WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (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).
>
> (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.

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(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.

(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.

(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. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: CITATION: R. v. Dowholis, 2016 ONCA 801
DATE: 20161031
DOCKET: C58278

Doherty, Tulloch and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Joshua Dowholis

Appellant

Jill R. Presser and Andrew Menchynski, for the appellant

David Finley and Michael Perlin, for the respondent

Heard: May 26, 2016

On appeal from the conviction entered on September 27, 2013 and the sentence imposed on January 7, 2014 by Justice Faye McWatt of the Superior Court of Justice, sitting with a jury.

Benotto J.A.:

[1] The appellant was convicted of three counts of aggravated sexual assault and two counts of forcible confinement. He challenges the convictions on two

broad grounds. First, the appellant argues that the trial judge should not have allowed the admission of evidence from the appellant's doctor, and also erred in not providing the jury with instructions on similar fact reasoning, discreditable conduct evidence, or a *Vetrovec* warning. Second, the appellant submits that trial fairness or the appearance of fairness was undermined by the conduct the jury foreperson, who participated in radio broadcasts discussing the trial.

[2] For the reasons that follow, I have concluded that the conduct of the juror created a reasonable apprehension of bias such that a new trial should be ordered. It will therefore not be necessary to address the other grounds of appeal or the sentence appeal.

A. FACTS

[3] The appellant, an HIV-positive man with an undetectable viral load, was charged with four counts of aggravated sexual assault and two counts of forcible confinement in relation to four separate complainants, all of whom were men. It was admitted that the appellant met each of the four complainants at a bathhouse in Toronto. They smoked crystal meth together and returned to the appellant's home. The appellant admitted engaging in consensual sexual activity with two of the complainants and contemplating sexual activity with the two other complainants, whom he admitted restraining until they asked to be released.

[4] At trial, the issues included whether sexual activity took place (with respect to two of the complainants) and consent.

(1) The need for juror impartiality was addressed at the outset of the trial and the trial judge instructed the jurors about their conduct throughout the proceedings

[5] The issue of juror impartiality was addressed before the jury was selected. The trial judge told the jury panel: “It is most important that every juror be impartial.” Trial counsel requested and was granted the right to challenge the prospective jurors for cause on the basis of potential bias against homosexuals. Every potential juror was asked the following question:

> As Her Honour will tell you, in deciding whether or not the prosecution has proven the charges against an accused, a juror must judge the evidence without bias, prejudice or partiality. Sometimes people have a bias against a certain group such that they’re unable to fulfill this duty of a juror. The purpose of my question is to determine whether you are able to serve as a juror in this case. Do you have a bias against homosexuals?

[6] The juror at issue in this appeal answered: “I do not”. He then took the oath to well and truly try the case and became Juror #12. The Registrar read the indictment to the jury and, as in all jury trials, said: “[F]or his trial he hath put himself upon his country, which country you are. Your charge therefore is to inquire whether he be guilty or not guilty and hearken to the evidence.”

[7] The trial began on September 10, 2013 with the trial judge's opening instructions to the jury. She told them that they were the judges of the facts. She told them not to discuss the case or give any information about it to anyone, including friends, family, or fellow workers. She said: "If anyone else approaches you to discuss any part of the case, please tell them that you cannot discuss it with them." The trial judge also added this:

> To make you feel confident that what happens in your jury room will always be private and secret and to encourage frank discussion with your fellow jurors, Parliament has made it an offence for any juror to reveal anything about what happens in the jury room even after the trial is over.

[8] The trial judge's charge to the jury at the conclusion of the evidence reiterated that the jurors were judges. She also told them that punishment had no place in their discussions and was not part of their job. They were told to choose a foreperson to guide their discussions and announce the verdict in court. The foreperson was responsible to act as the chairperson of the deliberations, and be "firm in leadership, but fair to everyone." Juror #12 was selected as foreperson.

[9] The jury deliberated for two days on September 26 and 27, 2013. On September 27, 2013, the foreperson announced the guilty verdict on the forcible confinement charges and three of the sexual assault charges. The appellant was acquitted of the fourth sexual assault charge.

(2) Juror #12 appeared twice on a radio show and discussed the case.

[10] Juror #12 was the producer of a radio programme called “The Dean Blundell Show.” The Crown aptly characterized the participants on the programme as “shock jock” – a term usually used to denote a disc jockey on a talk-radio show who expresses opinions in a deliberately offensive or provocative way.

[11] On September 20, 2013, while the trial was underway, the juror appeared on the programme and spoke with hosts Dean Blundell and Billie Holiday. They all made derogatory comments about sexual activity between men. The three laughed and mocked the juror’s oath. The juror returned to the program on September 30, 2013, after the trial had ended and the jury had found the appellant guilty. There was more laughter about the participants in the trial, more derisive comments about the lifestyle of the participants, and discussions about the jury’s deliberations and the sentence likely to be imposed.

(3) After the Programmes

[12] On October 1, 2013, the Crown and officer-in-charge contacted the radio show to advise the juror that they were on their way to speak to him. The Crown

also emailed him. They met with the juror that day and provided him with a copy of s. 649 of the *Criminal Code*, R.S.C. 1985, c. C-46.[1]

[13] The appellant sought an order for the disclosure of all information surrounding the Crown's discovery of the juror's on-air appearances regarding jury duty, and all contact between Crown counsel, police, and the juror. The applicant alleged that Juror #12's actions undermined his *Charter* right to a fair trial, and sought an inquiry by the trial judge to determine the appropriate remedy and to create a record for consideration on appeal. The trial judge determined that she was *functus* and thus had no jurisdiction. She indicated that the matter should be dealt with before this court.

B. ISSUES ON APPEAL

[14] Issues were raised that I do not address: whether the juror was in fact partial and whether the verdict was in fact tainted by his conduct. These issues are irrelevant in light of what I perceive to be the determinative issue in the appeal: the *apprehension* of bias.

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[1] Section 649 reads: "Every member of a jury… who [aside from during an investigation into or as a witness in proceedings on a charge of obstructing justice] discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction."

C. POSITION OF THE PARTIES

[15] The appellant submits that the juror's conduct was homophobic, demonstrated actual bias, and created a reasonable apprehension of bias such that a new trial is necessary.

[16] The respondent submits that there was no bias in fact and points to the many indicia of this: the procedural safeguards, the positive evidence of an unbiased approach, including the fact that the jury returned a not guilty verdict on one of the counts, and the lack of evidence that the jury engaged in impermissible reasoning. The respondent further submits that there could be no apprehension of bias because the reasonable observer would know not to take shock jock radio seriously. In fairness to the Crown, there was no attempt to condone the statements made during the broadcasts. Instead, the submission was that they did not rise to the high level required to establish either bias or apprehension of bias.

D. ANALYSIS

[17] It is presumed that jurors are impartial. The presumption can be rebutted if a reasonable observer would conclude that the juror's conduct made it more likely than not that the juror, whether consciously or unconsciously, would not decide fairly.

(1) The presumption of impartiality

[18] A juror is a judge. There is a strong presumption of judicial impartiality and a heavy burden on a party who seeks to rebut this presumption. Judicial impartiality has been called “the key to our judicial process”: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59. The presumption of impartiality anchors public confidence in the integrity of the administration of justice.

[19] In order to rebut the presumption of impartiality, a stringent test has been developed by the Supreme Court of Canada. It was first articulated by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, and has been repeatedly endorsed:

> [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…. [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[20] In his reasons in *R. v. S. (R. D.)*, [1997] 3 S.C.R. 484, Cory J. explained, at para. 111, that the test set down by de Grandpré J. “contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the

case." The determination is also fact-specific: *Wewaykum*, at para. 77. The analysis contemplates a hypothetical observer who is informed of all the facts. It does not depend upon the views or conclusions of the litigant or the accused.

[21] In order to maintain public confidence in the administration of justice, the appearance of judicial impartiality is as important as the reality: *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (No. 2)* (1999), [2000] 1 A.C. 119 (U.K. H.L.). At issue is the impression that would be given to other people. The appearance of impartiality was emphasized in *Weywakum*, at para. 66:

> [W]here disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. [Emphasis in original.]

[22] The Canadian system starts on the presumption that jurors are capable of setting aside their views and prejudices and acting impartially. There are safeguards in place to address potential sources of juror partiality. In *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 107, this was explained as follows:

> [T]he safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and

> counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest – all collaborate to keep the jury on the path to an impartial verdict despite offence-based prejudice.

[23] Although these safeguards were in place here, it is my view that a reasonable person would conclude that they failed.

(2) The presumption is rebutted

[24] The high threshold to rebut the presumption of impartiality is met here as a result of three related factors: the remarks made about the participants in the trial; the remarks made about the trial process; and the failure of the trial safeguards. A reasonable person, who was made aware of these interrelated issues and had thought the matter through, would perceive that the juror, whether consciously or unconsciously, would not decide fairly. In other words, a reasonable apprehension of bias existed that disqualified the decision-maker.

(a) Remarks about the participants

[25] The juror participated in public discussions that ridiculed the appellant and the complainants. He expressed disgust at their behaviour and lifestyles, particularly their sexual practices, drug use, and promiscuity. During the trial he described the courtroom as having “whores all over the place.” He summarized the content of the proceedings with disgust, saying “there’s a certain segment of

our population that will do similar things to that but instead of going to bed, they say, you know, I should go to a gay bathhouse and have sex with 600 other people." The response from the co-hosts of the radio show was that this was "gross." The juror continued to mock the participants in the trial as gross, and laughed as the co-host repeatedly referred to the appellant as a "dirt ball" and "dirt bag".

[26] The juror impersonated the appellant on a pretend phone call with his mother to tell her about being sentenced to a lengthy prison term. He mockingly said: "I finally got a steady job, yay. I'm going straight to the showers." The juror agreed with one of the hosts when she said a prison sentence would be "like a cruise" for the appellant. He then agreed with the other host when he congratulated the juror for having "damned a man to five of the greatest years of his life." In fact, the juror responded by saying: "I've done my job, my civic duty."

[27] The juror referred to the complainants as "not the smartest people in the world." He made multiple joking references to "pink discharge", which referred to the evidence of one of the complainants.

[28] The Crown suggests that it is relevant that the juror did not initiate the conversations. The recordings, however, demonstrate his willing participation. There is much laughter and clapping. He was part of the show and part of the

jokes. He hinted at the content of the trial and spurred on the hosts even before the trial was over.

[29] The tone and content of the conversations reveal prejudicial attitudes towards the lifestyles of some gay men. The issue of prejudice against gay men was a concern from the outset of trial. That is why trial counsel requested the challenge for cause. The Crown admits as much, noting in its factum that the comments "can reasonably be construed as expressing negative and stereotypical views regarding homosexual men."

(b) Remarks about the trial process

[30] The juror participated in jokes about the juror's oath, and laughed when one of the hosts said the juror's fingers were crossed while taking it. He made jokes about a "hung jury" and smelling the evidence.

[31] The juror referred to the offences at issue as "good old aggravated sexual assault", then said it was "all men, all the time". This was greeted with laughter and applause and a host responded that "[they] got so lucky with this one."

[32] During the trial, the juror twice raised the question with "Psychic Nikki", a guest on the radio show, of whether the verdict would be "innocent or guilty." He asked her, "can you give me a prediction on how this might go?"

(c) Failure of trial safeguards

[33] The Crown submitted that the attitudes demonstrated by the juror do not rise to the level of apprehension of bias, in part because of the numerous safeguards put in place to ensure impartiality. Here, the juror's own words show that many of the safeguards were not effective; the challenge for cause process, the oath, and the trial judge's explicit instructions were ignored.

[34] In response to the challenge for cause, the juror said he had no bias toward homosexuals. The challenge process highlighted the fact that homophobia was a concern for the court. The juror would have been aware of this. Yet, he participated in public jokes that targeted gay men.

[35] The juror was advised that he could not talk about deliberations. Yet he revealed that the jury had to determine issues regarding the appellant's HIV disclosure and whether the witnesses were credible "because they were boneheads". He also commented specifically on deliberations, saying: "we kind of determined that though these people are not the smartest individuals in the world…they probably couldn't hold up a fake story because the whole court proceeding took two years to get to this point. So if they … had made it up they would have cracked at some point with all the questioning they had to do and testimonials and stuff like that."

[36] The Crown submitted that another safeguard that preserves the integrity of the verdict despite concerns about a single juror is that the juror is but one of twelve who had to reach a unanimous decision. This may be true, but confidence that this safeguard was effective is diminished because of the fact that this juror was the foreperson of the jury. He was charged with directing the discussions of the other jurors and acting as the spokesperson for the jury.

[37] The Crown also submitted that the solemnity of the trial acts as a safeguard, as stated in *Find*. Again, this seems to have been lost on the juror. He created the impression that – far from taking his role seriously – the trial was a source of material for his and the public's obscene entertainment.

(d) Combined Effect of these Factors

[38] Juror #12, the foreperson, ignored the trial judge's instructions not to discuss the case or the jury's deliberations; he publicly demeaned and ridiculed the appellant and the complainants; he condemned their lifestyle and sexual practices – the events at the core of the appellant's trial; he mocked the juror's oath; and, in all, he demonstrated a lack of respect for the participants and justice system.

[39] The Crown submitted that a reasonable person would know that the juror was playing a role – that he was just joking. This submission presumes that jokes of this type are innocuous. They are not. They have a destructive side. They

target marginalized groups often based on race, gender, gender identity, or sexual orientation. They promote – and risk normalizing – negative stereotyping. They are demeaning, malicious, hostile, and encourage prejudice.

[40] A listener may very well diminish the significance of banter aired on a shock jock programme. However, the hypothetical reasonable person here would not be just assessing the comments of a shock jock. The reasonable person would be assessing the comments of a juror – a juror repeatedly instructed about impartiality, the seriousness of his role in connection with serious sexual assault offences that carry severe penalties. The appellant was a gay man and the juror's comments related to the behaviour and sexual practices that were directly before him in his role as a judge.

[41] I recognize that a reasonable observer would not be merely identifying bias, but rather a bias that would likely affect the juror's ability to decide fairly. In this regard, the type of bias is relevant. Some types of bias may be easier to set aside than others. Pre-trial publicity about a case may be easier for a juror to ignore than – for example – an ingrained attitude about certain classes of persons.

[42] This was recognized by Doherty J.A. when he discussed racial bias in the context of a challenge for cause in *R. v. Parks*, 15 O.R. (3d) 324 (C.A.), at para. 59:

> In deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized. For some people, anti-black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them. In my opinion, attitudes which are engrained in an individual's subconscious, and reflected in both individual and institutional conduct within the community, will prove more resistant to judicial cleansing than will opinions based on yesterday's news and referable to a specific person or event.

[43] This reference to racial bias applies equally to bias against homosexuals. Like the racial bias described by Doherty J.A., bias against homosexuals may be "learned over a lifetime", "engrained in an individual's subconscious" and "reflected in both individual and institutional conduct within the community." It may influence the reasoning of a decision-maker in ways that are difficult to identify, like the preconceptions described in *Find*, at para. 95. These factors would impact the observer's concern about the integrity of the trial.

[44] The likelihood that a bias against gay men would affect the juror's decision-making process is greater given his willingness to publicly disregard instructions, engage in homophobic rhetoric, and mock the court process. The issue is not whether the juror meant what he said. Nor is it whether he was in fact unfair. The issue is the impression that his conduct created.

[45] The impression created by the juror's conduct goes beyond a bias against gay men. A reasonable observer would have the impression that the juror lacked respect for the justice system. This goes directly to the perception of fairness.

[46] My colleague states that it is not this court's function to "speculate" about the effects of offensive comments on targeted groups. I take a different view. It is not necessary to speculate. Such comments have no place in a fair and impartial justice system. The reasonable observer would expect that a person who comes before the courts would be treated with dignity and respect and not be publicly ridiculed by the person judging him.

[47] My colleague also states that a reasonable observer would not apprehend bias because this type of "humour" has become mainstream. Again, I take a different view. The reasonable observer would hold those who represent the justice system to a high standard and expect them to show respect for the system and the persons involved in it. In an era of declining civility in public discourse, it is more important than ever that the courts maintain the dignity and impartiality that grounds public confidence in our justice system.

[48] I agree with my colleague that the fresh evidence is not relevant.

[49] I conclude that a reasonable person, knowing all the facts, would apprehend that consciously or unconsciously it was more likely than not that this juror would not decide fairly.

E. DISPOSITION

[50] I would allow the appeal, set aside the convictions, and order a new trial.

"M.L. Benotto J.A."

"I agree M. Tulloch J.A."

Doherty J.A. (Concurring):

I

OVERVIEW

[51] I have read my colleague's reasons. I agree that the appeal should be allowed and a new trial ordered. However, I arrive at that conclusion by a different route. I do not agree that the conduct of Juror #12 requires that the convictions be quashed. I would hold, however, that the trial judge's instructions to the jury failed to adequately caution the jury against the use of evidence and factual findings relevant to the counts involving one complainant in its consideration of the counts involving the other three complainants. In the circumstances of this case, that error is fatal to all of the convictions.

[52] My colleague has briefly set out the evidence. It is unnecessary for me to add much detail.

[53] There were four complainants. The evidence of three of the complainants, D.M., J.B. and M.L., essentially described a single ongoing narrative. That narrative began with D.M.'s encountering the appellant at the spa during the evening of September 24, 2011. J.B., who knew D.M., joined D.M. and the appellant at about 3:00 a.m. on September 24th. According to D.M., the appellant had sexually assaulted him before they encountered J.B.

[54] D.M., J.B. and the appellant went back to the spa in the early morning hours of September 24th. D.M. left their company shortly afterwards. M.L., the third complainant, joined J.B. and the appellant at the spa.

[55] J.B., M.L. and the appellant went back to the appellant's home. According to J.B., the appellant's mood changed suddenly and he attacked and restrained J.B. on the bed. The appellant and another man named "Jack" proceeded to sexually assault J.B. Eventually, J.B. managed to get free and the appellant told him to leave the house.

[56] M.L. testified that he witnessed the assault by the appellant on J.B. and that he was assaulted in much the same way at the same time. His evidence, however, differed in some respects from J.B., particularly as it related to the involvement of "Jack". M.L.'s evidence was very unclear as to exactly what, if anything, "Jack" had to do with the events.

[57] Although on M.L.'s evidence, J.B. was present when M.L. was assaulted, J.B. testified that he had not seen the appellant sexually assault M.L.

[58] The fourth complainant, G.N., described an assault that occurred in early October 2011. G.N. testified that he met the appellant at the spa. He was attacked and sexually assaulted by the appellant at the appellant's home while G.N. was heavily under the influence of crystal meth. When first questioned about the events by the police, G.N. described the assault as "a dream". He gave

similar evidence at the preliminary inquiry but testified at the trial that the events had in fact occurred.

[59] The appellant did not testify. He did, however, give a statement to the police which was tendered by the Crown as part of its case. In his statement, the appellant indicated that he and D.M. had consensual sex and did not use a condom because both were HIV “positive possibly”. He testified that he playfully briefly tied up J.B. and M.L. with their consent, but untied them when they asked to be released. He did not have sex with either man. In his statement, the appellant indicated that he met G.N. at the spa and had consensual protected and unprotected sex with him at the bathhouse. G.N. stayed with the appellant at his house for a day or so afterwards.

[60] The credibility of all four complainants was very much in issue at trial. All were under the influence of alcohol and drugs during the relevant events. All gave a variety of inconsistent statements. J.B., who was recalled to the stand during the trial, admitted that he had committed perjury when he first testified and denied speaking with M.L. for several months before the trial. As it developed, M.L. and J.B. had stayed together in the same hotel room during the trial. J.B. also testified and denied any contact with D.M. during the trial. He was later confronted with evidence that J.B. had texted him during the trial.

[61] M.L. testified about staying with J.B. in the hotel during the trial. According to him, J.B. told M.L. that he had lied on the stand about his contact with M.L. and told M.L. that he should tell the same lie. M.L. replied that he would tell the truth. M.L. became very upset with J.B. and consumed a great deal of alcohol and ecstasy. When M.L. testified, he acknowledged his contact with J.B. during the trial. This led to the recall of J.B. and his admission that he had perjured himself during his testimony.

II

THE GROUNDS OF APPEAL

[62] There are several grounds of appeal. I will address the ground of appeal based on the alleged misconduct of Juror #12 and the ground of appeal based on the alleged inadequacy in the trial judge's instructions as they relate to the cross-count use of evidence and findings of fact. As I am satisfied that the appeal must succeed on the second of these grounds, and that the other grounds of appeal do not demonstrate reversible error, I will not consider those grounds of appeal.

F. JUROR #12'S ALLEGED MISCONDUCT

[63] My colleague has described the conduct of Juror #12 which is said to give rise to a reasonable apprehension of bias, necessitating the quashing of the verdicts. While I agree with my colleague's formulation of the relevant legal

principles to be applied in addressing this ground of appeal, I disagree with her application of the principles to the relevant facts.

(i) The fresh evidence proffered by the appellant

[64] Before explaining why I disagree with my colleague, I will address the appellant's fresh evidence application. The evidence offered by the appellant consists of various articles attached as exhibits to an affidavit of a lawyer who is an associate of counsel for the appellant. The articles summarize the content of the relevant radio programmes, offer opinions about some of those comments, report on events subsequent to the broadcast, including the cancellation of the programme, and offer opinions as to the impact of Juror #12's conduct on the fairness of the appellant's trial and, more generally, on the due administration of criminal justice.

[65] In my view, the proffered evidence, with one exception, is neither helpful nor admissible. This court has a disc of the broadcasts and transcripts of the broadcasts. Newspaper accounts of the excerpts from those broadcasts are obviously not as accurate as the discs and the transcripts. The reports about the "fallout" from the broadcasts, while interesting, are irrelevant to the apprehension of bias argument. Finally, opinions of individuals as to the impact of the comments of Juror #12 on the fairness of the proceedings or the appearance of justice, are irrelevant to the court's determination of the bias claim. Counsel's

submission that this court can take the opinions of two or three people who happen to express those opinions publicly as “circumstantial evidence” of how a reasonable person, fully informed of the facts, would react to the radio broadcasts, has no merit.

[66] I would, however, admit the evidence offered on appeal for one limited purpose. In considering whether Juror #12’s comments justify setting aside the verdicts, the context in which those remarks were made is very important. The evidence offered on appeal describes the nature of the programme on which the comments were made. The nature of the programme is a significant part of the context in which Juror #12’s comments must be placed. I would admit the fresh evidence for the very limited purpose of assisting in placing the comments of Juror #12 in their proper context. I would add that there does not appear to be any real dispute between the parties about the nature of the programme.

[67] Juror #12 made the comments during a programme called the Dean Blundell Show. The programme aired on weekday mornings on a Toronto radio station and was hosted, not surprisingly, by a person named Dean Blundell. Juror #12 was a producer on the show, and from time-to-time an on-air participant.

[68] The format of the show consisted of mostly music and light banter among Mr. Blundell and others, including Juror #12, about a variety of topics. The conversations were intended, at least in part, as comedic entertainment. Mr.

Blundell and his cohorts made fun of virtually everything and everybody. Their conversations are replete with remarks that can be characterized as politically incorrect, sexually suggestive, vulgar and deliberately offensive. The Dean Blundell Show clearly sought to attract an audience by pushing the limits of what one would normally hear on commercial radio.

[69] It is, of course, not this court's role to comment on the quality of the entertainment offered by the Dean Blundell Show. Nor, do I think it is part of this court's function to speculate about the effect of the kinds of comments made by Mr. Blundell and others on the programme. My colleague declares that some of the offensive statements and comments have a negative impact on those targeted or ridiculed by them. She may be correct. There is no evidence before the court on that issue. Nor should there be as, in my view, it is irrelevant whether the comments had a negative impact on anybody. This court's only chore, and it is a difficult one, is to decide whether the comments of Juror #12 create a reasonable apprehension that Juror #12 did not decide the case in accordance with his oath, thereby rendering the verdicts a miscarriage of justice. There are other forums in which other concerns raised by some of the content of the programmes can be addressed.[2]

(ii) The appellant's arguments

[2] Mr. Blundell was apparently fired, at least in part, because of this incident.

[70] Juror #12 made comments during the Dean Blundell radio programme that aired on September 20, 2013 and September 30, 2013. The September 20th comments were made while the trial was ongoing. The September 30th comments were made very shortly after the jury had delivered its verdicts.

[71] Counsel for the appellant makes three submissions based on Juror #12's comments. First, she submits that the comments were homophobic and display a bias against homosexuals such as the appellant. She submits that the comments, combined with the nature of the allegations against the appellant and the evidence heard by the jury, would cause a reasonable apprehension that Juror #12's verdicts were influenced by his homophobic beliefs.

[72] Second, counsel submits that even if Juror #12's comments do not create a reasonable apprehension of bias against homosexuals, those comments, considered in the context of the entirety of the two programmes, demonstrate that Juror #12 had a total disregard for the instructions of the trial judge, a disdain for the criminal jury process, and a contempt for both the complainants and the appellant. Counsel submits that a reasonable observer, apprised of Juror #12's mindset as revealed in his various comments, would conclude that Juror #12 did not take his responsibilities as a juror seriously and would further conclude that Juror #12 felt no obligation to return a true verdict according to the evidence. Counsel submits that Juror #12's conduct compromised the fairness of the trial and resulted in a miscarriage of justice.

[73] Third, counsel submits that Juror #12's comments after the verdicts were returned reveals that he, and perhaps other jurors, engaged in impermissible propensity and cross-count reasoning to arrive at verdicts. In support of this submission, counsel refers to specific comments made by Juror #12 during the September 30th broadcast.

[74] The third argument can be disposed of quickly. Assuming the comments of Juror #12 during the September 30th broadcast can be taken as evidence of how the jury actually deliberated and arrived at its verdicts as opposed to merely statements by Juror #12 about that process, Juror #12's comments cannot be used to challenge the validity of the verdicts. That use would be in direct contravention of the common law rule of jury secrecy as articulated in *R. v. Pan*, [2001] 2 S.C.R. 344, at paras. 77, 82, 123-26.

[75] I see no reason to narrow the scope of the common law rule because Juror #12 provided his description of the deliberations in a public forum as opposed to privately to counsel or some other person. I must also disagree with counsel's submission that because Juror #12 made the statements in a public forum there would be no need to further question Juror #12 or the other jurors if the evidence was admissible as evidence of what occurred during the jury deliberations. If, as counsel argues, the manner in which the jury arrived at its verdicts could be impugned by the comments of Juror #12, those comments would demand further inquiry under oath of Juror #12 and the other jurors concerning the nature of their

deliberations. Those inquiries are the exact mischief the common law rule of jury secrecy aims to avoid.

[76] Juror #12's comments on the September 30th programme were not admissible as evidence of the manner in which the jury arrived at its verdicts and cannot be used for that purpose to impugn the verdicts.

[77] Counsel's first two arguments are more substantial. The first is a straightforward reasonable apprehension of bias claim based on Juror #12's allegedly homophobic comments. Counsel submits that the comments demonstrate a bias against homosexuals and, that in the entirety of the circumstances, the reasonable observer would conclude that Juror #12's bias against homosexuals likely played a role in Juror #12's assessment of the appellant's guilt.

[78] The second argument is a little more difficult to articulate. I understand the submission to be that Juror #12's conduct, considered as a whole, including his willingness to disregard the trial judge's instructions about not speaking about the case, his repeated participation with Mr. Blundell and others in mocking the trial process and his demeaning and ridiculing remarks about those involved in the trial, would lead an informed person, viewing the matter realistically, to conclude that it was likely that Juror #12 did not feel bound to decide the case according to his oath and the trial judge's instructions. This argument does not disregard the

alleged homophobic nature of some of the comments made by Juror #12, but rather offers those comments to support the contention that Juror #12 did not take the matter seriously at all, but instead viewed his participation in the jury as an opportunity to provide fodder for the irreverent, and offensive, humour featured on the Dean Blundell Show.

(iii) Was there a reasonable apprehension of bias based on Juror #12's allegedly homophobic comments?

[79] Juror #12 made comments during the September 20th and 30th broadcasts, and laughed at comments made by Mr. Blundell and others, that could reasonably be regarded as homophobic. He also made negative comments about the appellant's lifestyle as revealed in the evidence. The appellant's sexual preference is naturally reflected in his lifestyle.

[80] To succeed on this argument, the appellant must demonstrate both bias and partiality: see *R. v. Find*, [2001] 1 S.C.R. 863, at paras. 40-41; *R. v. Parks*, [1993] O.J. No. 2157, at para. 35. He must satisfy the court that the reasonable observer, fully apprised of the circumstances and context in which the comments were made, would conclude that it was probable that:

- Juror #12 had preconceived negative attitudes towards homosexuals [bias];

AND

- Juror #12's negative attitudes towards homosexuals caused him to discriminate against the appellant in his deliberations [partiality].

[81] The distinction between bias and partiality is crucial. Jurors come from the community and reflect the views and values of the community. Inevitably, jurors will have biases for or against certain persons or certain groups. The jury system is predicated on the presumption that those biases can be overcome by the various protections built in to the jury trial process so that jurors, despite their biases, will decide the case on the evidence and the law as given to them by the judge.

[82] Several features of the jury trial process promote and support the presumption of impartiality. The presumption takes on particular force when, as in this case, jurors were subjected to a challenge for cause that targets the specific bias in issue. The challenge for cause process followed in this case eliminated prospective jurors whom the triers found to be biased against homosexuals. Equally important, the challenge for cause process alerts all prospective jurors, including those ultimately selected, to the risk that their own subconscious biases against homosexuals could affect their thinking about the case. An honest juror, having been through the challenge for cause process, would be aware of, and alert to, the danger that a subconscious bias against homosexuals could seep into his or her deliberations.

[83] I think the appellant's argument based on Juror #12's alleged bias against homosexuals fails at the first stage of the inquiry. I do not accept that a reasonable person, having regard to the context in which Juror #12's comments were made, would conclude that those comments demonstrate a bias against homosexuals. I will begin with the homophobic comments.

[84] Things people say are usually a very good indication of what they believe. Not all comments, however, provide a window into the beliefs of the speaker. Sometimes a joke, even a joke that is offensive, is nothing more than a joke. Jokes based on stereotypical notions of identifiable groups are a longstanding and common feature of popular mainstream culture. One need only turn on the television or radio to hear comedians making fun of virtually any identifiable group within the community, including men and women, the young and the old, homosexuals and heterosexuals, black and white. I pass no judgment on this kind of humour. Its prevalence in our culture, however, would lead the reasonable observer to readily understand that there is not necessarily any correlation between a disparaging remark made in the context of comedic entertainment and the actual beliefs of the person who makes the comment.

[85] I do not mean to suggest that things said in jest can never provide an insight into the speaker's actual beliefs. Comedy can be a powerful medium through which a speaker conveys a message. Things said in jest can also provide insight into the subconscious beliefs of the speaker.

[86] The distinction between comments that are only intended to entertain and comments that provide real insight into the speaker's beliefs can be difficult to discern. The reasonable observer must look at the context and any extraneous evidence that may assist in determining what connection, if any, to draw between the comment and the beliefs of the speaker.

[87] Juror #12's comments were made in the context of a programme that attempted to entertain by ridiculing everything and everybody. The programme's indiscriminate mockery of almost everything would suggest to the reasonable listener that little, if anything, said on the program should be taken as indicative of anything other than an attempt to make the listener laugh.

[88] The appellant also offers no extraneous evidence to support the contention that Juror #12's comments reflect his beliefs. There is no suggestion that homophobic comments were a common feature of the Dean Blundell Show. If there was evidence that homosexuals were regularly maligned and belittled on the Dean Blundell Show, I think it would be easier to infer from Juror #12's comments a bias, conscious or subconscious. Juror #12's comments, however, arose out of a very specific and unique event – Juror #12's participation on a jury trying a case that involved homosexual activity. In that circumstance, it is easier to infer that the homophobic comments are no more than an attempt to use Juror #12's participation on a jury to generate the kind of "shock jock" commentary regularly featured on the programme.

[89] There is also nothing about Juror #12, apart from the comments made on two occasions on the Dean Blundell Show, to suggest that he has any bias against homosexuals. His comments on the radio programme must be placed alongside his statement under oath during the challenge for cause process that he would not be influenced by any bias against homosexuals. In my view, a reasonable observer would not be prepared to take Juror #12's comments on two occasions on the Dean Blundell Show in isolation from everything else and conclude that Juror #12 was biased against homosexuals.

[90] Juror #12's comments were made during a programme that made fun of virtually everything and everybody on a daily basis. The programme challenged the limits of what some would call political correctness and others would describe as civility and good taste. Given the nature of the programme, I think it is very likely that had Juror #12 been a juror in a case identical to this one, except that it involved heterosexual activity among several persons, the very same kinds of jokes would have been made on the Dean Blundell Show. The incessant references to "smelling the evidence", to various kinds and colours of bodily fluids, and to different forms of sexual activity could have been easily adapted to fit a case involving heterosexual activity. In the same vein, jokes about the appellant being happy to go to the penitentiary because of the ready availability of same-sex partners would have become jokes about the appellant having to learn to deal with male rather than female partners. Similarly, the oft repeated

sexually suggestive references to a “hung” jury could just easily have been made had the case involved heterosexual activity.

[91] I am satisfied that a reasonable observer would take the homophobic nature of some of Juror #12’s comments, not as indicative of his beliefs, but as incidental to the true purpose of the comments which was to entertain, titillate and shock the listener. The reasonable observer would take the comments as part of the standard fare offered as entertainment on the Dean Blundell Show. The appellant has not convinced me that the reasonable observer would take the comments as reflecting Juror #12’s actual beliefs.

[92] Nor do I accept that the very public venue in which Juror #12 made his comments strengthens the inference that the comments reflect his actual beliefs. To the contrary, I think it is clear that to some extent Juror #12 was playing the “straight man” role in the broadcasts. It was his job to set-up Mr. Blundell and others to deliver their “punchlines”. Juror #12’s position was not unlike that of an actor delivering homophobic lines from a script. In my view, the reasonable observer would be less inclined to think that Juror #12’s comments made during the Dean Blundell programme reflected his true beliefs than would be the case had the juror’s comments been made in a venue in which Juror #12 was not playing an assigned role as part of his employment.

[93] I stress, again, because, quite frankly, I feel my position will be misunderstood, that I do not mean to assert that humour predicated on stereotyping or ridiculing identifiable groups is harmless or acceptable. That kind of humour may be harmful insofar as it targets marginalized and otherwise vulnerable groups. That harm, however, is not the concern of this court on an appeal from convictions. This court cannot allow an appeal and quash the appellant's convictions on very serious criminal charges because it finds Juror #12's comments offensive, or because it has concerns about the harmful effects of those comments on the individuals who are targeted by them. This court can quash a conviction only if satisfied that the comments demonstrate a reasonable apprehension of bias giving rise to a miscarriage of justice. As a first step, the court must decide whether the reasonable observer would take the comments as indicative of Juror #12's actual beliefs about homosexuals. I do not think the appellant clears that hurdle.

[94] I turn now to Juror #12's comments about the appellant's lifestyle. Juror #12 made several comments, both on September 23rd and September 30th, that made it abundantly clear that he found the appellant's lifestyle as disclosed in the evidence extremely distasteful and offensive.

[95] It is not uncommon in criminal cases that evidence will paint a distasteful picture of the day-to-day lives of persons caught up in the criminal justice system. This is one such case. On the evidence, the appellant and the complainants

sought out anonymous and casual sexual encounters, fuelled by the copious consumption of illicit and dangerous drugs. As the appellant's lawyer put it, the appellant was on a "party weekend", fuelled by "MDMA, cocaine, alcohol and meth". Put in its best light, the appellant led a criminal, irresponsible, dangerous and immoral lifestyle. At worst, the evidence indicated that the appellant was a sexual predator, seeking out others for non-consensual, unprotected sex.

[96] Jurors are not expected to leave their moral compass at home when they attend for jury duty. They cannot, however, allow any negative view they may form about an accused's lifestyle to prejudice them against the accused in their deliberations. Juries are routinely instructed to that effect. The adequacy of the instruction given in this case is a separate ground of appeal.

[97] Juror #12's disapproving comments about the appellant's lifestyle included references to his sexual promiscuity. Those references, quite naturally, referred to homosexual activity. I do not, however, take from those disapproving comments about the appellant's lifestyle any bias against homosexuals or homosexual activity. A large segment of the community, regardless of sexual preference, would be offended by the appellant's lifestyle as depicted in the evidence. His lifestyle was offensive to many, not because it involved homosexual activity, but because it involved criminal, dangerous and predatory conduct.

[98] For the reasons set out above, the appellant has not convinced me that the reasonable observer would find that Juror #12 was biased against homosexuals. It follows that the claim of a reasonable apprehension of partiality based on homophobic bias must fail.

(iv) Did juror #12's conduct result in a miscarriage of justice?

[99] The appellant maintains that Juror #12's conduct and comments during the Dean Blundell programme demonstrate that he did not take his oath or responsibility as a juror seriously. Instead, he treated his role as a juror as a source of material for the radio programme. The appellant submits that any person with the cavalier attitude demonstrated by Juror #12's conduct cannot be trusted to have fairly and fully discharged his obligations as a juror. The appellant argues that a reasonable observer, fully cognizant of Juror #12's attitudes, would conclude that it was more likely than not that Juror #12 disregarded his oath and obligations in discharging his duties as a juror.

[100] This argument has two building blocks. First, the appellant submits that Juror #12's conduct on the programmes establishes that he had no regard for the trial judge's instructions to the jury that they should not discuss either the case or their deliberations with anyone. The appellant submits that Juror #12 violated both instructions. Second, the appellant submits that Juror #12's comments demonstrate a disdain for the process and the persons involved in the process,

including the complainants and the appellant, that is irreconcilable with a juror's obligation to fully and fairly try the case according to the evidence and the law as provided by the trial judge.

[101] The trial judge, following a well-established practice, told the jury in her pretrial instructions that they should not give information about the case to anybody. She instructed the jury to tell anyone who inquired about the trial that jurors were not allowed to discuss the case.

[102] During the September 20th broadcast when the trial was ongoing, Mr. Blundell repeatedly asked Juror #12 about the trial. Juror #12 told Mr. Blundell on at least eight separate occasions during the broadcast that he could not talk about the facts of the case as long as the case was ongoing. Mr. Blundell told his audience that he had asked Juror #12 off the air about the details of the trial many, many times and Juror #12 had refused to give him any details. Juror #12 said:

> I can't. I just can't. It's just wrong. …
>
> I don't want to jeopardize anything.

[103] Despite his repeated indications that he could not talk about the case, Juror #12 participated in a conversation with Mr. Blundell and his associate during the September 20th broadcast in which Mr. Blundell and his associate asked Juror #12 a series of specific questions about the trial. He provided cryptic answers obviously intended, at least in some instances, as "straight" lines

opening the door to sexually suggestive, and sometimes offensive, comments by Mr. Blundell and others on the programme.

[104] As the exchange between Juror #12 and Mr. Blundell continued, Juror #12 actually disclosed a few facts about the case. His statements were general. He indicated that the case involved “sex” and “drugs” and “a bunch of singles”. He allowed as how it might be possible that the case involved “a bunch of guys”. Juror #12 promised to tell the audience all about the case after the trial was over and everything was a matter of public record.

[105] Some of Juror #12’s comments on September 20th breached the trial judge’s instruction to not discuss the case with anyone. The information he provided was generic and benign. However, what concerns me about Juror #12’s conduct is his willingness, for entertainment purposes, to play along with Mr. Blundell despite the juror’s obligation to not discuss the case. As I interpret Juror #12’s involvement, he understood his obligation not to talk about the case, but at the same time played his role on the show by offering bits and pieces of information that would generate the kind of sexually suggestive and off-colour remarks that passed for entertainment on the Dean Blundell Show. He should not have engaged in any conversation about the trial beyond the fact that he was on a jury and was not allowed to talk about the case.

[106] A proper assessment of Juror #12's attitude towards his responsibilities as a juror requires a consideration of other comments he made during the September 20th broadcast. He made several statements that revealed a respect for his fellow jurors and commitment to the jury process. For example, Mr. Blundell asked, "Does anyone take jury duty seriously?" Juror #12 replied:

> You know what, they choose the jury appropriately, appropriate to the case. …
>
> … And actually all of the jurors in my jury are fantastic.

[107] Later in the broadcast, Juror #12 referred to jury duty as "fascinating", indicating that "putting your life on hold" was the only negative aspect of jury duty. He also made similar positive comments about his fellow jurors and the jury process in the September 30th programme. Juror #12 referred to the deliberations as hard work and said all the jurors were "mentally exhausted" after a day of deliberations. He also described the case as "really interesting".

[108] I do not come away from my review of the comments made by Juror #12 during the broadcasts with a sense that he had no regard for his obligations as a juror. To the contrary, I am left with the impression that he had found his role as a juror both interesting and worthwhile. Rather than showing disdain for the process, I think Juror #12's comments, considered as a whole, left a positive impression of the jury process.

[109] My colleague suggests that Juror #12 “mocked the juror’s oath” in the course of the September 20th broadcast. I do not read his comments that way. Certainly, Mr. Blundell mocked the oath. Juror #12 actually attempted to explain the oath-taking process at trial and the alternatives available to those who did not wish to be sworn. Juror #12 was continually interrupted by Mr. Blundell and an associate. Eventually, Juror #12 laughed when the associate made a comment about having one’s fingers crossed when taking the oath. It goes much too far to interpret his laughter as a mocking of the oath-taking process by Juror #12.

[110] In summary, during the September 20th programme, Juror #12 breached the judge’s order to not talk about the case. He put himself in a position in which his obligations as a juror conflicted with his role as the “straight man” on the Dean Blundell Show. To some extent, Juror #12 compromised his obligations as a juror to provide subject matter for the programme. He should not have done so.

[111] Not every impropriety by a juror demands that the verdicts returned by the jury be quashed. Juror #12 said very little about the facts of the case during the September 20th broadcast. While he should have said nothing, I would characterize what he did say as a relatively minor breach of the judge’s order. His breach must also be considered in the context of the rest of his comments about the process, particularly his positive comments about the jury experience. I would not infer from Juror #12’s breach of the judge’s order a disdain by Juror #12 for his obligations and responsibilities as a juror.

[112] Juror #12 returned to the Dean Blundell programme on September 30th, shortly after the jury had returned its verdicts. He indicated at the outset of his programme that he could now talk about the facts of the case since the verdicts had been returned, but that he could not talk about the deliberations. The distinction drawn by Juror #12 is correct in law. Section 649 criminalizes jury disclosure of information "relating to the proceedings of the jury when it was absent from the courtroom…." Section 649 is a permanent injunction against a juror discussing deliberations except in the exceptional circumstances identified in the section. However, after verdicts are returned, there is no prohibition against jurors discussing the evidence that was heard in a public courtroom, although as the developments in this case show, discussing the evidence can lead to discussions about jury deliberations.

[113] Juror #12 described the evidence and the proceedings at trial during the September 30th programme. His descriptions are largely accurate. Those descriptions precipitated various comments by Mr. Blundell and others. Juror #12 joined in this commentary. The comments referred to bodily parts, bodily fluids, smelling evidence, various forms of sexual activity, and described the appellant in very negative terms. Juror #12 and Mr. Blundell joked about the appellant, because he was homosexual, being happy to go to the penitentiary because of the ready availability of sexual partners. There is no doubt that some of the commentary is both crude and offensive. I have set out above why I do not draw

the necessary link between Juror #12's participation in those conversations and the allegation of homophobic bias.

[114] Unfortunately, Juror #12 also slipped into a discussion about the manner in which the jury assessed the complainants' credibility:

> *We kind of determined* that though these people [the complainants] are not the smartest individuals in the world … and yes, and they probably couldn't hold up a fake story because the whole court proceeding took two years to get to this point … so if they – if they made it up they would have cracked at some point with all the questioning they had to do and testimonials and stuff like that. [Emphasis added.]

[115] The comment may have contravened the prohibition in s. 649 of the *Criminal Code*. Counsel for the appellant submits that it provides strong evidence that any presumption that Juror #12 would have decided the case in accordance with his oath should be rejected.

[116] I do not accept this argument. Juror #12's comment was an isolated one. He did not set out to violate the prohibition against discussing jury deliberations. At the outset of the September 30th programme, he indicated to Mr. Blundell that he could talk about the facts of the case, but not about the deliberations.

[117] On my reading, Juror #12 slid into a comment about the manner in which the jury resolved credibility issues as an almost inevitable consequence of his discussion of the evidence and facts of the case. If he breached s. 649, the breach was not a wilful one. The lesson to be taken from the September 30th

programme is that jurors would be well advised to avoid any discussion of the facts of the case even after the trial is over.

[118] Juror #12 should not have said anything about the manner in which the jury went about its decision-making. I am not prepared, however, to accept that Juror #12's comment demonstrates a disdain for the process and a disregard for his obligations as a juror.

[119] In the course of discussing the evidence during the September 30th broadcast, Juror #12 described the intelligence of the complainants in disparaging terms on several occasions. For example, in one comment, he referred to them as "boneheads".

[120] Juror #12's remarks about the complainants were inappropriate and potentially hurtful. One would have thought that having concluded that the complainants were indeed victims, Juror #12 could have mustered a more empathetic reaction to their situation. Complainants in sexual matters have a difficult enough time in the criminal justice system without being subjected to demeaning commentary over the public airways by jurors.

[121] I do not, however, leap from a finding that Juror #12 made inappropriate comments about the complainants to a finding that a reasonable observer would conclude that Juror #12 did not abide by his oath. I see no connection between

Juror #12's low regard for the intelligence of the complainants and his overall respect for the process and ability to impartially try the case.

[122] For the reasons set out above, I would not give effect to the grounds of appeal based on the alleged misconduct of Juror #12.

G. THE JURY INSTRUCTIONS

[123] The Crown initially brought a similar fact application, seeking a ruling that the evidence directly relevant to each count was also admissible on the counts involving the other complainants. During the trial, the Crown abandoned that application. By the end of the trial, the allegations of each complainant stood or fell independently of each other. The trial judge instructed the jury:

> … Each allegation is a separate charge. You must make a separate decision and give a separate verdict for each of the six charges outlined in the indictment, which I believe you all have a copy of. You must make your decision on each charge only on the basis of the evidence that relates to that charge and any legal principles that I tell you apply to the decision on that charge. You must not use evidence that relates only to one charge in making your decision on any other charge.

[124] Shortly after this instruction, the trial judge summarized the evidence as it related to each element of each count in the six-count indictment. Crown counsel argues that by taking this approach, the trial judge at least impliedly identified and separated the evidence that related to each charge.

[125] Counsel for the appellant takes no issue with what the trial judge said, but submits that the instructions did not go far enough. Counsel contends that the trial judge had to make it clear to the jury that it could not use the evidence of one complainant to bolster the credibility of the other complainants. Counsel further argues that the trial judge had to specifically tell the jury that if the jury was satisfied that the appellant had committed the offences against any one of the complainants, it could not use that finding in any way in determining the appellant's liability on the other charges.

[126] I agree with both submissions. The evidence of each complainant as it related to his allegations could not be neatly compartmentalized and separated from the evidence of the other complainants. Their narratives of the relevant events overlapped as did their evidence of post-event conduct leading to allegations of collusion. On this record, the trial judge had to make it clear to the jury that except to the extent the complainants were testifying about the same events, the acceptance of the evidence of one of the complainants neither made the evidence of the other complainants more credible, nor provided any independent evidence that the appellant had committed any of the offences alleged by the other complainants.

[127] *R. v. F.T.*, 2015 ONCA 904 is directly on point. In that case, two complainants alleged that they had been sexually assaulted by their father. The Crown did not suggest that the evidence of one complainant was admissible as

similar fact evidence in respect of the other. The trial judge told the jury to consider the allegations of each complainant separately, using language similar to the language used by the trial judge in this case. In holding that the instruction was inadequate, this court held, at para. 27:

> … In addition to the caution prohibiting propensity reasoning, the jury should have been advised that they could not use the evidence of one complainant to support or confirm the evidence of another complainant [citation omitted.]. This additional instruction complements and amplifies the admonishment that the jury consider the evidence on each count separately. While this is a case that was approached by counsel and the judge on the basis that similar fact evidence did not apply, it is evident that the evidence of abuse of each complainant overlapped to a significant degree. In these circumstances, it was particularly important to displace a juror's normal inclination to reason that the several aspects of similar behaviour attributed to the appellant, if accepted, tended to mutually corroborate the evidence of each complainant. That type of reasoning is prohibited in a caution that one complainant's evidence could not confirm the evidence of the other was required.

[128] Crown counsel argues that the unqualified instruction to consider each count separately effectively eliminated any potential consideration of the evidence of one complainant when addressing the charges involving another complainant. Crown counsel submits that this instruction inured to the benefit of the appellant as on a proper instruction, the jury would have been told to compare and contrast the evidence of the complainants when assessing the

appellant's argument that the complainants had colluded to fabricate the allegations.

[129] Crown counsel may be correct in his contention that a more detailed instruction could have assisted the Crown on issues related to the alleged collusion by the complainants. However, with respect, this submission misses the prejudice caused by the non-direction. As pointed out in *F.T.*, when the evidence of complainants overlaps and is essentially part of an ongoing single narrative, there is a genuine risk that the jury will assess the credibility of the complainants as a whole, or at least that a positive impression with respect to the credibility of one will rub off on the assessment of the credibility of the other. Unless the evidence directly relevant to the allegations of one complainant qualifies as relevant to the allegations of the other complainants, this cross-count reinforcement of the credibility individual complainants is wrong in law. Even if a more detailed instruction could have assisted the Crown in some ways, the fact remains that the instruction provided failed to make the essential point that belief of one complainant could not support or confirm the allegations of the other complainants.

[130] The trial judge should also have instructed the jury that a finding that the appellant had assaulted or confined one of the complainants could not be used in considering his liability on the counts involving the other complainants. The similarities in the descriptions of the assaults by the complainants, and the

interconnected nature of their narrative, invited a line of reasoning moving quickly from a finding that the assault occurred against one to a further finding that the assault occurred against others. That line of reasoning, a form of propensity reasoning, may well have been encouraged by the extensive evidence portraying the appellant's lifestyle, particularly his sexual activities, in a potentially negative light. The trial judge should have pre-empted the risk of propensity-based reasoning with a clear instruction, both as it related to the prohibition against general propensity reasoning, and the prohibition against the use of a finding of guilt in relation to one complainant on the charges involving other complainants: see *R. v. J.A.T.*, 2012 ONCA 177, at paras. 39-40; 67-68.

III

CONCLUSION

[131] I would allow the appeal, quash the convictions and direct a new trial on those counts. The acquittal on count two stands.

Released: October 31, 2016

"Doherty J.A."