" (AF, ¶85; emphasis in original).

72. This is simply a disagreement with the judge's differing view of the evidence. The appellant made numerous statements that he transferred ownership and control of the Website so that he could not be compelled to take it down, with the intention of taking back the Website once he was no longer on probation. This clearly suggests an attempt to thwart the underlying purpose of the probation order and an effort to keep the Website running. In these circumstances, it was open to the judge to find that the appellant's own

statements pointed to some measure of control over the Website. It is not enough for the appellant to merely suggest a different interpretation of the evidence.

G. The Judge Did Not Err in Finding that the Appellant had Sufficient Opportunities to Produce the Email

73. The appellant takes issue with the judge's factual finding that he could have accessed his laptop during the trial and presented the email he claimed he sent to the Website editor (AF, ¶89; RFJ, AB, p. 13, 17, ¶7, 23).

74. The problem with this argument is that a judge's factual findings and inferences are afforded significant deference by appellate courts, and such findings will not be overturned on appeal unless they are "clearly wrong, unsupported by the evidence or otherwise unreasonable" (*R. v. Clark*, 2005 SCC 2, ¶9; *R. v. M.D.*, 2021 BCCA 339, ¶54-55). Here, the judge's finding that the appellant could have accessed his email during the trial was entirely reasonable given that the appellant asked the Crown to have Detective Dent bring his laptop to court, he was aware that Detective Dent did bring the laptop, and he admitted that it would have been possible for him to access the laptop and show the court the email (T, 127/38-128/26). It was also reasonable for the judge to reject the appellant's explanation that he did not access the email in the courtroom because he did not want the police to have access to his computer content, given that his laptop had already been seized and searched by the police (T, 72/39-73/45).³

75. Further, even if the judge erred in assessing the appellant's evidence regarding the email, the error did not impact the verdict and the *curative proviso* applies. As set out above at paragraphs 65 and 70, the judge found that even if the appellant sent the

³ The appellant claims that the judge's statement that "the police had already searched the laptop" was false, because "the VPD wasn't even aware that the laptop was configured with dual-boot, and that they only searched the Windows partition which I don't use, not the Linux partition which I do use" (AF, ¶47). However, the evidence at trial was simply that the police searched the appellant's laptop. While the appellant suggested to Detective Dent that only part of the laptop was searched, Detective Dent was not able to confirm that (T, 73/6-76/15).

purported email to the Website editor, further steps were required to comply with Condition 6 (RFJ, AB, p. 18-17, ¶¶23-26).

H. The Judge Did Not Err in Assessing the Appellant's Credibility

76. The appellant raises several issues with the judge's rejection of his claim that the Website was put online by someone else (AF, ¶¶101-115). This is essentially an attack on the judge's credibility assessment.

77. Again, the problem with this argument is that findings of fact, including findings regarding a witness's credibility, will not be overturned on appeal unless they are clearly wrong, unsupported by the evidence, or otherwise unreasonable (*Clark*, ¶¶9; *M.D.*, ¶¶54-55).

78. The appellant has failed to overcome this significant hurdle. The judge's reasons reveal no palpable and overriding error in her assessment of the appellant's credibility. It was open to the judge to reject the appellant's evidence that someone else launched the Website, given that the appellant made several statements to the police indicating that he launched the Website and that he transferred ownership and control of the Website to a third party so he could not be compelled to take the Website down (RFJ, AB, p. 13-16, ¶¶6, 9, 18-20). As the judge reasonably found, it simply does not make sense that a third party would, on their own initiative, put in the effort to publish and maintain a Website related to the appellant's legal issues. It is more plausible that the appellant simply changed his story once he realized that it was more incriminating to admit that he took steps to thwart the protective purpose of the probation conditions RFJ, AB, 15-16, ¶¶15-18).

I. No Abuse of Process Arising from Improper Crown Motives

79. The appellant alleges that the Crown used this prosecution as retaliation against him for publishing "proof of the corruption and misconduct" in his case, resulting in an abuse of process (AF, ¶¶116-122). In support of this argument, the appellant seeks to adduce the following additional evidence: 1) the transcript from a court appearance in the proceeding before Judge Rideout, dated February 2, 2021; and 2) three transcripts

relating to his bail hearing in a prosecution for a breach of probation that is alleged to have occurred after the conviction in this case.

80. The respondent's position is that the appellant has not established an abuse of process in this case and the fresh evidence should not be admitted.

81. The decisions that Crown prosecutors must make in the exercise of their prosecutorial discretion – including the decision to lay charges and proceed with a prosecution – are entitled to considerable deference. Prosecutorial discretion is only reviewable by the courts for an abuse of process. Abuse of process refers to Crown conduct that is egregious and seriously compromises the trial fairness and/or the integrity of the justice system (*R. v. Anderson*, 2014 SCC 41, ¶¶46-51). This can include prosecutions that are motivated by improper purposes, but the bar for finding that a prosecutor's conduct was prompted by an improper motive is very high (*R. v. Cawthorne*, 2016 SCC 32, ¶¶25-29). A stay of proceedings for an abuse of process will only be warranted in the "clearest of cases" (*R. v. Babos*, 2014 SCC 16, ¶¶31).

82. In this case, the appellant has not established an abuse of process because there is no evidence to support his speculative contention that the Crown brought this prosecution for an improper purpose. For the same reason, the appellant's application to adduce additional evidence should be dismissed. The transcripts from other proceedings do not provide any basis to conclude that the Crown was motivated by improper purposes, and therefore the additional evidence is not relevant to a potentially decisive issue, nor could it have affected the result at trial (*Barendregt v. Grebliunas*, 2022 SCC 22, ¶¶29-64).

PART IV – NATURE OF ORDER SOUGHT

83. This conviction appeal should be dismissed.

February 22, 2023
Vancouver, B.C.



Mila Shah

PART V – LIST OF AUTHORITIES**Paragraph**

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Secondary Sources

21.	David Berg, "Vagueness and Impossibility in Probation Conditions" (1996), 38 Crim. L.Q. 472.....	40, 44
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