File Number: 39456

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

TANNER JAY MORROW

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE RESPONDENT
HER MAJESTY THE QUEEN

RULES 36 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. Three days after being charged with criminal harassment of AU, the appellant went to her home to tell her how she could drop the charges against him. He claimed that he went to pick up some of his property, but the trial judge found that his overarching purpose was to persuade her to drop the charges.[1] The trial judge concluded that the appellant's means of persuasion was to prey on AU's emotion and affection. He further found that the appellant's acts, in context, were "corrupt means" as contemplated in section 139(3)(a) of the *Criminal Code*. The trial judge convicted the appellant of obstruction of justice.

2. A majority of the Alberta Court of Appeal upheld the conviction. It noted that dissuading someone from testifying or pursuing criminal charges may be obstruction, depending on the context, the circumstances, and the relationship between the parties. The majority observed that deference is owed to a trial judge's assessment, and the context clearly supported the inference he drew.[2]

3. The dissenting judge would have set aside the conviction. In his view, appeals to emotion or affection are not "corrupt means". He found that the appellant's acts were not directed at persuading AU to drop the charges, but rather at rekindling a relationship with her. He concluded that the conviction was unreasonable because it was based on an inference or finding that was plainly contradicted by the evidence relied on by the trial judge, and was incompatible with evidence that the trial judge had not otherwise rejected.[3]

4. Respectfully, the dissenting judge was wrong. Appeals to emotion or affection are part of the "cycle of violence" that this Court recognized in *Lavallee*. Offenders who commit crimes against their intimate partners routinely apologize, show kindness and remorse, and offer gifts or

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[1] Appellant's Record ("AR") Vol. I 12/29-30
[2] *R v Morrow*, 2020 ABCA 407 at paras 16-17
[3] *R v Morrow*, 2020 ABCA 407 at paras 27-32

promises about their ability to change.[4] Such acts often form part of an attempt to interfere with the course of justice by dissuading the victim from proceeding with the prosecution. A rule of law holding that appeals to affection never constitute "corrupt means" would be both novel and dangerous.

Background

5. AU was a young mother who lived with her two daughters, ages 3 and 1, and her roommate JL in a residence in Medicine Hat, Alberta. By the time of the trial she was 19 years old and in college.[5]

6. The appellant and AU had been in a brief relationship, which began in late February or early March of 2018. The relationship lasted less than two months. When the relationship ended, the appellant did not take it well. During a heated argument, he threw things and raised his hand suggesting he was going to hit AU. She had to call police to escort the appellant out of the house. At the time, she did not want to press charges.[6]

7. After the breakup, the appellant refused to leave AU alone. He repeatedly phoned and texted her. He started to show up at her work. He told her he would wait for her at her younger brother's soccer games. When she blocked him, he created fake social media accounts to continue to communicate with her. Eventually she phoned the police again because he was not leaving her alone and she did not feel safe.[7]

8. On May 30, 2018, police charged the appellant with criminal harassment of AU, as well as breaching terms of a probation order.[8] The charge indicated that his conduct had "caused [AU] reasonably to fear for her safety…" The appellant was released on a recognizance that included conditions that he have no contact with AU except in court or through legal counsel, and that he was banned from going within a 2 block radius of AU's residence. There was a one-

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[4] *R v Lavallee*, [1990] 1 S.C.R. 852 at para 50
[5] AR Vol. II 22/11-41, 24/1-12
[6] AR Vol. II 23/20-16/3; 25/6-7; 41/26-30
[7] AR Vol. II 13/12-14/31
[8] AR Vol. II 59/33-37

time exception that allowed him to go there in the presence of a peace officer to retrieve personal property. The appellant signed the recognizance, and initialled each of the conditions.[9]

9. AU was conflicted about the situation. She testified, "I felt a lot of guilt with Tanner and having to have charges pressed again."[10] Some evidence suggested that she had spoken with the appellant's father about possibly dropping the charges.

The Offence

10. On June 2, 2018, the appellant knocked on AU's door. She was home alone. She knew he had a no-contact order, and she asked him what he was doing there.[11] He replied that he was there to grab some of his belongings from the house, and that an officer was on the way to escort him. AU replied that he could come back when the officer was with him. She closed the door and did not let him in.[12]

11. A few minutes later, the appellant knocked again. AU opened the door and let him walk in, believing that the police officer was with him. There was no officer there – but the appellant was already inside. She let him walk through the residence collecting his things. He asked if he could go downstairs to see if he left anything there. At that point he began to speak to AU about how she could drop the charges against him.[13]

12. The appellant's presence was frightening. She was scared and concerned that even criminal charges and a court order would not stop him from contacting her.[14] Despite these concerns, AU chose not to call the police. The trial judge explained:

> [S]he did not want police involved because in the past when that had occurred the accused had become very upset and was throwing things, causing a problem, and in fact had apparently threatened her. So she wanted to deal with it on her own, to keep it as calm as possible.[15]

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[9] Exhibit 3 – Recognizance for 180623431P1("Exhibit 3") [Record of Respondent Part 3 Tab A]
[10] AR Vol. II 35/19-20
[11] AR Vol. II 27/20-38
[12] AR Vol. II 32-35
[13] AR Vol. II 28/30-37
[14] AR Vol. II 35/33-35
[15] AR Vol. I 6/19-22

13. AU described the conversation about dropping charges:

> He asked if he could go look downstairs to see if he had left anything in our room. And it just sort of continued in a conversation about what had been going on with the charges. He was informing me on how I could drop the charges.
>
> Q What did he talk to you about in that regard? What did he say?
>
> A I can't remember word for word, but it began with him checking to see if I cared about him after these charges being laid. He thought that I just didn't care, maybe that I wanted to punish him. And I confirmed to him that, like, I still cared about him but that I was doing what I did to protect myself and my kids. And it got to the point where he was explaining to me where he had learned that I could drop the charges and what process I would have to go through. […]
>
> And after that I guess our conversation probably got more intense about the fact that, like, these charges are being placed, that it wasn't because I didn't care. And he tried to kiss me, and I said that it wasn't okay, that there was the no-contact order, he wasn't even supposed to be there, and that he needed to leave.[16]

14. AU testified that the conversation with the appellant made her feel "pressured to please him, to get him out of the house, to remain calm and civil…" She explained that the last time he was there, there was "a huge fight with things thrown and my kids at home".[17]

15. The appellant eventually left the residence when some furniture movers arrived. He later returned again, leaving a necklace and a love letter for AU.[18]

16. The appellant acknowledged that he had been at the house, and that he discussed dropping the charges with AU. He said he had heard from his father that AU was having second thoughts about the charges, so after calling police and getting advice as to how to have charges dropped, he went to her house to help her with that information. He testified that it was only for her benefit and had nothing to do with him. He admitted that he kissed her, but claimed it was consensual.[19]

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[16] AR Vol. II 28/34 - 29/14
[17] AR Vol. II 30/29-32
[18] AR Vol. I 7/3-4
[19] AR Vol. I 716-30

Reasons for Conviction

17. In convicting the appellant, the trial judge made several key findings. He found that the appellant's purpose in going to AU's home was at least in part to dissuade her from proceeding with the charges.[20] He inferred the specific intent for obstruction from the totality of the evidence, including AU's testimony and the appellant's. He found that the appellant's "overarching goal" was to have AU withdraw the charges.[21]

18. The trial judge reviewed AU's testimony about what the appellant said to her:

> She testified that the accused gave her information about how to drop the charges laid against him where she was the complainant. She said they somehow ended up on the bed together and he tried to kiss her, which she resisted, but he finally grabbed her face and, rather than resist, she gave in so she could get it over with and he would hopefully leave. She testified he tickled her on the inner thigh, approximately three quarters of the way up from the knee, but not as high as the groin, and that he again told her to drop the charges. She said they left the room and he told her he had a fantasy of having the two of them at opposite ends of the hallway and then walking towards each other and hugging. He told her this would provide him with some closure to their relationship. Again she agreed, hoping it would result in him leaving.[22]

19. The judge concluded that the appellant was preying on AU's affections to attempt to dissuade her from proceeding with the matter. He accepted AU's testimony that the appellant tried to use their relationship and his affection for her as a means to convince her to have the charges dropped. He said the circumstances were quite similar to *R v Crazyboy,* an Alberta Provincial Court case that counsel had referred to in argument. He concluded that the appellant wilfully attempted to defeat the course of justice by attempting to dissuade AU from proceeding with the matter by preying on her affections for him.[23]

20. The judge concluded that the sexual assault was part of the appellant's efforts to persuade AU to withdraw the charges:

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[20] AR Vol. I 10/8-14
[21] AR Vol. I 12/29-30
[22] AR Vol. I 6/25-34
[23] AR Vol. I 10/16-25

> In my view, the actions of the accused on the date in question as they relate to the charge under section 271 do constitute an offence. His advances were unwanted and not consented to. She testified that she felt pressured and uncomfortable as a result of them. In my view, his actions were part and parcel of his overarching goal to have her withdraw her charges.[24]

21. The judge held that the appellant's efforts, taken collectively, constitute the *actus reus* of obstruction. He inferred that the appellant had the specific intent to satisfy the *mens rea* requirement. He found that the appellant's actions were done in an attempt to dissuade her from giving evidence.[25]

22. The judge convicted the appellant of obstruction, sexual assault, and breaching his bail conditions. He appealed his convictions for sexual assault and obstruction of justice. The Alberta Court of Appeal unanimously dismissed the appeal from the sexual assault conviction. The majority also upheld the conviction for obstruction of justice, but one judge dissented.

Alberta Court of Appeal Reasons

23. The majority noted that dissuading someone from testifying or pursuing criminal charges can be obstruction of justice, depending on the context of the act, the circumstances under which it occurred, and the relationship between the parties. In the majority's view, deference was owed to a trial judge's assessment of these matters. It was for the trial judge to determine whether the attempt to persuade AU to drop the charges and the provision of information as to how she could go about doing that amounted to improper pressure and therefore represented an attempt to pervert justice.[26]

24. The majority found that the context clearly supported the judge's inference of intent:

> The appellant knew that he had just recently been charged with harassing the complainant and that he had signed a recognizance promising not to contact her. Despite this, he went to her home to pressure her to drop the charges. He was persistent and refused to leave the home for over two hours. He sexually assaulted her. The complainant testified she was afraid. The trial judge inferred that the appellant knew his attendance at the complainant's home would have a significant impact on her and concluded that his actions were undertaken with intent to dissuade the complainant from proceeding with the prosecution. The inference that

[24] AR Vol. I 12/27-30
[25] AR Vol. I 10/27-31
[26] *R v Morrow*, 2020 ABCA 407 at paras 16-17

> the appellant applied pressure on the complainant for an improper purpose was available on the record. No palpable and overriding error has been demonstrated.[27]

25. The majority therefore upheld the conviction.

26. Slatter J.A. dissented. He concluded that the appellant's attempt to use the prior relationship and his affection as a means to convince AU to drop the charges was neither illicit nor corrupt.[28] Although AU did not want to speak to the appellant, Slatter J.A. considered it important that "it was [AU] who initiated the discussion about withdrawing the charges."[29] He wrote that appealing to emotion or affection does not fall within "threats, bribes, or other corrupt means."[30] He found that the appellant's attempts to kiss AU were not directed at obstructing justice, but rather at attempting to rekindle the relationship.[31] He concluded that the conviction was unreasonable because it was based on an inference or finding that was plainly contradicted by the evidence relied on by the trial judge, and was incompatible with evidence that has not otherwise been rejected by the trial judge.[32] He would have set aside the conviction.

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[27] *R v Morrow*, 2020 ABCA 407 at para 17
[28] *R v Morrow*, 2020 ABCA 407 at para 29
[29] *R v Morrow*, 2020 ABCA 407 at para 30
[30] *R v Morrow*, 2020 ABCA 407 at para 30
[31] *R v Morrow*, 2020 ABCA 407 at paras 30-31
[32] *R v Morrow*, 2020 ABCA 407at para 32

PART II – ISSUES

Ground 1: The conviction for attempting to obstruct justice is unreasonable because it is based on an inference or finding that is plainly contradicted by the evidence relied on by the trial judge and is incompatible with evidence that has not otherwise been rejected by the trial judge.

The respondent suggests the issues can be framed as:

1. **Did the trial judge commit palpable and overriding error when he inferred that the appellant intended to dissuade AU from giving evidence?**
2. **Did the trial judge err by holding that the appellant's acts, including his appeals to AU's emotions or affection, constituted "threats, bribes, or other corrupt means"?**

Respondent's Position:

The trial judge did not err. The inference of intent was reasonable, and the appellant's acts satisfied the *actus reus*. The appeal should be dismissed.

PART III – ARGUMENT

Overview

27. Section 139 of the *Criminal Code* serves an important function in protecting the integrity of the justice system, including the safety and security of justice system participants. This is particularly true when an accused person is released on bail. Section 139 makes it an offence for them to threaten, bribe, or otherwise corruptly interfere with their alleged victim. This protection is crucial in cases of intimate partner violence, because victims in those cases are often vulnerable to interference.

28. The dissenting judge's statement that appeals to emotion do not count as "corrupt means" neglects the context in which those appeals typically occur. Offenders on bail often attempt to contact their victims and try to persuade them to reconcile. These efforts often include declarations of love, gifts, and promises not to repeat the offending behaviour. These acts are all part of the persuasive package proffered to obtain forgiveness. To hold that these acts, as a matter of law, are not corrupt would impair the effect of section 139 in domestic cases. It would have the effect of withholding the law's protection from victims who desperately need it.

29. The dissenting reasons emphasize that AU "initiated" the discussion about dropping the charges. The dissenting judge believed this distinguished this case from other comparable authorities.[33] But he glossed over an essential fact: the discussion that AU initiated was with a third party. Whatever she may have said to other people, AU clearly did not want to have this discussion – or any discussion – with the appellant. When the appellant showed up at AU's home against her will, in breach of the bail conditions she had expressly sought to keep him away, he forced her to have a discussion that she did not want to have. To say that she "initiated" that discussion is inaccurate.

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[33] *R v Morrow*, 2020 ABCA 407 at para 30: "Again, it was the complainant who initiated the discussion about withdrawing the charges. That distinguishes cases like *R v Esau*…"

30. The trial judge was entitled to infer *mens rea* from all the circumstances, and he did not commit palpable or overriding error in doing so. The conviction for obstruction of justice should be upheld.

Legal Principles

31. Section 139(2) makes it an offence to intentionally attempt to obstruct, pervert or defeat the course of justice. Section 139(3) adds that, without restricting the generality of subsection (2), every one commits obstruction who in a judicial proceeding, existing or proposed, dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence.[34]

32. Obstruction of justice is a specific intent offence:

> … the acts in question must have been done with the purpose of perverting or obstructing the course of justice … or with knowledge or awareness that the acts in question would or might lead to a perversion or obstruction of justice…[35]

33. The gist of the offence is the doing of an act that (a) has the tendency to pervert or obstruct the course of justice, and (b) is done for that purpose.[36] When the offender's acts tend to obstruct justice by dissuading a witness from testifying, the Crown need not prove that he used any threats of violence or the like although if proved it would be an aggravating factor.[37] In cases of obstruction of justice, the administration of justice is the victim.[38]

34. It is obstruction to persuade a complainant to withdraw charges, provided that it is done corruptly. "Corrupt means" is a broad concept that is difficult to define precisely, but one definition some courts have used is "a wrong design to acquire some pecuniary or other

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[34] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 139(2)
[35] *R v Abdullah*, 2010 MBCA 79 at para 39
[36] *R v Graham*, (1985) 20 C.C.C. (3d) 210 (Ont C.A.) at para 10; affirmed [1988] 1 S.C.R. 214; also see *R v Levin*, 2014 ABQB 90 at paras 11-18; the Court noted that despite the strange wording of (3), there can be no "deeming" of the accused's mental state.
[37] *R v Emmelkamp*, 2013 ABCA 71 at paras 13-14
[38] *R v Emmelkamp*, 2013 ABCA 71 at para 19

advantage."[39] Obstruction may be committed with respect to judicial proceedings that have yet to be commenced, or that have been concluded. The section stipulates that the judicial proceeding may be "existing or proposed". Thus, for example, giving a false name to a police officer to avoid arrest for driving while prohibited is obstruction.[40]

35. Courts have rejected a narrow scope of "corrupt" means. In *Reynolds* the accused told a complainant to get a false doctor's note to avoid having to testify. A majority of the Ontario Court of Appeal held that suggesting the use of a false doctor's note was not a "corrupt means". The minority said the act of dissuasion constituted an improper, dishonest method of dissuasion that involved deceiving the court. This Court reversed:

> The appeal should be allowed. The Crown succeeded in proving the charge of obstructing justice. The accused's act of dissuading the employee from testifying was improper and dishonest. When the accused suggested he lie in order to accomplish his desired objective, that was an equally important part of the total persuasion. The suggestion was part of the same chain of events to convince the employee to not testify in order to get a specific result. To suggest to the employee that he provide a doctor's note was not a logistical detail but was an integral part of the overall persuasive package intended to delay and obstruct the course of justice.[41]

36. An otherwise lawful act may constitute obstruction if the necessary intent is established. In *Barros,* the Crown alleged the accused obstructed justice by trying to learn the identity of a police informant. Although not a crime in and of itself, if done "for the purpose of interfering with criminal proceedings" then it would be an offence under section 139.[42] Similarly, a threat made to a witness that is too ambiguous to justify a conviction for threatening death or bodily harm may be a sufficient threat to justify conviction for attempting to obstruct justice.[43]

37. A person may be convicted of obstruction for telling a witness to give false testimony, even if the false testimony could not possibly affect the outcome of the trial: "On a charge of wilfully attempting to obstruct justice by counselling false testimony in a pending trial, if the

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[39] *R v Targon,* (1981), 61 C.C.C. (2d) 554 (Ont. Co. Ct.); also see *R v Valentine,* 2003 CanLII 2465 (ON SC) at paras 28-30
[40] *R v Spezzano*, 15 O.R. (2d) 489 (Ont. C.A.)
[41] *R v Reynolds*, 2011 SCC 19
[42] *R v Barros*, 2011 SCC 51 at paras 46, 49
[43] *R v Johnny*, 2012 BCCA 130

evidence reveals a guilty mind and a wilful act designed to fulfill the intention of the guilty mind, it matters not that the intention could not be satisfied by the act undertaken."[44] Similarly, convincing a witness to change her evidence can be obstruction even if the offender believes he is convincing her to tell the truth if the means of persuasion is corrupt.[45]

The Trial Judge Reasonably Inferred Intent

38. The intent necessary to make out obstruction is typically established by inference:

> The specific intent of attempting to obstruct justice often must be inferred from the conduct of an accused and its surrounding circumstances. This inference is easily made where the conduct at issue is obviously detrimental to the administration of justice. ...[46]

39. A few examples may be helpful. In *Kaiswatum,* while a witness was testifying, the accused made a loud sound like an animal call. The witness had a sudden loss of memory. The trial judge inferred that he made the noise with the intent to obstruct justice. The Saskatchewan Court of Appeal upheld the conviction, noting that "There is nothing remarkable in a trier of fact drawing an inference that an accused had the necessary *mens rea* based on the voluntary commission of the *actus reus*, along with any other circumstances that may be relevant."[47] In *Williams*, the accused passed a note to his girlfriend (then co-accused) during a preliminary inquiry asking her to say the gun was hers. The judge inferred that the accused had the requisite intent for obstruction of justice.[48] In *Houle,* the accused gave evidence in direct, then asked for a break to use the washroom. During the break he left court and never returned. The judge inferred that his intention was to obstruct, pervert, or defeat the course of justice. The Court of appeal affirmed: "For the purposes of proof of the offence of attempting to obstruct justice, the inference of the specific intent required for the offence may be drawn from conduct, like what occurred here, that is 'obviously detrimental to the administration of justice'."[49]

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[44] *R v Hearn,* [1989] 2 S.C.R. 1180
[45] *R v Pare*, 2010 ONCA 563
[46] *R v Abdullah*, 2010 MBCA 79 at para 51
[47] *R v Kaiswatum*, 2019 SKCA 7 at paras 56-58
[48] *R v Williams*, 2016 ONCA 937
[49] *R v Houle*, 2016 MBCA 121

40. In the present case, there was nothing unusual about the trial judge's inference that the appellant intended to pervert or obstruct the course of justice. This was a finding of fact, which should not be overruled absent palpable and overriding error. The majority of the Court of Appeal correctly upheld the conviction. The dissenting judge would have reversed the trial judge's inference – but the dissent made several errors in its analysis.

41. In assessing whether an obstruction offence is made out, a trial judge should be alive to the context. For example, in *R v Esau* (which the majority relied on) the offender told the complainant that he wanted her to drop the charges because she was "going to look real stupid in court." He was convicted. The Saskatchewan Court of Appeal observed:

> [S]ince [the trial judge] saw and heard these two people testify, he was in a position to capture the atmosphere, gauge their respective attitudes, and pick up on the nuances of their relationship, making it possible for him to ascribe more sinister and persuasive force to the words used by the accused than such words, used in a different context, might ordinarily imply.[50]

42. The same reasoning applies here. The majority noted that the appellant knew that he was accused of criminally harassing AU and causing her to fear him. He was charged on May 30, 2018, and signed a recognizance promising to have no contact with her. Nevertheless he went to AU's home and pressured her to drop the charges. He was persistent and refused to leave the home for over two hours. Given these facts, the trial judge reasonably inferred that the appellant knew his attendance at AU's home on June 2, 2018, would have a significant impact on her. His conclusion that the appellant's acts were done with the intent to dissuade AU from proceeding with the prosecution was reasonable and supported by the record.

43. The dissenting reasons do not articulate an adequate basis to overturn this finding. The dissent asserts that the record did not support a finding that the appellant intended to dissuade AU from giving evidence, and the finding reflects palpable and overriding error.[51] The trial judge was well aware that the appellant was asking AU to contact the prosecutor and request that the charges be withdrawn. It is true that this is "not the same" as asking a witness to disregard a subpoena, but either can be obstruction. The dissent does not explain why the difference is

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[50] *R v Esau*, 2009 SKCA 31 at para 50
[51] *R v Morrow*, 2020 ABCA 407 at para 28

important, let alone why it could justify interfering with findings of fact. Likewise, the dissent makes a conclusory statement that "the appellant's communication of information about withdrawing charges was not illicit."[52] He does not explain why he would substitute his assessment for the trial judge's.

44. The dissenting judge also asserted that, "when the meeting evolved into the appellant's attempt to kiss the complainant, his acts were not directed at obstructing justice." Instead, in Slatter J.A.'s view, they were an attempt to reconnect with the AU. This reasoning overlooks the obvious: the appellant was attempting to reconnect with AU and at the same time obstruct justice by dissuading her from giving evidence. The two purposes go hand in hand.

45. Finally, the dissent asserts that the physical contact between the appellant and AU "was not sufficiently directed to the withdrawal of the charges to make out an attempt to obstruct justice". The word "sufficiently" seems to acknowledge that the physical contact was directed at withdrawal of the charges to some degree. The assessment of the extent to which the appellant's acts were done for the purpose of obstructing justice should be left to the trial judge.

46. This is an issue that where the standard of review should be decisive. In *Kotch*, the Alberta Court of Appeal held that drawing an inference of an improper purpose is "exclusively a jury issue". The Court adopted a passage from *R v Kellet*:

> There may be cases of interference with a witness in which it would be for the jury to decide whether what was done or said to the witness amounted to improper pressure and so wrongfully interfered with the witness and attempted to pervert the course of justice, and it would be not only unnecessary and unhelpful but wrong for this court or the trial judge to usurp their function.[53]

47. In sum, the finding that the Appellant applied improper pressure, for an improper purpose, was a finding of mixed fact and law. This is a typical inference that is drawn in obstruction trials. The standard of review is palpable and overriding error. No such error is established on this record.

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[52] *R v Morrow*, 2020 ABCA 407 at para 31

[53] *R v Kotch*, 1990 ABCA 348 at para 18, citing *R v Kellet*, [1975] 3 All E.R. 468 [Book of Authorities of the Respondent Tab 1]

"Threats, Bribes, or Other Corrupt Means"

48. The second issue is whether the appellant's acts can qualify as "threats, bribes, or other corrupt means". The dissenting judge stated that "appealing to emotion or affection clearly does not fall within 'threats, bribes, or other corrupt means' referred to in subsection 139(3)."[54] This reflect an improper, piecemeal approach to the evidence. The appeal to emotion or affection should be analysed in the context of the evidence as a whole. In this case the appellant had been communicating with AU so persistently that she sought police protection and laid charges of criminal harassment. The appellant, then subject to bail conditions not to contact her, appeared at her home. Given the totality of the circumstances, it was reasonable for the trial judge to find that the "appeal to emotion or affection" that followed was indeed corrupt.

49. The dissenting judge wrote that AU "initiated the discussion about withdrawing the charges."[55] This seriously misunderstands the circumstances. AU initiated a discussion with a third party, as she had every right to do. She did not initiate a discussion *with the appellant.* The appellant commenced a discussion with AU against her will, in breach of bail conditions imposed only three days earlier. It was reasonable for the trial judge to find that these acts satisfied the *actus reus* for obstruction of justice.

50. Victims of intimate partner violence often feel conflicted after reporting a crime to the police. AU certainly did. It is not unusual for victims of domestic violence to seek continued contact with their abusers; this is a well-recognized aspect of the cycle of violence that makes domestic abuse so chronic and difficult.[56] But it is not the law that a complainant's discussion with a third party disentitles her to the protection that section 139(2) would otherwise confer.

51. Violence against an intimate partner is routinely followed by a period of "loving contrition", which may include persistent attempts to contact her and persuade her to reconcile. This is the third phase of the "cycle of violence" that this Court recognized in *Lavallee*:

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[54] *R v Morrow*, 2020 ABCA 407 at para 30
[55] *R v Morrow*, 2020 ABCA 407 at para 30
[56] *R v Johnston*, 2018 MBCA 8 at paras 39-40

> In phase three which follows, the batterer may apologize profusely, try to assist his victim, show kindness and remorse, and shower her with gifts and/or promises. The batterer himself may believe at this point that he will never allow himself to be violent again. The woman wants to believe the batterer and, early in the relationship at least, may renew her hope in his ability to change. This third phase provides the positive reinforcement for remaining in the relationship, for the woman.[57]

52. Thus, it is predictable that an offender will appeal to his victim's "emotion or affection" in order to persuade her to resume the relationship. That is exactly what happened here: the appellant told AU how he dreamed about a future with her, gave her a love letter, and tried to give her a necklace as a gift. Holding that these kinds of appeals to emotion or affection can never be "corrupt means" would neglect the reality of intimate partner violence in Canada.

53. Parliament recently recognized the need to give greater protection to victims of intimate partner violence in the passage of Bill C-75. The legislative summary of the bill includes this background:

> Despite increased efforts over the last 30 years to address violence against intimate partners, victimization by an intimate partner is one of the most common forms of police-reported violent crimes committed against women. There is no specific offence of intimate partner violence in the *Criminal Code*, but rather, it spans a range of conduct and offences which can be committed against intimate partners, including assault (causing bodily harm, with a weapon, and aggravated assault), kidnapping and forcible confinement, sexual assault (causing bodily harm, with a weapon, and aggravated sexual assault), criminal harassment, uttering threats, and homicide. Between one-fifth to one-third of violent intimate partners reoffend, and the majority of this recidivism (61%) occurs within six months of the previous offence, with more than one-third (37%) occurring within three months.[58]

54. In view of these legislative facts, it would be regressive and harmful to hold that attempts to manipulate a victim's emotions or affection can never be corrupt. The respondent does not assert that appeals to affection will always constitute obstruction. But they are an important part

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[57] *R v Lavallee*, 1990 SCC 852 at para 50

[58] Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament) at page 18

https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c75-e.pdf

of the context. Where an offender contacts a victim in breach of bail conditions and offers her gifts, promises, and other forms of loving contrition, all with a view to rekindling the relationship and dissuading her from proceeding with the prosecution, a judge may reasonably find that these acts constitute the offence of obstruction of justice.

55. The trial judge and the majority of the Court of Appeal were correct in finding that the appellant employed "threats, bribes, or other corrupt means" to dissuade AU from proceeding with the prosecution. The appellant knew AU was afraid of him and wanted to be left alone. He contacted her and insisted on telling her how she could go about asking to have the charges withdrawn. His persuasive efforts included offering gifts, declaring his undying love, and preying on the affection that he knew AU still held for him. This behaviour is typical of the third phase of the cycle of violence.

Conclusion

56. The judge reasonably inferred that the appellant had the requisite *mens rea*. And the purpose of section 139 of the *Code* would be poorly served if this Court adopted a principle of law that appeals to emotion or affection are not "corrupt". The assessment is a factual one that should be left to the trial judge. In this case, the trial judge's conclusions were reasonable and supported by the record. There is no basis for an appellate court to interfere.

PART IV – COSTS

57. The respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

58. The appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 12th day of April, 2021.

Andrew Barg

ANDREW BARG
COUNSEL FOR THE RESPONDENT

AB/las

PART VI – SUBMISSIONS ON CASE SENSITIVITY

59. No information that could identify AU should be published, broadcast, or transmitted.

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Authorities	**Cited at Paragraph No.**	**Tab #** (if applicable)
R v Abdullah, 2010 MBCA 79 at paras 39, 51	32, 38	
R v Barros, 2011 SCC 51 at paras 46, 49	36	
R v Emmelkamp, 2013 ABCA 71 at paras 13-14, 19	33,	
R v Esau, 2009 SKCA 31 at para 50	41	
R v Graham, (1985) 20 C.C.C. (3d) 210 (Ont C.A.) at para 10; affirmed [1988] 1 S.C.R. 214	33,	
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R v Houle, 2016 MBCA 121	39	
R v Johnny, 2012 BCCA 130	36	
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R v Kaiswatum, 2019 SKCA 7 at paras 56-58	39	
R v Kellet, [1975] 3 All E.R. 468	46	1
R v Kotch, 1990 ABCA 348 at para 18	46	
R v Lavallee, [1990] 1 S.C.R. 852 at para 50	4, 51	
R v Levin, 2014 ABQB 90 at paras 11-18	33, 43	
R v Morrow, 2020 ABCA 407 at paras 16-17, 27-32	23, 25-26, 29, 48-49	
R v Pare, 2010 ONCA 563	37	
R v Reynolds, 2011 SCC 19	35	
R v Targon, (1981), 61 C.C.C. (2d) 554 (Ont. Co. Ct.)	34	
R v Valentine, 2003 CanLII 2465 at paras 28-30 (ON SC)	34	
R v Williams, 2016 ONCA 937	39	

R. v Spezzano, 15 O.R. (2d) 489 (Ont. C.A.)	34	
Legislation	**Cited at Paragraph No.**	
Criminal Code, RSC 1985, c C-46, s 139(2) Code criminal, LRC (1985), ch C-46, s 139(2)	1, 27, 31, 48, 50, 56	
Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament) at p 18 Document d'information législatif : Loi modifiant le Code criminel, la Loi sur le système de justice pénale pour les adolescents et d'autres lois et apportant des modifications corrélatives à certaines lois, tel qu'elle a été édictée (projet de loi C-75 lors de la 42e législature) at p 18	53	