CANADA / JUDGMENT

R. v. Batson

2025 BCCA 436

COURT
British Columbia Court of Appeal

DECIDED
11 December 2025

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2025 BCCA 436 R. v. Batson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Batson,

2025 BCCA 436

Date: 20251211

Docket: CA49989

Between:

Rex

Respondent

And

Arrio Ramon E Batson

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting, or

transmission in any way of evidence that could identify the complainant.

This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Justice Riley

The Honourable Justice Gomery

The Honourable Justice MacNaughton

On appeal from: An order of the Provincial Court of British Columbia, dated

April 20, 2023 (conviction) (R. v. Batson, Port Coquitlam Docket 105332-1-K).

Counsel for the Appellant:

M. Shamess

M. Beckett

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

September 25, 2025

Place and Date of Judgment:

Vancouver, British Columbia

December 11, 2025

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Justice Gomery

The Honourable Justice MacNaughton

Summary:

The appellant challenges his conviction on a single count of sexual assault. He argues that the trial judge made multiple interrelated errors, which together amount to a miscarriage of justice. Held: Appeal allowed; the conviction is set aside, and a new trial is ordered. The trial judge's reasons reveal multiple misapprehensions of evidence and insufficiently explain how he reconciled apparent discrepancies in ruling on the appellant's credibility and in dismissing the defence of honest but mistaken belief in communicated consent. The combination of these errors obscures the path to conviction and frustrates appellate review. This requires setting the conviction aside under s. 686(1)(a)(iii) of the Criminal Code.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

[1] Mr. Batson seeks to overturn his conviction on a single count of sexual assault, following a trial in Provincial Court. He argues that the trial judge committed multiple interrelated errors in assessing his testimony and in concluding that the Crown had proven its case beyond a reasonable doubt.

[2] For the reasons that follow, I would allow the appeal, set aside the conviction, and order a new trial. I agree with the appellant that the trial judge's reasons reveal multiple interrelated errors. In particular, the reasons contain inconsistent findings as to Mr. Batson's credibility, do not allow for meaningful appellate review on at least one issue, and disclose material misapprehensions of evidence bearing directly on the judge's reasoning process.

Facts

Background

[3] Mr. Batson was in his late 20s at the time of the events in question. The complainant was a few years younger. They knew each other and had spent time together over a period of several months. The sexual assault charge related to events that occurred in the complainant's apartment on the night of 14 October 2020. As is often the case in sexual assault prosecutions, the only two witnesses to the events were the complainant and the appellant. There was no dispute that sexual interactions occurred. The issue was whether those interactions were non-consensual.

Text Messages

[4] Mr. Batson and the complainant had arranged by text message to see each other at the complainant's apartment on the evening in question. The details of the text message exchange are not germane to the issues on appeal.

At the Complainant's Apartment

[5] Mr. Batson arrived at the complainant's apartment at around 7:00 p.m. The complainant's two children were already in their bedroom for the night.

[6] The complainant and Mr. Batson sat together on the couch, watched television, and engaged in conversation. In their trial testimony, the parties gave very different accounts of what happened next.

Complainant's Account of the First Incident

[7] On the complainant's account, she and Mr. Batson were sitting together on the couch. Mr. Batson had his arm on the back of the couch behind her head. They talked about their relationship.

[8] Mr. Batson leaned in to kiss her. She said she did not want him to do that and moved her head around to "dodge" the kiss. They physically struggled. She found herself underneath Mr. Batson. She rolled over onto her stomach, with Mr. Batson on his knees, straddling her. She repeatedly told him, "I don't want this", or words to that effect. He responded, "[w]hen I see you, I lose control". She held onto the front of her pants, as Mr. Batson pulled them down from behind. He pulled so hard the pants tore at the seam.

[9] Mr. Batson proceeded to have non-consensual vaginal intercourse with her, while on top of her, from behind, for 10 to 15 minutes. Mr. Batson asked her where she wanted him to ejaculate. She responded that she did not want him to ejaculate at all. He ejaculated inside of her. She was crying.

Mr. Batson's Account of the First Incident

[10] On Mr. Batson's account, while he and the complainant were together on the couch, the complainant remarked that she had just finished a "photo shoot" and had purchased some new underwear. She lifted up her shirt to show him.

[11] He and the complainant started "kissing and touching each other". He kissed her and she "kissed [him] back". She said if all he wanted was sex then it was not fair to her. Mr. Batson denied that all he wanted was sex but explained that he had a lot going on in his life.

[12] They "proceeded to ... kiss more" and "ended up having sex". The complainant removed Mr. Batson's shirt, and Mr. Batson took off his own pants. He tried to remove the complainant's pants but could not get them all the way off because they got "stuck at the ankles".

[13] Mr. Batson and the complainant had sex for about 20 minutes, in "a couple [of] positions". She was moaning. The final position was with the complainant on top of him. He asked her where she wanted him to ejaculate, and she said inside of her.

[14] When Mr. Batson finished, he sat up, at which point he could hear the complainant crying. He was "shocked" by this.

Interval Between the Two Incidents

[15] It was common ground that between the two incidents, the complainant was crying.

Complainant's Account of the Second Incident

[16] On the complainant's account, Mr. Batson asked if she was crying and she said yes. Mr. Batson said, "so now I'm the bad guy".

[17] After a few minutes, Mr. Batson pulled her toward him for a hug. Referring to the first incident, he told her, "it wasn't forced", they just had "intense sex". She said she did not want a hug.

[18] Mr. Batson kissed her and, according to her, she "kissed him back", or "he kissed me and I wasn't pulling away".

[19] Mr. Batson then "abruptly" turned her around, asking her "if [she] was sure", to which she responded, "sure, I guess so". When asked in direct examination at trial why she responded in that way, she said:

at that point I felt like in the first like incident of where he had forcefully had sex with me I felt like I had said it in any way vocally possible and using my body language as much as I could to make myself clear, and that was not successful in any way. And then I had tried again being vocal afterwards and it just seemed like it didn't really affect him, what had just happened. I also had my girls sleeping in the other room and my girls are little. And I just was unsure of how things would happen if they had woken up, so I felt at that point that that was very clear what he was there for and that if it -- if I gave him what he wanted at that time that he would leave maybe after.

[20] Mr. Batson then grabbed her by the "scruff of [her] hair", pulled her head back, and had forcible vaginal intercourse with her, from behind, while she was pinned against the couch.

[21] The incident continued as Mr. Batson pulled her by the hair to two other locations in the apartment. He first pulled her into the bathroom where he continued to have forcible intercourse with her, up against the counter. He then pulled her over to the dining room and had forced intercourse with her on or up against the table. (The complainant testified that Mr. Batson was six foot three or four and weighed over 200 pounds, while she was five foot seven and weighed 115 to 120 pounds.)

[22] The complainant estimated that the second incident lasted approximately 10 minutes, after which Mr. Batson went back to the couch, got dressed, and left the apartment.

Mr. Batson's Account of the Second Incident

[23] On Mr. Batson's account, he was shocked when he realized the complainant was crying. He said that she was "[bawling] and crying really loudly". He asked her what was wrong and told her, "I can't read your mind". The complainant replied, "I said no, I said no".

[24] Mr. Batson testified that he had mixed feelings at this point. On one hand, he thought it was just "another" of the complainant's "ploys ... to get [his] attention". On the other hand, he considered that her allegation could be serious because of "the damage it could do" to his reputation, his career, and his family. Mr. Batson thought she just needed a hug. They "hugged for a little bit", he "kissed her on the forehead", and then she "laid in [his] lap".

[25] The complainant then said, "let's have sex". Mr. Batson asked her how she could make this suggestion right after accusing him of "like sexually assaulting" or "raping" her. The complainant responded she just, "didn't want to have sex that one time".

[26] Mr. Batson pondered her answer. He thought the right thing to do might be to leave, but worried that if she phoned the police, he would not have "anything to stand on". So, he said, "okay, let's go", and they "proceeded to have sex".

[27] Mr. Batson felt if he had sex with the complainant in a number of different places throughout the apartment, it would be "hard for her to say that ... I sexually assaulted her". Mr. Batson then had consensual sex with her on the dining table, and in the bathroom. He ejaculated inside her again.

[28] The complainant then starting smoking from a bong, which made Mr. Batson upset, so he left. He estimated that by this time it was around 12:00 or 1:00 a.m. He testified that the complainant wanted him to stay, but he left because he had a class in the morning.

[29] In cross-examination, the complainant's account of the second incident was put to Mr. Batson, and he disagreed with it:

Q: Okay. I'm going to suggest that she never laid her head on your lap.

A: She did.

Q: And I'm going to suggest that she never said to you, let's have sex.

A: She did say that.

Q: I'm going to suggest that what happened was you've pulled her in for a hug, you're kissing her, she's not really saying anything at that point and then you say, are you sure.

A: I disagree.

Q: And that her response then is sure or I guess so or something to that effect.

A: Disagree with that.

Q: And I'm going to suggest that you knew that that answer was questionable given what she had just been saying to you about this first time you had sex.

A: Yes.

Q: Right? You knew that that answer was questionable.

A: I knew it wasn't a normal response, yes.

Q: Right. In your mind it wasn't a normal response for someone who has just said that you've sexually assaulted them to now say let's have sex again.

A: Yes.

Q: So you - you knew that this could be problematic. Right?

A: Guess.

Q: Her saying let's have sex again, this is problematic, right?

A: Yes.

Subsequent Events

[30] At 11:58 p.m. on that night, the complainant sent a text message to Mr. Batson that read, "[l]et's just forget about this shit ok? I love you, I know you love me. I just want us to move forward".

[31] Some days later, the complainant and Mr. Batson argued about his proposal to include personal information about her in a school paper he was writing. The complainant told Mr. Batson she was frustrated with this because she felt Mr. Batson had mistreated her.

[32] The complainant brought her allegations to the police on 26 October 2020.

Trial Judge's Reasons

[33] After reviewing the elements of the offence of sexual assault, the testimony of the two witnesses, and setting out the principles governing credibility assessment under R. v. W.(D.), [1991] 1 S.C.R. 742, the trial judge considered the credibility and reliability of Mr. Batson's evidence. No issue is taken on appeal with the trial judge's statement of legal tests.

[34] In assessing Mr. Batson's testimony, the trial judge identified the following four "discrepancies":

1) Mr. Batson testified that when he first arrived at the apartment, one of the complainant's children came out of her bedroom to show him a stuffed toy. He then went into the children's bedroom for several minutes while the complainant put them back to sleep. In cross-examination, Mr. Batson agreed that he did not mention this in his statement to the police, and that these events took place on another occasion when he was at the complainant's apartment.

2) Mr. Batson testified that in between the first and second incidents, the complainant got up from the couch and went to look for her phone. In cross-examination, he agreed that he did not mention this in his police statement. Instead, he told the police that the complainant got up from the couch and went into the children's bedroom to settle the children, and she came out of the bedroom crying.

3) Mr. Batson testified that in the course of the first incident, he and the complainant had sex in multiple positions. However, his police statement made "no mention of this". The trial judge stated in his reasons, "[t]his raises a concern on my part that Mr. Batson has embellished his evidence at trial".

4) In his testimony in chief, Mr. Batson said that in between the first and second incidents, he put on his boxer shorts. In cross-examination, he agreed that in his police statement, he said he got fully dressed in the interval between the first and second incidents.

[35] The trial judge concluded:

[52] given these discrepancies, Mr. Batson's evidence is not credible or reliable. I find that his evidence alone does not raise a defence or negate an essential element of the offence of sexual assault.

[53] The second step in the analysis is to ask whether Mr. Batson's evidence nevertheless raises a reasonable doubt. Once again, given my finding that Mr. Batson's evidence was not credible or reliable, I find that a reasonable doubt has not been raised.

[54] As I go through the R. v. W. (D.) analysis I am mindful that the burden of proof always remains on the Crown.

[55] The third step in the analysis requires an assessment of all the evidence. I will turn then to examine the evidence of [the complainant].

[36] In his subsequent analysis of the complainant's testimony, the trial judge addressed the defence submission that she was not credible because she had various motives to lie. He considered three separate motives put forward by the defence. The details are not germane to the issues raised on appeal. The judge did not consider the evidence "sufficient" to support a conclusion that the complainant had a motive to lie, but instructed himself that the "failure to show" such a motive did not mean he must accept her evidence.

[37] The trial judge also considered a defence submission that the complainant's testimony was not reliable because she contradicted herself about the date of the incident in relation to the duration of her relationship with Mr. Batson. The judge did not find that submission to be borne out by the evidence.

[38] With respect to the complainant's credibility and reliability the trial judge said:

[63] I found [her] evidence to have been forthright and candid. Her testimony that she did not consent to sexual intercourse was consistent throughout. [Her] evidence was not successfully shaken in cross-examination, and her answers in cross-examination were consistent with her answers in direct examination.

[39] The trial judge then turned to discuss the two "incidents" of "sexual activity".

[40] With regard to the first incident, the trial judge was satisfied that the complainant "never communicated her consent, whether by words or conduct". He found that Mr. Batson "forced himself upon [the complainant]". The judge was "satisfied that Mr. Batson was aware of [the complainant]'s objections at the time and chose to ignore them". On this basis, the trial judge concluded that the first incident was a sexual assault.

[41] The trial judge considered the second incident to be "more problematic". He explained the basis for his concern as follows:

[70] Mr. Batson said after he and [the complainant] first had sexual intercourse, she was crying and telling him she said "no." Mr. Batson recognized that he could go to jail for sexual assault and that all he had worked for could be lost. Despite this serious concern, Mr. Batson said [the complainant] asked him to have sex again and he accepted the offer.

[71] I would have found this description to be unbelievable except for [the complainant]'s evidence.

[72] [The complainant] testified that after the first incident, Mr. Batson kissed [the complainant] and she kissed him back. Mr. Batson then said, "Are you sure?" [The complainant] answered, "Sure, I guess."

[73] Mr. Batson then turned [the complainant] so that she was facing the back of the couch. According to [the complainant] Mr. Batson again asked, "Are you sure?" [The complainant] responded, "Sure. Yeah. I guess so."

[74] This exchange raises the possibility that either [the complainant] consented to the second act of intercourse, or that Mr. Batson had a mistaken belief in [the complainant]'s consent.

[Emphasis added.]

[42] The trial judge then considered whether the Crown had proven both the actus reus and mens rea of sexual assault in relation to the second incident.

[43] With regard to the actus reus, relying on the holding in R. v. Ewanchuk, [1999] 1 S.C.R. 330 at para. 62, that a complainant's "freedom of choice" may be vitiated by fear, fraud, or the exercise of authority as contemplated in s. 265(3) of the Criminal Code, R.S.C. 1985, c. C-46. In such circumstances, "the law deems an absence of consent" and the actus reus of sexual assault is established. The judge reasoned that the complainant's "apparent consent" to the further sexual activity in the second incident had to be "viewed in the context that the first incident was without [the complainant]'s consent". On the evidence as a whole, the judge was satisfied that the complainant "only appeared to consent", "out of fear and her wish for Mr. Batson to leave", such that the actus reus had been made out in relation to the second incident.

[44] Turning to the mens rea, that Mr. Batson intentionally touched the complainant was conceded; the only issue was whether the Crown had proven beyond a reasonable doubt that he knew of, or was reckless or wilfully blind to, the complainant's lack of consent. He agreed that after the first incident, the complainant was crying, and that she told him she had said "no". He conceded in cross-examination that her subsequent suggestion to have sex was "not a normal response". He viewed her request as "problematic", but felt the best way to deal with it was to have sex with her in different locations throughout the apartment.

[45] The trial judge then said this:

[82] Mr. Batson said he asked for [the complainant]'s consent twice before further sexual activity. The second time he asked her was while he was already positioning [her] for sexual activity. In my view, any expression of consent by [the complainant] was forced from her.

[46] The trial judge concluded that, "[a]t a minimum, Mr. Batson was reckless or wilfully blind as to whether [the complainant] was consenting to sexual activity the second time". Mr. Batson had reason to be concerned about the complainant's consent, but chose to ignore his concerns. The steps he took to ascertain whether the complainant was truly consenting were "inadequate and unreasonable". The judge was therefore satisfied that Mr. Batson had the requisite mens rea to be guilty of sexual assault in relation to the second incident.

On Appeal

[47] Mr. Batson's factum identifies the following interrelated errors in the trial judge's assessment of the credibility and reliability of his evidence:

(i) Insufficiency of Reasons: The trial judge's reasons and findings in relation to the first incident cannot be reconciled with his reasons and findings in relation to the second incident, such that the reasons are insufficient to explain the outcome or to allow for proper appellate view, particularly in relation to the second incident.

(ii) Errors of Law: The trial judge misapplied the burden of proof and the principles governing assessment of Mr. Batson's testimony as discussed in W.(D.) by collapsing the first and second stages of the analysis, and further erred in his consideration of the issue of honest but mistaken belief in communicated consent.

(iii) Misapprehensions of Evidence: The trial judge misstated or mischaracterized the evidence in finding "discrepancies" in Mr. Batson's testimony. He also conflated the testimony of Mr. Batson and the complainant on the topic of consent (or honest but mistaken belief in communicated consent) in relation to the second incident.

[48] For its part, the Crown argues that, when read as a whole, and interpreted in light of the presumption that the judge knew and properly applied the law, the reasons are sufficient to permit appellate review and disclose no reviewable error. Counsel acknowledged that the reasons contain at least two factual errors but maintained that these errors were not material to the outcome, and therefore do not meet the stringent standard for overturning a judgment on the basis of misapprehension of evidence.

Analysis

Principles Governing Appellate Review of Credibility Findings

[49] The legal principles governing appellate review of credibility findings in the context of an appeal from conviction under s. 675(1)(a) of the Criminal Code are well known. As applicable to this appeal, they can be stated in four propositions.

[50] First, deference is owed to the trial judge's assessment of the evidence. Credibility findings are particularly deserving of appellate deference, because they often rest on "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events": R. v. Kruk, 2024 SCC 7 at para. 81, citing R. v. Gagnon, 2006 SCC 17 at para. 20.

[51] Second, the trial judge's reasons must be read as a whole, functionally and contextually. The reasons ought not to be parsed for error: R. v. G.F., 2021 SCC 20 at para. 76. This is particularly important when it comes to review of credibility findings, given the "acute practical difficulties trial judges face in articulating why a particular witness was believed or disbelieved": Kruk at para. 84.

[52] Third, the trial judge's reasons must be read in conjunction with the record. Even if the reasons standing on their own do not explain the "what" and the "why", there will be no reviewable error where the answer to those questions becomes clear when the reasons are read together with the record: G.F. at paras. 68-70. However, where the basis for the judge's decision is not apparent from the reasons read together with the record, it is not open to the appeal court to substitute its own analysis: R. v. Dinardo, 2008 SCC 24 at para. 32.

[53] Fourth, the trial judge is presumed to know the law, and is not required to expound upon well-known and non-controversial legal principles. In keeping with this presumption, and the deferential approach described above, ambiguity in the judge's reasons will generally be resolved in favour of the presumption that the judge knows the law and correctly applied it: G.F. at paras. 74, 78-79.

(i) Insufficiency of Reasons

[54] Mr. Batson argues that it is impossible to discern what the trial judge's findings were, or why the judge found Mr. Batson guilty, particularly in relation to the second incident. The trial judge first made a global finding at paragraphs 52-53 of his reasons that Mr. Batson's testimony was not credible or reliable, and did not raise a reasonable doubt as to his guilt. Then at paragraph 71, the judge stated that he would have found Mr. Batson's "description" of the second incident to be "unbelievable", were it not for the complainant's testimony that, when Mr. Batson asked if she wanted to have sex a second time, she said, "sure, I guess so." The judge went on to consider whether the essential elements of sexual assault were proven in relation to the second incident.

[55] The judge's comment at paragraph 71 suggests he was of the view that Mr. Batson's testimony about the second incident might have been true, particularly when considered in light of the complainant's testimony that she said, "sure, I guess so" when Mr. Batson asked for her consent in connection with the second incident. In other words, the judge's comment at paragraph 71 suggests Mr. Batson's testimony might have raised a reasonable doubt at the second stage of the W.(D.) analysis. Mr. Batson says this is inconsistent with the trial judge's earlier global finding that his testimony had not raised such a doubt.

[56] Mr. Batson says the apparent inconsistency in the judge's analysis is exacerbated by his misstatement of the evidence in paragraph 82 of the reasons, conflating the testimony of Mr. Batson and the complainant, and attributing all of it to Mr. Batson. His testimony was not that he asked the complainant whether she wanted to have sex the second time (as the trial judge stated at paragraph 82). This was in fact the complainant's account, which Mr. Batson expressly denied when it was put to him in cross-examination. Mr. Batson's testimony was that when the complainant suggested they have sex a second time, he asked her why she would say that right after accusing him of sexual assault, in response to which the complainant explained that she "didn't want to have sex that one time".

[57] In the result, Mr. Batson says it is not possible to discern whose evidence the trial judge was considering when assessing Mr. Batson's argument of honest but mistaken belief in communicated consent. This is important because the judge rejected the honest but mistaken belief in communicated consent argument at least in part because, on the judge's (inaccurate) statement of the evidence, Mr. Batson asked for the complainant's consent "while he was already positioning [her] for sexual activity". That was not Mr. Batson's evidence, but rather the complainant's evidence. Yet in his reasons, the trial judge attributed the evidence to Mr. Batson.

[58] The Crown argues that to the extent that there is any flaw in the reasons, it is limited to the judge's analysis of the second incident. Counsel says the conviction can stand on the basis of the judge's findings in relation to the first incident. The reasons make it clear that the judge rejected Mr. Batson's evidence in relation to the first incident, found that it did not raise a reasonable doubt, and was satisfied beyond a reasonable doubt on the basis of the complainant's evidence that the essential elements of the offence had been proven.

[59] In support of this position, the Crown cites R. v. G.L.M., 1999 BCCA 467. In that case, the accused was convicted on a single count of indecent assault, involving four separate incidents that spanned a period of several years. The trial judge instructed the jury that the accused could be found guilty if they were satisfied that any one of the four incidents had been proven beyond a reasonable doubt. The jury convicted. At sentencing, the judge had to interpret the jury verdict and concluded for sentencing purposes that three of the four incidents had been proven. On appeal, the accused contended that only two of the four incidents had been proven. He urged the court to set aside the conviction, amend the indictment to charge four separate counts, and order a new trial on two of them.

[60] Justice Ryan, writing for the majority, reasoned it was not improper to charge a single count alleging multiple incidents, on the theory that a series of events can constitute a single continuing transaction. She explained that "[a]lthough it is not improper to charge a continuing offence as one count in an indictment", it remains open to the court to divide the count under s. 590(3) of the Criminal Code where required in the interest of justice: G.L.M. at paras. 12-13. Such an amendment might be required where the count as framed would prejudice the accused in his defence. Since no objection was taken to the form of the indictment at trial, and the appellant did not identify any prejudice arising from defending

one charge instead of four, there was no basis for ordering a new trial: G.L.M. at para. 14. The conviction appeal was dismissed, with dissenting reasons from Chief Justice McEachern, who took issue with the trial judge's failure to instruct the jury that they had to unanimously conclude that at least one of the incidents had been proven (G.L.M. at paras. 57-58), a point that does not arise in the present appeal.

[61] More recently, in R. v. Stover, 2020 BCCA 368 at paras. 18-19, Justice Abrioux cited G.L.M. as the leading authority in this province for the proposition that "a 'single transaction' may validly encompass several occurrences if they relate to similar acts or a similar course of conduct".

[62] The Crown argues that, whatever complaint Mr. Batson has about the judge's findings and reasoning in relation to the second incident, the judge made an error-free determination that the essential elements of the offence had been made out in relation to the first incident. The Crown says the conviction can be upheld on that basis alone.

[63] I do not find the Crown's argument convincing, at least on the judge's reasons in this case. On my reading of the reasons, the trial judge's initial analysis of Mr. Batson's credibility at paragraphs 45 to 54 was not limited to the first incident. The judge reached his conclusion that Mr. Batson's testimony was not credible and did not raise a reasonable doubt before going on at paragraphs 55 to 63 to consider the credibility and reliability of the complainant's evidence in relation to both incidents and then moved on at paragraph 64 and following to assess whether the elements of the offence had been made out in relation to each of the two incidents.

[64] Thus, at paragraphs 45 to 54 the judge made a global finding that Mr. Batson's trial testimony was not credible and did not raise a reasonable doubt. Later in the reasons (at paragraphs 69 to 71), the judge appeared to state that he was not prepared to entirely reject Mr. Batson's description of the second incident, and then went on (at paragraph 82) to misstate Mr. Batson's evidence.

[65] I accept that a trial judge is not required to analyze the evidence in any particular order and that the reasons must be read as a whole. However, on my assessment of the reasons as whole, it is impossible to discern whether the judge's initial wholesale rejection of Mr. Batson's testimony accounted for the subsequent observation that at least one aspect of Mr. Batson's description of the events could be believable given its correspondence with an utterance admittedly made by the complainant.

[66] In the result, the judge's reasons are, in my respectful view, deficient in two ways.

[67] First, the trial judge appeared to make inconsistent findings on the key issue of Mr. Batson's credibility, and the reasons are insufficient to explain the discrepancy. This deficiency implicates the judge's analysis of both incidents, not just the second as the Crown maintains.

[68] Second, and specifically in relation to the second incident, the judge's analysis of Mr. Batson's honest but mistaken belief in communicated consent argument rested on a conflation of the testimony of Mr. Batson and the complainant. This makes it impossible to conduct meaningful appellate review of the trial judge's conclusion on that particular issue.

[69] To explain, the trial judge rejected Mr. Batson's honest but mistaken belief in communicated consent argument by reasoning that when he asked the complainant a second time for her consent, he was already "positioning her" for sex. This was not Mr. Batson's testimony, rather it was the complainant's account. As a result, it is not possible to discern from the reasons whose evidence the trial judge was actually considering in assessing and ultimately rejecting Mr. Batson's honest but mistaken belief in communicated consent argument.

[70] It is important to point out that the insufficiency of the judge's reasons is closely tied to his misapprehension of the evidence, as discussed below. I therefore agree with appellant's counsel that these two grounds of appeal are interrelated. It is the insufficiency of the reasons, combined with the judge's misapprehensions of the evidence, that make it impossible to discern and properly evaluate the pathway to conviction.

(ii) Errors in Law

[71] Mr. Batson argues that the trial judge made an extricable error in law in assessing the credibility of his trial testimony, by compressing the first and second steps of the W.(D.) analysis. This argument focuses on paragraph 53 of the reasons, where the trial judge stated that at the second stage of the analysis, he had to consider whether, despite his finding that he did not believe Mr. Batson's evidence, it nevertheless raised a reasonable doubt. The judge concluded that, "given [the] finding that Mr. Batson's evidence was not credible or reliable", he was not left with a reasonable doubt as a result of Mr. Batson's testimony.

[72] I do not agree that this passage, read together with the reasons as a whole, reveals any extricable error of law in the trial judge's credibility analysis. The same reasons that cause a trier of fact to find an accused's evidence not credible or reliable may properly ground a finding that the accused's evidence does not raise a reasonable doubt. The point that the second stage of the W.(D.) analysis addresses is that even where the accused's evidence is not believed, it may still raise a reasonable doubt. On the whole of the trial judge's reasons, I see no basis for concern that he misunderstood or lost sight of that point.

[73] Mr. Batson also argues that the trial judge made an extricable error of law in his consideration of the argument of honest but mistaken belief in communicated consent. Mr. Batson says the second incident is "precisely the kind of situation" alluded to in R. v. Hoffman, 2024 BCCA 98 at para. 148 and R. v. Comin, 2022 BCSC 530 at para. 34, where the testimony of the two parties involved could in theory be "spliced" in such a way that the only material contradiction between them is not what happened, but rather differing interpretations of what happened. Counsel submits that on Mr. Batson's "interpretation" of what happened, he may well have been left with an honest but mistaken belief in communicated consent.

[74] Had the trial judge made a clear and error-free finding that the events unfolded as described by the complainant, and that Mr. Batson's account was not true, and did not raise a reasonable doubt, this would not have been a situation of differing interpretations. As already noted, the difficulty is that, when considering the issue of honest but mistaken belief in communicated consent, the trial judge erroneously attributed the complainant's account to Mr. Batson.

[75] For the purposes of this analysis, I would summarize the complainant's account as follows. She did not consent to any of the sexual activity involved in the second incident. She explained why the words "sure, I guess so" were not reflective of her true state of mind at the time. Her thinking at the time was that she had already been subjected to a forcible sexual assault, her vocal protestations had been ignored and did not affect Mr. Batson's actions, she did not know what would happen if she refused again, she was aware that her children were asleep in the nearby bedroom, and she wanted Mr. Batson to leave. So, when asked by Mr. Batson, "are you sure?", as he was positioning her for sex, she gave in and said "sure, I guess so".

[76] This testimony is entirely consistent with the judge's conclusion that consent had been vitiated by fear as contemplated in Ewanchuk at para. 62, applying s. 265(3)(b) of the Criminal Code. Thus, the actus reus of sexual assault was satisfied. The only remaining issue was whether the mens rea was proven. On that issue, the question to be considered on the complainant's account was whether her utterance of the phrase "sure, I guess so" in the circumstances somehow gave rise to an honest but mistaken belief in communicated consent on Mr. Batson's part.

[77] This can be contrasted with Mr. Batson's account. The complainant was lying in his lap. They had just had consensual sex, although afterward the complainant cried and told him she had not consented. The complainant then suggested that they have sex again. He asked her why she would say that after just accusing him of sexually assaulting her, and she responded she did not want to have sex "that one time". At this point Mr. Batson decided the best approach would be to have consensual sex with the complainant in multiple locations throughout the apartment, thereby undermining her after-the-fact claim that she did not give consent in relation to the first incident.

[78] On Mr. Batson's account, the complainant did in fact consent in relation to the second incident, such that the actus reus of the offence was not proven.

[79] Even if the judge accepted the complainant's assertion that she did not consent to the second incident, such that the actus reus element was proven, a further question would arise as to whether, on Mr. Batson's account, the complainant's utterance of the phrase "let's have sex", together with her explanation for why she would say that after just accusing Mr. Batson of sexual assault, gave rise to an honest but mistaken belief in communicated consent on his part.

[80] Due to the trial judge's error in conflating the complainant's testimony with Mr. Batson's on the issue of honest but mistaken belief in consent, it is impossible to conduct effective appellate review of whether the judge made a substantive error in finding that Mr. Batson did not have an honest but mistaken belief in communicated consent.

[81] I accept the Crown's argument that the trial judge's error in attributing the complainant's testimony to Mr. Batson on the issue of honest but mistaken belief in communicated consent goes only to the second incident. This error does not directly implicate the trial judge's conclusion that the essential elements of sexual assault had been proven in relation to the first incident. However, as explained both above and below, there are other errors implicating the judge's conclusions in relation to both incidents.

(iii) Misapprehensions of Evidence

[82] Mr. Batson argues that the trial judge misapprehended the evidence in relation to the "discrepancies" in his trial testimony, and further that the trial judge misapprehended the evidence on the question of honest but mistaken belief in communicated consent in relation to the second incident. For its part, the Crown acknowledges that the trial judge erred or misstated the evidence in relation to two specific points, but maintains that these misstatements do not qualify as misapprehensions of evidence as described in the applicable case law, because the two conceded misstatements did not have a material bearing on the outcome.

[83] A material misapprehension of evidence may arise from or implicate a trial judge's assessment of witness credibility, although the standard to be met by an appellant in establishing such a misapprehension is "stringent": R. v. Lohrer, 2004 SCC 80 at para. 2, applying R. v. Morrissey, 97 C.C.C. (3d) 193, 1995 CanLII 3498 (Ont. C.A.).

[84] A misapprehension of evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence": R. v. Osinde, 2021 BCCA 124 at para. 17, citing Morrissey at 218. However, it is not enough for the appellant to put forward a different interpretation of the evidence, or to merely point to evidence which arguably weighs against the trial judge's factual findings: R. v. S.S.M., 2024 BCCA 417 at para. 50. In other words, to qualify as a misapprehension of evidence, "[t]he plain language or the thrust of the reasons must disclose an actual mistake": R. v. Sinclair, 2011 SCC 40 at para. 53.

[85] A misapprehension of evidence that is peripheral to the judge's reasoning or merely goes to the detail rather than the substance of the reasons will not suffice. Rather, the error must have played an "essential part" in the reasoning process: Lohrer at para. 2. A misapprehension is sufficiently central to the judge's reasoning process where it "could have" affected the outcome, in the sense that the result would not necessarily have been the same had the judge not made the mistake: R. v. Gill, 2018 BCCA 275 at para. 60; R. v. Smith, 2021 SCC 16 at para. 2.

[86] A material misapprehension of evidence that is shown to be central to the trial judge's reasoning process undermines the fairness of the trial. To allow the verdict to stand in such circumstances would countenance a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code. This is so even where the evidence is otherwise capable of supporting the conviction: Lohrer at paras. 1-2, citing Morrissey at 221.

[87] Mr. Batson submits that the trial judge misapprehended the evidence in relation to each of the four "discrepancies" relied upon to find that he was not credible. I do not agree with Mr. Batson's submission in relation to the first, second, or fourth points characterized by the trial judge as discrepancies. In relation to each of those points, the record supports the judge's conclusion that there was a discrepancy between Mr. Batson's trial testimony and the content of his police statement. His quarrel is more about the judge's weighing of these discrepancies, given Mr. Batson's contention that they pertained to peripheral matters.

[88] I accept that the first discrepancy -- pertaining to Mr. Batson's description of an interaction with one of the complainant's children that he later admitted must have been on a different date -- might fairly be characterized as peripheral to the material issues in the case. However, at the end of the day it was for the trial judge to consider this "discrepancy", together with the others, in assessing the credibility and reliability of Mr. Batson's testimony. Certainly, the fact that Mr. Batson included this erroneous or misremembered detail when describing the events of the night in issue supports an inference that he did not have as clear and distinct a recollection of the events as his testimony in chief might have suggested.

[89] I disagree that the second and fourth discrepancies were as "peripheral" as Mr. Batson suggests. Both pertained to events that occurred between the first and second incident. How the events actually unfolded over that period of time was critical to Mr. Batson's account of both the first and second incidents. He testified that he did not realize or notice that the complainant was crying until after the first incident ended, leading to the discussion in which the complainant said that she had not consented. Mr. Batson also testified that the second incident only occurred after the complainant suggested "let's have sex" and he followed up with a question about why she would say that. I therefore find it hard to accept Mr. Batson's submission that the accuracy of his testimony about the unfolding of events between the first and second incidents was peripheral. In any event, it was for the trial judge to weigh these discrepancies, and Mr. Batson's argument on appeal is simply an attempt to re-argue the facts of the case in the face of the trial judge's clear findings.

[90] However, I agree with Mr. Batson that the trial judge misapprehended the evidence in relation to the third "discrepancy". The trial judge stated that Mr. Batson's statement to the police made "no mention" of multiple sexual positions during the first incident. This is factually inaccurate.

[91] The Crown concedes that the trial judge misapprehended the evidence on this point, but submits that the error is not material to the outcome because it goes to only one of the four "discrepancies" identified by the judge. The Crown says even without this "discrepancy", there were three others relied upon by the trial judge to find that Mr. Batson was not a credible witness.

[92] I find it hard to accept the Crown's submission that the misapprehension of the evidence on this point was not central to the judge's reasoning process. This third discrepancy is the one that went most directly to his account of the sexual activity. It is also the only discrepancy the trial judge expressly linked to Mr. Batson's credibility, as opposed to the reliability or accuracy of his recollection. The judge characterized Mr. Batson's evidence of multiple sexual positions during the first incident as embellishing his testimony. The implication of the judge's finding was that there were not multiple sexual positions during the first incident, as his erroneous impression of Mr. Batson's police statement would suggest. In the end, the trial judge rejected Mr. Batson's account of the first incident, and found beyond a reasonable doubt that the complainant's account (involving one sexual position during the first incident) was accurate and reliable.

[93] I conclude that the judge's misapprehension of evidence on this point bore directly on his reasoning process, and made it easier for him to accept the complainant's account of the first incident.

[94] Mr. Batson also argues that the trial judge misapprehended the evidence in relation to the second incident, in several respects.

[95] One such error is found at paragraphs 72 to 73 of the reasons, where the trial judge recounted the complainant's evidence about what she said just before the second incident began. The trial judge stated that Mr. Batson twice asked the complainant, "are you sure?", and she replied, "sure, I guess so" the first time, and "[s]ure. Yeah. I guess so" the second time. This is incorrect. The complainant's testimony was that Mr. Batson asked her once, and she replied only once.

[96] The Crown argues that this is not a material misapprehension of the evidence, because it was a mistake that benefitted Mr. Batson. If this were the only mistake in the judge's analysis of the second incident, I might be inclined to agree.

[97] However, as already noted, the trial judge also misapprehended the evidence at paragraph 82 of the reasons by attributing to Mr. Batson evidence given by the complainant and drawing from the description of the circumstances -- that he was then "already positioning [her] for sexual activity" -- a conclusion adverse to Mr. Batson.

[98] The Crown argues that the trial judge's reference at paragraph 82 of the reasons can clearly be understood as a simple misstatement or slip of the tongue. The trial judge referred to Mr. Batson's testimony, when in the Crown's submission based on the whole of the reasons, he clearly meant to refer to the complainant's testimony. It is by no means clear that the judge

made a simple misstatement. The judge had already made several other errors in recounting the evidence. From the appellant's perspective, the reasons for judgment, which were reduced to writing and signed by the trial judge, are wrong. I find it hard to disagree with that view.

[99] Accepting that the judge made an error, I find that it was material for the following reasons. As explained above, the trial judge's analysis of the honest but mistaken belief in communicated consent argument depended on whose evidence the judge was considering. Unless he rejected Mr. Batson's testimony as being completely incredible and not raising a reasonable doubt (which the trial judge evidently had some difficulty in doing, at least in relation to honest but mistaken belief in communicated consent, as indicated in paragraph 71 of his reasons), it was incumbent on him to assess whether Mr. Batson's testimony raised a reasonable doubt. On Mr. Batson's account, the complainant suggested, "let's have sex", and he followed up by asking why she would say that given her behaviour. The trial judge never considered Mr. Batson's honest but mistaken belief in communicated consent argument on that basis.

[100] The Crown also points out that this particular misapprehension of evidence relates solely to the judge's analysis on the second incident. If this were the only misapprehension of evidence in issue, that argument might carry some sway on the authority of G.L.M., and the theory that the conviction could be supported based on the trial judge's conclusion that the elements of sexual assault were made out in relation to the first incident. However, the judge made other misapprehensions of evidence, one of which materially affected the judge's initial, global assessment of Mr. Batson's credibility. That error implicates his reasoning in relation to both incidents. Further, the judge's reasons contain what appear to be mutually inconsistent conclusions on the issue of Mr. Batson's credibility on the two incidents, and do not reveal a pathway to a finding of guilt in relation to the second incident.

[101] I conclude that, in view of the judge's misapprehensions of evidence, coupled with reasoning that is insufficient to explain the result, the conviction must be set aside under s. 686(1)(a)(iii) of the Criminal Code.

Disposition

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

"The Honourable Justice Riley"

I AGREE:

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Justice MacNaughton"

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Prepared on 27 October 2026 · Esheria