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CANADA / JUDGMENT

## R. v. B.A.S.

2020 BCSC 657

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COURT

Supreme Court of British Columbia

DECIDED

29 April 2020

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2020 BCSC 657 R. v. B.A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.A.S.,

2020 BCSC 657

Date: 20200429

Docket: 34406-2

Registry: Fort St. John

Between:

Regina

Appellant

And

B.A.S.

Respondent

Before: The Honourable Mr. Justice Tindale

On appeal from: Provincial Court of British Columbia, April 5, 2019

(R. v. B.A.S., Fort St. John Docket No. 34406-1)

Reasons for Judgment

Counsel for the Crown (Appellant):

D.J. Kozera

Counsel for the Accused (Respondent):

N. Whitling

Place and Date of Hearing:

Fort St. John, B.C.

November 4, 2019

Place and Date of Judgment:

Fort St. John, B.C.

**April 29, 2020**

[1] This is a Crown appeal of the acquittal of B.A.S., the respondent, for a charge of sexual assault after a trial in the Provincial Court of British Columbia. That judgment is dated April 5, 2019.

## **Background**

[2] The respondent was charged with a single count of sexual assault contrary to s. 271 of the Criminal Code in relation to sexual activity between the respondent and the complainant A.H. which occurred on August 21, 2016 in Fort St. John, British Columbia.

[3] The allegations relate to sexual activity which occurred after the respondent and A.H. first met each other on August 20, 2016 in a bar in Fort St. John, British Columbia. They danced and talked during the evening.

[4] A.H. offered to drive the respondent to his residence. This occurred in the early morning hours of August 21, 2016. After a short time at the respondent's residence A.H. left to assist her friend however she returned at approximately 3:30 a.m.

[5] Both the respondent and A.H. agreed to share the same bed and to become more physically intimate with one another. The evidence of A.H. and the respondent diverge with regard to the issue of consent of sexual activity that took place between approximately 4:00 a.m. and 5:15 a.m.

[6] A.H. testified that she would not have sex without a condom, and told the respondent on two occasions that she did not want to have sex without one. Neither was able to locate a condom, but A.H. testified that B.A.S. proceeded to have sex with her despite her assertion she said "no" twice.

The respondent testified that, while he agreed the use of a condom was raised by A.H., she raised this casually, had previously disclosed that she was on birth control and the issue of the condom was dropped when they could not find one. The respondent argued at trial that A.H. consented to having sex with him, or in the alternative, that he had an honest, but mistaken belief in consent.

[7] The trial of this matter proceeded on March 2, 2018, January 22 - 24, 2019 and February 12, 2019.

[8] The Trial Judge delivered the Reasons for Judgment on April 5, 2019 (the "Reasons") finding the respondent not guilty on the single count of sexual assault.

#### The Reasons

[9] The Trial Judge defined the issues at trial in the Reasons at para. 10:

The foremost issue is whether B.A.S. proceeded to have sex with A.H. on the first occasion notwithstanding A.H.'s express lack of consent. The one other issue is whether B.A.S. honestly but mistakenly believed that A.H. consented to the first act of sexual intercourse.

[10] The Trial Judge described three different acts of sexual intercourse between the respondent and A.H. as follows:

- i. the act of sexual intercourse which occurred after the discussion of the condom (the "First Act");
- ii. the act of sexual intercourse where A.H. was atop of the respondent (the "Second Act"); and
- iii. the act of sexual intercourse where the respondent was behind A.H. (the "Third Act").

[11] It is agreed between the parties that at trial neither party delineated the sexual activity between the respondent and A.H. into three different acts of sexual intercourse.

[12] The Trial Judge stated the following at para. 7 of the Reasons:

Both A.H. and B.A.S. testified that there were two later or subsequent acts of sexual intercourse. Both agreed that the second act of sexual intercourse involved in a sexual position chosen by A.H. and that the third act was a sexual position chosen by B.A.S. As I understand the testimony of both A.H. and B.A.S., the second and third acts of sexual intercourse were with their mutual consent.

[13] The Trial Judge noted the following at paras. 82 and 83 of the Reasons:

[82] The complainant, A.H. testified that she did not consent to have sex with the accused, B.A.S., on August 21, 2016. Moreover, A.H. says that she told B.A.S. in express terms that she did not want to have sex without a condom. Conversely, B.A.S. submits that A.H. did consent or, alternatively, B.A.S. says that he had an honest but mistaken belief that A.H. did consent.

[83] This case at its heart revolves around the credibility and reliability of their respective testimony

- [14] In his assessment of A.H., he described her to be both fair and temperate. He found her to be a careful witness, who did not guess or speculate and had no obvious animus towards the accused. She did not embellish, nor exaggerate her testimony. As well, she made appropriate concessions, and was candid when she lacked recall of details on cross examination. He also stated that he found her recall to be neither too vague, nor too detailed, given the time that had passed since the incident: paras. 95 - 99 of the Reasons.
- [15] Of the key points in issue, the Trial Judge said this at para. 99:
- her memory of looking in to B.A.S.'s eyes and telling him she did not want to have sex without a condom twice in rapid succession was vivid and detailed. Similarly, her recall that B.A.S., in response to A.H. saying no to sex without a condom, said that, "Chlamydia is curable" is the kind of detail that would not be easy to contrive or fabricate, in my respectful opinion, and tends, in my opinion, to enhance A.H.'s overall credibility.
- [16] He continued highlighting that the evidence of her purchasing Plan B, feeling "dirty and disgusting" and wanting to "get rid of [her] skin" were details that lend credence to her testimony: para. 99 of the Reasons.
- [17] Turning to B.A.S.'s credibility, the Trial Judge found the respondent's evidence to be coherent, logical and internally consistent: para. 103 of the Reasons.
- [18] He found him to be attentive and responsive, and to have an "almost extraordinary recall of certain events", particularly his evidence regarding the precise words that A.H. used regarding the condom and the position involved in the Second Act. The Trial Judge expressed concern regarding B.A.S.'s detailed recall, stating "few persons" tend to recall such things with that level of detail two and a half years after the incident, and thus found that B.A.S.'s account of the exact words A.H. used "invite[s] close scrutiny". He further said this was tempered by his observation that B.A.S. seemed to be a person who remembers granular details of mundane issues, such as the location of A.H.'s car that night.
- [19] The Trial Judge pointed to some external consistency with other evidence including the conversation that he and A.H. had the following morning when she stated "I don't know about you." In reply to his answer asking "what do you mean?", she said "I said no and you still did it, isn't that weird?". To which he replied "no.": para. 103 of the Reasons.
- [20] The Trial Judge found that neither A.H.'s, nor B.A.S.'s memories were impaired by alcohol, based upon B.A.S.'s evidence that he consumed three beers and A.H.'s evidence that she consumed one alcoholic beverage.
- [21] The Trial Judge said the following with regard to his understanding of the law of consent at para. 109 of the Reasons:

It is axiomatic, in my respectful opinion, that a complaint must give their ongoing and conscious consent to each and every sexual act and that their consent can be revoked at any time. My understanding of the law in this area with respect to consent places, in my mind, a positive obligation on each participant to take reasonable steps to ensure the ongoing and actual active consent of the other person throughout each and every phase of the sexual activity.

[22] The Trial Judge expressed the following "serious concerns" with the respondent's evidence at paras. 108 and 110 of the Reasons:

On B.A.S.'s own version, namely:

1. It was so dark he could not see A.H.'s face;
2. A.H. had inquired about using a condom; and
3. B.A.S. proceeded to have sex with A.H. without any further discussion whatsoever.

These, in my mind, constitute, respectfully, in my opinion, the very kind of circumstance that would have required B.A.S. to ensure that A.H. consented to having sex without a condom.

[23] The Trial Judge then expressed the following concerns with the Crown's case at para. 111 of the Reasons:

The case at bar, however, is that Crown submits that A.H. told B.A.S. twice in rapid succession in the clearest way possible that she did not want to have sex without a condom. There are certain aspects of the Crown's case that cause me concern, as well. These are as follows:

1. A.H. admitted in her direct testimony that she had sex with B.A.S. on the second occasion with her atop B.A.S.;
2. A.H. agreed in cross that it was possible B.A.S. may have asked if she had a sexual position she wanted to try;
3. A.H. agreed in cross that B.A.S. did not force her to have sex the second time with her when she was atop B.A.S.;
4. A.H. in direct gave a disjointed explanation as to how she went from the first sexual act of sexual intercourse to what she then described when she was on her hands and knees with B.A.S. in behind her;
5. A.H. acknowledged in cross that it was possible that B.A.S. may have asked her if she was on birth control prior to them having sex;
6. also during cross, A.H. said in effect that she was not making herself clear to B.A.S.;
7. A.H. testified that when she said to B.A.S. about it being weird that they had sex without a condom, B.A.S. replied, "No"; and

8. A.H. agreed that just before she left his apartment, B.A.S. asked her if it was okay if he could call her.

[24] The Trial Judge, in finding the respondent not guilty, said the following at para. 113 of the Reasons:

I have heard two diametrically opposed versions of events that occurred at B.A.S.'s apartment early on the morning of August 21, 2016. A.H. has given an entirely plausible account of being sexually assaulted by B.A.S. B.A.S. has provided a much less plausible, but nonetheless still plausible account of a consensual sexual encounter between he and A.H. Having considered B.A.S.'s evidence in the full context of all the evidence, I am unable to reject his evidence. For the reasons set out above, after considering all the evidence, I am left with a reasonable doubt as to A.H.'s subjective belief that she did not consent to the sexual activity.

[25] As he had determined that the Crown did not prove a lack of consent he did not turn to consider the respondent's alternative defence of honest but mistaken belief in consent: para. 1116 of the Reasons.

#### Position of the Parties

#### Crown

- [26] The Crown's theory of the case was that A.H. did not consent to any sexual activity and that the defence of honest but mistaken belief was not established.
- [27] The Crown argues that the Trial Judge erred in law by applying the wrong test for consent to sexual activity.
- [28] Specifically, the Crown says the Trial Judge misstated the law of consent; applied the incorrect test for consent to the Second Act and Third Act because he equated her admitted lack of resistance, or physical compulsion to participate, with consent; failed to consider or apply ss. 273.1 or 265(3) of the Criminal Code and considered irrelevant evidence.

#### A. Misstatement of the law of consent

- [29] The Crown argues that the Trial Judge misstated the law of consent in his statement, where he framed the issue as "whether B.A.S. proceeded to have sex with A.H. on the first occasion notwithstanding A.H.'s express lack of consent". The Crown argues that this "transformed" the assessment of the complainant's subjective state of mind about consent to the sexual activity into an objective assessment that considered external circumstances, such as the complainant's words and respondent's actions. Crown notes that a misstatement of the law itself is not reversible per se, but states it undermines the presumption that the Trial Judge applied the correct law.

#### B. Application of the wrong test for consent

1. Second and Third Acts

[30] The Crown argues that the Trial Judge took for granted that the Second Act and Third Act were consensual because he found that A.H. testified she consented. The Crown submits that this is incorrect and reflects an error of law.

[31] The Crown points to the following passages from the hearing on January 22, 2019 where A.H. testified as follows:

Q. All right and, [A.H.], did you at any time consent to sexual intercourse with [B.A.S.]?

A. No, no.

Transcript from January 22, 2019, at p. 6 lines 6 - 8.

[32] A.H. further testified on cross-examination to the following:

Q. You continue to have sex with [B.A.S.] for about 20 minutes, correct? Correct?

A. We were still in that bed for 20 minutes, yes.

Q. What did you say? I'm sorry?

A. we were in that bed for 20 minutes, yeah.

Q. Okay.

A. And yeah like we were--I-- so that that happened and then I was really confused and I thought, "Okay, well this is-- this is fine. You can do this as, you know. It doesn't matter." And then-- and then it got to, you know, I was participating. I wasn't like fighting him off but I told him no. I said it right in his face and I said it-- I looked him in the eyes and I said "No". I said it twice and I said it-- I wasn't-- I wasn't smiling. I wasn't saying anything that was like oh I'm joking. It was so clear. And then when he just did it anyways I was like "Okay".

Transcript from January 22, 2019, at p. 61 lines 15 - 33.

[33] A.H. also testified that she was afraid that the respondent would fight her or throw her out naked without her possessions if she resisted: Transcript from January 22, 2019, at p. 32 line 34 - p.33 line 44.

[34] The Crown submits that the Trial Judge inferred consent from A.H.'s admission that she did not resist and was not physically compelled or threatened. The Crown argues that the Trial Judge was wrong in his understanding that A.H. consented to the Second Act and Third Act. By equating lack of resistance with consent, the Trial Judge failed to apply a subjective test for consent and thereby erred in law.

## 2. First Act

[35] The Crown submits that the Trial Judge misapplied the law of consent to the First Act by considering the following irrelevant evidence:

- i. evidence of the Second Act and Third Act;

- ii. evidence of the respondent's behaviour before intercourse;
- iii. evidence of the complainant was not making herself clear; and
- iv. evidence of the respondent's behaviour after intercourse.

- [36] Much of the evidence the Crown is referring to was summarized by the Trial Judge at para. 111 of the Reasons. Overall, the Crown argues that the Trial Judge failed to explain how he used this evidence to assess consent without relying on impermissible myths and stereotypes about how sexual assault complainants should act before, during or after the sexual activity in question.
- [37] The Crown argues that this evidence was irrelevant to A.H.'s subjective state of mind and, while some of this may go to credibility, the Trial Judge did not link this evidence to any credibility analysis that he did. They submit that there is no reasonable basis to suggest that the Trial Judge used this evidence in a permissible manner to reach the conclusion he did. Crown further submits that the Trial Judge did not explain why this evidence caused him concern, nor how he used it in assessing consent.
- [38] The Crown submits that the irrelevant evidence relied upon includes evidence of subsequent sexual acts, such as the Second Act and Third Act, and that these are irrelevant to consent.
- [39] In the Crown's submission, a complainant's consent to other sexual activity is not evidence that she was more likely to have consented to the activity in question, nor is it evidence that she is less worthy of belief: *R. v. Butts*, 2012 ONCA 24, at para. 18; *R. v. Crosby* (1994), 88 C.C.C. (3d) 353 at 375 (N.S.C.A.), at para. 81, rev'd on other grounds in *R. v. Crosby*, [1995] 2 S.C.R. 912; *R. v. Seaboyer*, [1991] 1 S.C.R. 577, at pp. 620-621.
- [40] Additionally, the Crown states that it is not clear what the Trial Judge was referring to in the Reasons at para. 111 where he stated he had concerns that A.H. was "not making herself clear" to the respondent. They also argue that the impression she left with the respondent would only be relevant to the assessment of honest but mistaken belief in consent, not her subjective consent.
- [41] Of the other evidence the Crown points to, they argue that it is irrelevant whether the respondent may have asked A.H. if she was on birth control prior to them having sex. They also point to the Trial Judge's credibility finding that A.H. was "frank and candid" in stating she could not recall a conversation about birth control or whether she was indeed on birth control at that time.
- [42] The Crown further argues that it is irrelevant that the respondent did not agree with A.H. that it was "weird that they had sex without a condom". It is also irrelevant that the respondent asked if it was okay if he called A.H.
- [43] The Crown submits that, based upon these errors, a new trial should be ordered.

## Respondent

- [44] The respondent argues that the appeal should be dismissed.
- [45] The respondent generally agrees with Crown that neither counsel at trial argued that sexual acts should be divided to three separate acts. The respondent states that the issue at trial was whether there was consent prior to the sexual activity and agrees that a complainant can withdraw consent at any time.
- [46] The respondent argues any error by the Trial Judge respecting the Second Act or the Third Act had no potential to affect the outcome of the trial. The live issue was whether or not the complainant consented to any sexual activity. The Trial Judge's analysis does not reflect any reliance upon any separate consent to the Second Act or the Third Act.
- [47] The Trial Judge at the end of the day had a reasonable doubt as to the issue of lack of consent.

## C. Misstatement of law of consent

- [48] The respondent agrees that the complainant's evidence is the only direct evidence of her state of mind. However, the respondent says that external evidence is admissible in determining the presence or absence of that subject to state of mind. Therefore, the Trial Judge did not "transform" the subjective inquiry into the state of mind of the complainant, as the Crown argues.
- [49] For this point, the respondent relies upon the Supreme Court of Canada decision in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (*Ewanchuk*), where they stated the following at paras. 29 and 30:
- [29] While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
- [30] The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the mens rea stage of the inquiry.

- [50] The respondent argues that the Trial Judge was required to consider all of the circumstances of this case, including the complainant's words and the respondent's actions in determining whether or not the complainant's assertion that she did not consent was credible.
- [51] The respondent argues that the Trial Judge ultimately considered the issue of consent in relation to the totality of the evidence. The respondent submits that the Trial Judge is obligated to consider external evidence in determining the complainant's subjective state of mind.

#### **D. No application of wrong test and not reversible error**

- [52] The respondent submits that the Crown's argument is based upon a point that they did not argue at trial, and therefore they are barred from raising it on appeal. Specifically, they say the Trial Judge did not err by failing to determine whether the complainant consented to the Second and Third Acts because the Crown did not argue the initial consent was inapplicable to the Second and Third Acts. Rather, they argued that the complainant did not consent to having sex at all. The respondent further states that the Crown did not raise ss. 273.1 and 265(3) at trial, and therefore it is unsurprising the Trial Judge did not address them and they cannot form the basis of a second trial.
- [53] In the respondent's submission, the Trial Judge's comments at para. 7 of the Reasons were introductory statements framing the scope of his analysis, but that he properly considered the issue of whether the complainant consented prior to the commencement of the sexual activity in question, which they assert was the only point at issue in the trial.
1. Lack of resistance or physical compulsion not equated with consent
- [54] The respondent submits that there is nothing in the Reasons which would indicate that the Trial Judge inferred the existence of consent from mere passivity or acquiescence on the part of A.H.
- [55] The respondent further argues that the Trial Judge clearly understood that the complainant must give their ongoing and conscious consent to each and every sexual act because he said that at para. 109 of the Reasons. They argue that this paragraph, read together with para. 7 of the Reasons, does not support the conclusion that the Trial Judge erroneously believed a mere lack of protest constituted consent, particularly his statement that "ongoing and actual active consent" is required.
- [56] Instead, the respondent argues that the brevity of para. 7, combined with its location in the Reasons, suggests that where the Trial Judge characterized the Second and Third Acts as ones where the parties "mutually consent[ed]", he was simply identifying matters that would not be the focus of analysis, as they had not been placed into issue.

## E. Consent to the First Act

- [57] The respondent also states that, contrary to the Crown's submission that the Trial Judge considered irrelevant evidence in the assessment of consent to the First Act, he in fact considered the issue of consent in its totality. They again highlight the passage from Ewanchuk, arguing that external evidence is relevant to a determination of a complainant's subjective state of mind.
- [58] The respondent submits that there is no evidence in the Reasons to suggest the Trial Judge employed irrational reasoning based upon the stereotypes and assumptions about sexual assault complainants. They argue that the Second and Third Acts comprise the conduct with which the respondent was charged, and thus evidence regarding these were relevant and admissible. In this case, the respondent suggests this evidence was relevant to the credibility assessment because the consistencies between the respondent and complainant's evidence with regard to the Second and Third Act lends support as an external consistency to the respondent's version of events. Reasonable doubt, they argue, can arise from this type of external support.

## Decision

- [59] The parties have raised a number of factors for the court to consider in assessing this appeal. These reasons will focus on only those which I have decided are determinative of this matter.

## F. Standard of review

- [60] On a summary conviction appeal, the Crown may appeal on questions of fact, law, and mixed fact and law (*R. v. Antonelli*, 5 B.C.L.R. 154). The Crown argues that each of the grounds raised is an error of law reviewable on a correctness standard: *R. v. Churchill*, 2002 BCCA, at para. 18; *Ewanchuk*; *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 27 and 36.
- [61] The Supreme Court of Canada in *R. v. J.M.H.*, 2011 SCC 45, in discussing the assessment of the evidence based on a wrong legal principle in the context of a Crown appeal, stated the following at paras. 29 and 30:
- [29] This is another category mentioned in *Morin*. In that case, Sopinka J. stated at p. 295, "Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle." In *B. (G.)* [1990] 2 S.C.R. 57], Wilson J. added important cautionary words concerning this space for appellant intervention:

it will be more difficult in an appeal from an acquittal to establish with certainty that the error committed by the trial Judge raised a question of law alone because of the burden of proof on the Crown in all criminal prosecutions and the increased importance of examining critically all evidence that may raise a reasonable doubt. [p. 75]

[30] This proposition was said by Lamer J. (as he then was) in *Schuldt* to constitute a proper basis for the Court's decision in *Wild v. The Queen*, [1971] S.C.R. 101. In *Schuldt*, at p. 610, it was affirmed that except in the rare cases in which a statutory provision places an onus upon the accused, it can sometimes be said as a matter of law that there is no evidence on which the Court can convict, but never that there is no evidence on which it can acquit as there is always the rebuttable presumption of innocence. This approach was also adopted in *B. (G.)* by Wilson J., at pp. 69-70, and the point was further underlined in the concurring reasons of McLachlin J. (as she then was), at p. 79, where she wrote: "In the absence of misdirection the law is clear that doubts about the reasonableness of the trial judge's assessment of the evidence [in the context of a Crown appeal of an acquittal] do not constitute questions of law alone "

[62] I agree with the Crown that the standard of review on this appeal is correctness.

[63] With respect to the test for granting a Crown appeal, the Supreme Court of Canada articulated it in *R. v. Graveline*, 2006 SCC 16, and it was helpfully summarized recently in *R. v. Barton*, 2019 SCC 33, at para. 160:

To secure a new trial, the Crown bears a heavy burden: it must demonstrate that the error or errors in question "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 (S.C.C.), at para. 14). A mere hypothetical possibility that the accused would have been convicted but for the error or errors will not suffice (see *ibid.*). However, the Crown is not required to demonstrate that the verdict would necessarily have been different (see *ibid.*).

## G. Elements of sexual assault

[64] The burden of proof in a trial for sexual assault, as in any criminal trial, is on the Crown. The Crown in the case at bar had the burden to prove beyond a reasonable doubt that the respondent had physical contact with A.H. in circumstances of a sexual nature without the consent of A.H.

[65] In determining the absence of consent as an element of the *actus reus* "the actual state of mind of the complainant is determinative": *Ewanchuk*, at para. 27. This test is purely subjective. If the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove absence of consent: *Ewanchuk*, at para. 29.

[66] The absence of consent is not defined in the Criminal Code however ss. 265 (3) and 273.1 do provide a non-exhaustive list of examples in which consent is not present.

[67] The Crown must also prove that the respondent intended to have physical contact with A.H. and knew that A.H. was not consenting to the sexual activity. The *mens rea* of the offence of sexual assault is often put into issue by the defence of honest but mistaken belief in consent, which the respondent did raise as an alternative defence at trial.

## H. The law of consent

- [68] The Crown argues generally that the Trial Judge misstated the law of consent on the basis of his statement at para. 10 of the Reasons, where he said "whether B.A.S. proceeded to have sex with A.H. on the first occasion notwithstanding A.H.'s express lack of consent" and therefore that he misapplied the law by transforming the purely subjective inquiry into the complainant's state of mind into one that considered external circumstances, such as the complainant's words and the respondent's actions.
- [69] I note that A.H.'s evidence at trial was that she expressly told the respondent "no" on two occasions prior to any sexual activity occurring, stating that she did not want to have sex without a condom. However, I am not convinced that the Trial Judge misapplied the law of consent in his statement of the issues at para. 10 of the Reasons by transforming the inquiry at this stage after considering the Reasons in their totality.

## I. Misapplied law of consent to the Second and Third Acts

- [70] The Crown further argued that the Trial Judge took for granted that the Second Act and the Third Act were consensual because he found that A.H. testified that she consented to this activity.
- [71] The Trial Judge stated "As I understand the testimony of both A.H. and B.A.S., the second and third acts of sexual intercourse were with their mutual consent": para. 7 of the Reasons.
- [72] I agree with the Crown that this statement is incorrect. A.H. did not at any time during the trial testify that she consented to the Second Act or Third Act. A.H. testified that she did not consent to sexual intercourse without a condom and told the respondent "No" on two occasions.
- [73] The Crown argues that the comment at para. 7 of the Reasons, that the Second Act and the Third Act were with the mutual consent of the parties, appears to be more than just a misstatement by the Trial Judge. The Crown submits that it appears the Trial Judge inferred consent based upon her admissions that she did not resist and was not physically compelled or threatened. They point to the Trial Judge's statements at paras. 35, 36 and 97 of the Reasons as the basis for this argument:
- [35] Again, in cross, A.H. could not recall B.A.S. asking her if she had a favourite sexual position and her having responded that she liked to be on top, sometimes referred to as the "cowgirl" position. A.H. did, however, agree that at some point she and B.A.S. did have sexual intercourse and that she was on top of B.A.S. and she also agreed that B.A.S. did not force her to do this.

- [36] She also testified during cross and agreed that when she and B.A.S. had sex for the third time with A.H. on her hands and knees at that B.A.S. did not push her face into the pillow, but that her discomfort was caused by the sexual position itself. A.H. said under cross that her face was in the pillow making it hard for her to breathe and that she pushed B.A.S. off saying she had enough. B.A.S. stopped and asked A.H. "Am I too big for you?"
- [97] I found A.H. to be both fair and temperate in her testimony. She regularly acknowledged on cross that she and B.A.S. did, following the initial act of intercourse, have sex a second time and that she was atop B.A.S. A.H. had however, omitted this detail in her direct testimony. A.H. acknowledged, as well, on cross that this second act of sex was not forced upon her. A.H. said, however, in cross that she did not recall B.A.S. having asked her if she had a sexual position that she would prefer or like to try.
- [74] The Trial Judge's statement that the Second Act and Third Act were with the mutual consent of the parties is clearly wrong. My assessment of whether the statements at para. 7 are merely a poor choice of language, or whether they reflect an error in the application of the law of consent will hinge upon my assessment of the reasons overall. I will therefore return to this question.

J. Criminal Code sections 265(3) and 273.1

- [75] S. 273.1, as it read in 2016, states as follows:

273.1 (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

- (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
  - (b) the complainant is incapable of consenting to the activity;
  - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
  - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
  - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

- [76] I agree there was no analysis pursuant to ss. 265 (3) and 273.1 of the Criminal Code.

- [77] I also note that these provisions were not raised at trial, I am also aware that s. 273.1 outlines the statutory definition of consent for the purposes of sexual assault. In the absence of specific reference to these provisions, some discussion of factors that would tend to suggest the presence or absence of that consent must still be considered in determining whether consent actually existed.
- [78] In my view, there is evidence in the Reasons that the Trial Judge considered A.H.'s words and conduct in connection with his assessment of her consent to engage in sexual activity. Most importantly, he noted that she said "no" on two occasions.

## K. Irrelevant evidence

- [79] The Crown argued, in their third ground of appeal, that the Trial Judge applied the wrong test for consent because he considered irrelevant evidence in assessing whether the complainant consented to the sexual activity. Here the Crown refers to the Trial Judge's comments at paras. 110 - 111 of the Reasons, where he concludes his credibility assessments of A.H. and B.A.S.
- [80] First, they argue that the Trial Judge erred by considering external evidence in the assessment of the complainant's subjective state of mind. I do not agree with the Crown that external evidence is irrelevant to an assessment of the complainant's credibility with respect to her subjective state of mind. Ewanchuk makes clear that her credibility on this point must still be considered in light of all of the evidence, and that her words and actions before and during the incident, may lead to a reasonable doubt about her assertion that she did not consent: at para. 29.
- [81] However, I do agree that much of what the Trial Judge raises in his list of concerns about the complainant's evidence is irrelevant to the assessment of her credibility about her subjective state of mind.
- [82] The Trial Judge was left with the difficult task of assessing the evidence of the respondent and A.H. The totality of the evidence, including any ambiguous conduct must be taken into account in assessing credibility. However, I note that ambiguous conduct does not constitute consent.
- [83] The law of consent is a complainant can withdraw consent at any time, can consent to one sexual act, but not another. That A.H. may have said she was on birth control is not evidence of her consent to sex without a condom. That she engaged in different positions that appear to have no physical coercive aspects to them is not evidence that she consented to the sexual activity in the first place. The Reasons do not make clear how the Trial Judge used this evidence in his analysis of consent.

- [84] Some of the factors in para. 111 of the Reasons do relate however to the defence of honest but mistaken belief in consent. These include the fact that A.H. agreed that B.A.S. may have asked her what position she wish to try, that she agreed she may not have made herself clear and they tried multiple positions.
- [85] Despite the fact that para. 111 of the Reasons is unclear as to whether the Trial Judge's concerns are in relation to A.H.'s subjective consent or an honest or mistaken belief in consent he clearly understood that A.H. did not consent to have sex with the respondent because he states that at para 82 of the Reasons.
- [86] The Trial Judge correctly stated the law of consent at para. 109 of the Reasons.
- [87] The Trial Judge found that A.H. "has given an entirely plausible account of being sexually assaulted by B.A.S".
- [88] In my view taking into account the Reasons in their totality I am satisfied that the Trial Judge's statement at para. 7 of the Reasons with regard to "mutual consent" was a misstatement on his part in the Reasons.
- [89] Even if the Trial Judge did fail to appreciate the evidence in this regard I cannot say that the failure was based on a misapprehension of the law of consent. I am not satisfied the Trial Judge relied upon impermissible reasoning to arrive at his conclusion with regard to consent after a consideration of the Reasons in their totality. He explained in the Reasons that his concern with the Third Act was A.H.'s disjointed evidence in describing this act which relates to her reliability and credibility.
- [90] The Trial Judge did express concerns that A.H. could not remember discussing the Second Act with the respondent but did agree that they engaged in that activity. This relates to the reliability of A.H. generally and not to a misconception on the part of the Trial Judge with regard to myths and stereotypes regarding sexual assault complainants.
- [91] In his conclusion, the Trial Judge rightly instructed himself and did engage in a W.(D) analysis, finding that despite the complainant's evidence being plausible, and the respondent's evidence slightly less plausible he was unable to reject the respondent's evidence. The Trial Judge in not rejecting the respondent's evidence was left with a reasonable doubt.
- [92] In *R. v. Sheppard*, 2002 SCC 26, the Supreme Court of Canada said the following about sufficiency of reasons:

46 the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has

circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

[93] The Reasons despite some of their deficiencies do explain why the respondent was acquitted and these inadequacies do not provide a significant impediment to the exercise of the right of appeal.

[94] The test for granting a Crown appeal is whether the error identified might reasonably have a material bearing on the acquittal. I do not find that the Crown has met this test.

## Conclusion

[95] For all the above noted reasons I dismiss the Crown's appeal.

"The Honourable Mr. Justice Tindale"

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