

CANADA / JUDGMENT

R. v. Boodhoo

2024 BCCA 294

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 294 R. v. Boodhoo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Boodhoo,

2024 BCCA 294

Date: 20240815

Docket: CA48417

Between:

Rex

Respondent

And

Isaiah Melvin-Jean Boodhoo

Appellant

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Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Griffin

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated September 1, 2021 (conviction) (R. v. Boodhoo, Vancouver Docket 251279-1).

Counsel for the Appellant:

C.L. Corriveau

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

May 27, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 15, 2024

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Voith

Summary:

The appellant appeals from his conviction of sexual assault. He says that the acquittal on a second count of administering a noxious substance was inconsistent with the conviction of sexual assault. He also says the judge erred in his approach to the credibility and reliability of the complainant and the appellant. Held: Appeal dismissed. The two counts were logically separate, and acquittal on one was not inconsistent with conviction on the other. The judge carefully considered any inconsistencies, gaps or weaknesses in the complainant's evidence, but concluded she was credible and reliable on the key points of evidence relating to the sexual assault. The judge also carefully considered the appellant's evidence, which had many inconsistencies. The evidence was not tainted by improper cross-examination by Crown counsel nor did the judge err in considering aspects of his statement to police not in evidence. Further, the judge did not err in making general assumptions about male behaviour not specific to the appellant. After assessing his evidence in detail, the judge found the appellant not to be credible or reliable. The appellant has not demonstrated a basis for appellate interference in the judge's assessment of the credibility and reliability of the complainant and the appellant.

Reasons for Judgment of the Honourable Justice Griffin:

- [1] Mr. Boodhoo appeals from his conviction of sexual assault, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46. The complainant was his post-secondary classmate and friend. The sexual interaction took place in Mr. Boodhoo's bedroom where the two had been playing video games after consuming alcohol and a marihuana joint.
- [2] Mr. Boodhoo was also charged in count 2 with administering a noxious substance to the complainant, contrary to s. 245(1) of the Criminal Code. It was alleged that he gave the complainant a Listerine strip with intoxicating drugs on it. He was acquitted of this charge.
- [3] At trial by judge alone, Mr. Boodhoo did not deny that he engaged in sexual activity with the complainant. The central issue was consent or honest but mistaken belief in consent, and this turned to a large degree on the judge's assessment of the credibility and reliability of the complainant and Mr. Boodhoo, the only two witnesses to the sexual interaction. Given his credibility and reliability findings, the judge concluded that Mr. Boodhoo's defence of honest but mistaken belief in communicated consent did not have an air of reality. He found Mr. Boodhoo guilty with respect to count 1.
- [4] The grounds of appeal primarily challenge the judge's assessment of the credibility and reliability of the complainant, on the one hand, and Mr. Boodhoo, on the other hand. In addition, Mr. Boodhoo asserts that conviction on the sexual assault charge is inconsistent with the dismissal of count 2.
- [5] For the reasons that follow, I would dismiss the appeal.

Background

- [6] Mr. Boodhoo invited the complainant to his residence, a house he shared with other students, on the evening of May 19, 2019. At that time, he was 22 years of age; she was 18 but close to turning 19. The two of them played pool and drank alcohol. They smoked a marihuana joint provided to them by Mr. Boodhoo's roommate.
- [7] The complainant drank approximately three beers and had a sip of whiskey, in addition to sharing the joint. The joint was smoked on the roof of the garage.
- [8] Just after finishing the joint, Mr. Boodhoo offered the complainant a Listerine strip which she consumed. He told her the Listerine strip contained "acid".
- [9] The two resumed playing pool in the house but the complainant then used the washroom. She felt dizzy and light-headed when she sat down. When she stood up, she could not think straight and her mind was "like mush".
- [10] She returned to play pool and soon after followed Mr. Boodhoo into his bedroom to play video games.

- [11] According to the complainant's evidence, after playing video games for a while the screen started to get blurry and her body felt weak. It was then that Mr. Boodhoo got on top of her, started kissing her, then pulled her pants and underwear down, and began touching her between her legs.
- [12] The complainant's evidence was that Mr. Boodhoo was talking and asking her questions but she could not process what he was saying. She said "no" over and over again and told Mr. Boodhoo "I can't make decisions". She ultimately said "if you're going to do something, at least put on a condom". After the incident ended, she was upset and when she left the residence she was sobbing.
- [13] The complainant's messages to a friend, by video on Snapchat before the sexual interaction, and by text message after, were entered into evidence. The judge considered these messages in the Reasons.
- [14] Mr. Boodhoo's evidence was similar to the complainant's evidence regarding their drinking and then smoking a joint on the roof of the garage. He agrees he gave the complainant a Listerine strip and he told her it contained acid. He says it was simply a joke. After playing pool for a while, he invited the complainant to play video games in his bedroom, where he had a video game set up he was quite proud of. They laid on the bed to play video games.
- [15] Mr. Boodhoo said they began kissing at one point, and the sounds the complainant was making indicated she was loving it. He said that the sexual interaction progressed, but with each step of him touching her, he first asked her if it was okay or if she was sure he should keep going. She indicated yes, and to keep going. As he progressed with touching her, he pulled down her pants and underwear and performed oral sex on her. At one point when he asked her if she wanted him to continue, she said yes, as long as he had a condom. He went to put on a condom but was unable to achieve an erection. He was about to try having intercourse when the complainant said "no, stop". He then immediately stopped.
- [16] He denied that she told him "no" earlier in the encounter or said she "can't make decisions".
- [17] Mr. Boodhoo said that he walked the complainant to the door and outside.
- [18] Mr. Boodhoo was interviewed by the police when he was arrested on June 24, 2019. There were two stages to his interview, broken up by an interval when he was left alone. Mr. Boodhoo's version of events changed as between the first and second stages of the interview, and his evidence at trial changed yet again, including over the course of his testimony. These inconsistencies were the subject of cross-examination and were important to the judge's consideration of Mr. Boodhoo's credibility.

Trial Judgment

- [19] The judge self-instructed on the correct legal principles, and appreciated that the critical issue on count 1 turned on the facts of what happened after Mr. Boodhoo and the complainant went into the bedroom to play video games.
- [20] The judge reviewed the evidence in considerable detail, focusing on alleged inconsistencies and gaps in the testimony of each of Mr. Boodhoo and the complainant.
- [21] The judge analyzed Mr. Boodhoo's evidence in detail, explaining at paras. 66-104 of the Reasons several examples where he lacked credibility or reliability. The judge addressed how Mr. Boodhoo deliberately left out the sexual encounter with the complainant in the first part of his statement to police. After Mr. Boodhoo was truthful with police about the sexual encounter, he continued to offer contradictory statements about his state of mind and level of intoxication on the evening in question, and evolving evidence about what happened. The judge concluded Mr. Boodhoo lacked credibility, and his evidence was also unreliable: para. 105.
- [22] The judge found the complainant to be a credible witness, who occasionally made mistakes and had gaps in her memory, going to her reliability, but was doing her best to be truthful. The judge analyzed in detail the reliability of the complainant's evidence, given her alleged intoxication, noting that intoxication can affect one's ability to perceive and recall events. The judge considered the Snapchat and text messages that the complainant sent as indicating a state of mind consistent with the truthfulness of her testimony.
- [23] The judge was not satisfied beyond a reasonable doubt Mr. Boodhoo caused the complainant to take a noxious substance. The judge reasoned that the complainant may have felt the way she did from consuming the marijuana joint. There was no evidence that acid could be administered on a Listerine strip or presence of acid in the complainant's system.
- [24] The judge next analyzed whether the complainant had the capacity to consent to the sexual interaction in the bedroom. He concluded that while she had some level of awareness, she had difficulty processing information. She understood the physical acts that occurred but not that she had a choice whether to engage in the activity once it started. She was incapable of forming subjective consent. The judge added that he was satisfied beyond a reasonable doubt she did not consent. He accepted her evidence that she did not want to engage in sexual activity with Mr. Boodhoo that evening.
- [25] The lack of consent satisfied the actus reus element of the sexual assault offence.
- [26] The judge then turned to the mens rea component, namely, whether Mr. Boodhoo honestly believed "that the complainant affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity", at para. 158, citing *R. v. Barton*, 2019 SCC 33 at para. 90 and *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 49, 1999 CanLII 711.

[27] The judge considered the defence of honest but mistaken belief in consent, stating at para. 159:

[159] As can be seen, the focus of this defence is the communication of consent, which can be by words or conduct. In *R v. Park*, [1995] 2 SCR 836 (at para. 44), L'Heureux-Dube J. broke the practicalities of the analysis into two components:

(1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (emphasis in original). See also *Barton*, at para. 91.

[28] Further, the judge stated at para. 162:

[162] In the present case, Mr. Boodhoo and [the complainant] gave evidence that differed in important aspects regarding consent. The applicability of this defence is influenced by the degree of similarity (or difference) in the evidence of an accused and complainant of what happened at the material time. The point was explained in *Park* (at para. 26):

To summarize, when the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, then the defence of honest but mistaken belief in consent should generally be put to the jury, except in cases where the accused's conduct demonstrates recklessness or wilful blindness to the absence of consent. On the other hand, courts have generally refused to put the defence of honest but mistaken belief in consent to the jury when the accused clearly bases his defence on voluntary consent, and he also testifies that the complainant was an active, eager or willing partner, whereas the complainant testifies that she vigorously resisted. In such cases, the question is generally simply one of credibility, of consent or no consent.

[29] The judge analyzed this issue and concluded that the defence of honest but mistaken belief in communicated consent did not have an air of reality, based on the following findings:

[163] I have rejected Mr. Boodhoo's evidence that he continually asked [the complainant] for consent at each juncture of their sexual activity, and that she affirmatively communicated that consent each time. I have also discussed my acceptance of [the complainant]'s evidence that she said "no" repeatedly, and that she "could not make decisions". Despite these statements, the activity continued leading her to say something like, "If you're going to do something please put on a condom".

[164] I appreciate that there are gaps in the dialogue between [the complainant] and Mr. Boodhoo without reliable evidence to fill them. But in the context of the words that I do accept were spoken, and when they were spoken, I cannot see how the later request to put on a condom, could be construed as communicating consent. It sounds more like succumbing to the inevitable which was effectively [the complainant]'s evidence.

- [165] On the other hand, if the comment could be construed as something other than that, at best it introduces ambiguity when considered in the context of [the complainant]'s earlier comments. Proceeding in the face of such ambiguity demonstrates recklessness or potential wilful blindness to the absence of consent.
- [166] It is hard to ascribe much weight to [the complainant]'s evidence that she felt when she made her police statement that there was miscommunication between her and Mr. Boodhoo. The basis for her conclusion, and what the miscommunication was, is simply unclear. For example, was this a conclusion she reached because she had repeatedly said "no" and "I can't make decisions" but Mr. Boodhoo went ahead anyway? Or was there dialogue or action by one that the other just wasn't grasping?
- [167] Given the credibility and reliability findings I have made I do not find the defence of honest but mistaken belief in communicated consent has an air of reality.

Issues on Appeal

- [30] Mr. Boodhoo alleges that the acquittal on count 2, administering a noxious substance, was inconsistent with the verdict on count 1.
- [31] The remaining grounds of appeal can be divided into a challenge to the judge's assessment of the complainant's credibility; and a challenge to the judge's assessment of Mr. Boodhoo's credibility.

Legal Principles on Appeal

- [32] A verdict can be set aside as unreasonable pursuant to s. 686(1)(a)(i) of the Criminal Code. Where it is argued that a verdict is unreasonable because it is inconsistent with another verdict, the accused must show that the two counts are not logically separate and the separate verdicts could not be reconciled on a rational basis; and that no reasonable trier-of-fact, properly instructed, could have arrived at those conclusions: *R. v. Campbell*, 2023 BCCA 19 at paras. 36-43; *R. v. R.V.*, 2021 SCC 10 at paras. 28-30; *R. v. Pittiman*, 2006 SCC 9 at paras. 6-8.
- [33] An appeal court is precluded from interfering in a trial judgment assessing credibility except where narrow grounds of appeal have been established. The appellant must demonstrate the judge made a palpable and overriding error, not simply argue that the evidence could have been interpreted differently. A palpable error is one that is obvious; an overriding error is one that played an essential part in the reasoning process resulting in the conviction: *R. v. Lohrer*, 2004 SCC 80 at para. 1.
- [34] As explained by Justice A. MacKenzie in *R. v. S.S.*, 2022 BCCA 392, in order for a misapprehension of evidence to justify appellate interference, it must go to the substance rather than the detail of the trial judge's reasons and play an essential part not just in the narrative, but in the reasoning process resulting in conviction: at para. 53; *Lohrer* at para. 2.

- [35] The Supreme Court of Canada has affirmed these principles several times, in restoring trial judgments that have been interfered with by appeal courts, including more recently in *R. v. Kruk*, 2024 SCC 7 at paras. 80-86.
- [36] I referred to these principles in *R. v. Thomas*, 2024 BCCA 150, summarizing them as follows:
- [61] Absent a recognized error of law, these are findings entitled to deference on appeal unless a palpable and overriding error can be shown: *R. v. Kruk*, 2024 SCC 7 at para. 82. As noted in *Kruk*, credibility findings can be the most important findings in a criminal trial, are grounded in the totality of the evidence including the trial judge's experience watching and listening to the witnesses, and can be difficult for a trial judge to precisely articulate:
- [81] Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621).[4] With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, at para. 28; *R. v. G.F.*, 2021 SCC 20, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.
- [Emphasis added in *Thomas*.]
- [62] Appellate courts are restricted to reviewing lifeless written transcripts and are often encouraged to focus on a few lines only, unlike trial judges, who sit through an entire case and hear evidence from all the witnesses. Accordingly, trial judges have a significant advantage when it comes to assessing credibility. Appellate review is limited to circumstances where a judge errs in principle in assessing credibility or uses irrelevant criteria: *R. v. S.S.*, 2022 BCCA 392 at paras. 36-37.
- [37] Furthermore, the appeal court must read reasons for judgment generously, considering them in their entire context, including in context of the evidence and submissions at trial. The appeal court needs to appreciate that it can be difficult for the trial judge to articulate the constellation of factors and impressions that emerge after watching and listening to all the witnesses, leading the judge to believe some witnesses and disbelieve others: *R. v. W.F.G.*, 2024 BCCA 65 at paras. 13-15, *R. v. R.E.M.*, 2008 SCC 51 at para. 16; *R. v. G.F.*, 2021 SCC 20 at paras. 69, 79, 81.

Analysis

1. Acquittal on Count 2 and Alleged Inconsistent Verdict

[38] Mr. Boodhoo submits that the Crown theory at trial was that he administered a noxious substance to the complainant, acid on the Listerine strip, and this impaired the complainant so he was then able to engage in sexual activity with her without her consent. When count 2, the offence of administering a noxious substance, was not proven, this fundamentally undermined the Crown case so an acquittal ought to have followed on the sexual assault charge. Mr. Boodhoo argues that dismissal of count 2 meant the complainant was not credible or reliable generally, which is not consistent with conviction on the sexual assault charge.

[39] This argument ignores the following key points:

- a) The complainant did not contend she had direct knowledge of Mr. Boodhoo putting acid on the Listerine strip. She simply gave evidence that she had the impression he had done so. He agreed he told her there was acid on the Listerine strip. Therefore, the complainant's evidence was not shown to be an exaggeration, untruthful or unreliable when the judge was not satisfied beyond a reasonable doubt Mr. Boodhoo had tampered with the Listerine strip.
- b) The complainant described how she felt as the night went on and they moved into Mr. Boodhoo's bedroom. Mr. Boodhoo agreed she had consumed alcohol and a marijuana joint, as did he. There was no scientific evidence regarding the qualities of the joint and its interaction with alcohol. On the evidence, the complainant was more intoxicated than was Mr. Boodhoo but different people may react differently to intoxicating substances. It was available to the judge to conclude that the complainant did experience the intoxication symptoms she described, but he had a reasonable doubt that it was due to a noxious substance administered by Mr. Boodhoo on the Listerine strip.

[40] Contrary to Mr. Boodhoo's submissions, the two counts were logically separate. The judge could have rationally convicted on either count without convicting on the other.

[41] Dismissal of count 2 was not in any way inconsistent with believing the complainant was a credible witness and reliable on key points regarding the sexual assault.

[42] Mr. Boodhoo submits that it was unfair for the judge to find that the complainant was intoxicated by some other means and therefore lacked capacity, when the Crown theory was that she was administered a noxious substance and that precluded her consent.

[43] I disagree.

[44] The state of mind of the complainant was in dispute and the Crown position was that she was subjectively incapable of consenting and did not consent, based on her described mental state. The evidence surrounding the consumption of alcohol and marihuana was not a surprise to defence counsel. Indeed, defence counsel cross-examined the complainant on the topic, and made submissions that her intoxication could have been from the marihuana

joint. It was not unfair to the defence that the judge found she was intoxicated and it could have been from the alcohol and joint.

[45] Mr. Boodhoo also submits that given he did not administer a noxious substance to the complainant, he could not have known how intoxicated or incapacitated she felt and could have had an honest but mistaken belief in consent. Thus, acquittal on count 2 supports his defence of honest but mistaken belief in consent.

[46] However, the judge analyzed the evidence regarding the sexual activity separately, without assuming or finding Mr. Boodhoo administered a noxious substance. The rejection of that defence did not turn on finding Mr. Boodhoo was responsible for the complainant's degree of impairment. Rather, in reaching his conclusion, the trial judge accepted the complainant's evidence of what happened that evening, including how she felt, what she said and what Mr. Boodhoo did, and rejected Mr. Boodhoo's evidence of their sexual interaction.

[47] I would therefore not accede to this ground of appeal.

2. Challenges to the Judge's Assessment of the Complainant's Credibility

[48] Mr. Boodhoo submits the judge erred in his assessment of the complainant's credibility in numerous ways, including:

- a) in his assessment of the complainant's degree of intoxication and how this impacted the reliability of her evidence;
- b) in his assessment of the complainant's evidence regarding the Listerine strip;
- c) in his treatment of the complainant's Snapchat messages to a friend before the alleged offence and her distress when she left the residence; and,
- d) in his treatment of gaps or inconsistencies in the complainant's evidence or evidence that Mr. Boodhoo says tended to support his version of events.

[49] The problem with Mr. Boodhoo's arguments is that in his Reasons, the judge carefully analyzed every point now raised on appeal relating to an alleged inconsistency or potential gap or weakness in the complainant's evidence. The judge considered all of the same weaknesses and challenges with the complainant's evidence. He rejected the interpretation of her evidence urged on us by Mr. Boodhoo. He grappled with the frailties in her evidence and concluded that the complainant was credible and reliable on her evidence as to how intoxicated she felt and what happened to her after she entered Mr. Boodhoo's bedroom, including that she repeatedly told him "no" and said "I can't make decisions".

[50] At best, Mr. Boodhoo simply wishes this Court to weigh and interpret the complainant's evidence differently than did the judge. That is not this Court's role.

[51] Mr. Boodhoo has demonstrated no basis for appellate interference in the judge's approach to the complainant's evidence.

[52] I would not accede to this ground of appeal.

3. Challenges to the Judge's Assessment of Mr. Boodhoo's Credibility

[53] Mr. Boodhoo challenges the judge's assessment of his credibility, and says the judge erred in several ways, namely in:

- a) considering his entire statement to the police;
- b) allowing him to be improperly questioned by the Crown; and,
- c) treatment of points of evidence as negatively reflecting on his credibility, including his inability to achieve an erection during the sexual interaction, and his understanding regarding DNA evidence.

a. Statement to the Police

[54] Mr. Boodhoo submits the judge relied on his entire statement made to the police to conclude he was not credible, and did not confine his analysis to only those portions of his statement put to him in the witness stand at trial.

[55] The judge's Reasons do not bear this argument out. Mr. Boodhoo has not demonstrated the judge relied on any portion of his police statement not also touched on in his evidence at trial.

b. Questioning by Crown

[56] As to the argument that there was improper questioning, there is no doubt Crown counsel examined Mr. Boodhoo on his several inconsistent statements, namely, those made in his interview by the police, and at trial. Based on these inconsistencies, and Mr. Boodhoo's attempted explanations for those inconsistencies, Crown counsel did suggest in the course of the cross-examination that Mr. Boodhoo was untruthful.

[57] Mr. Boodhoo complains that Crown counsel mocked his religious beliefs. That suggestion is not apparent in a review of the transcript. Crown counsel did, however, challenge Mr. Boodhoo's evidence that due to his belief in God, he decided to tell the truth in the second part of his police interview.

[58] For example, under cross-examination, Mr. Boodhoo described simply "withholding" one part of what happened when speaking to police in the first part of his interview after his arrest, but said when he was left alone for approximately 15 minutes, he prayed and decided to "come clean about everything" in the second part of the interview. Counsel for the Crown challenged Mr. Boodhoo's evidence that he was "mostly honest" in the interview, pointing out several times when he misled the police in both parts of the interview.

- [59] As I read the transcript, there was a proper foundation for the Crown to suggest that Mr. Boodhoo was not telling the truth. Mr. Boodhoo has not demonstrated any example of Crown counsel showing disrespect for his religious beliefs, as opposed to legitimately challenging his assertion that after praying he decided to tell the truth.
- [60] The Crown at one point suggested to Mr. Boodhoo, under cross-examination, that the reason for his inconsistencies was not because his "mind's all over the place" as Mr. Boodhoo stated, but because he was trying to tailor his evidence in a way that he thought would help him get acquitted. Defence counsel did not immediately object but later advised the court that Crown counsel was not entitled to suggest that Mr. Boodhoo was being untruthful because he was trying to obtain an acquittal, to which the judge indicated "okay". Defence counsel did not ask the Court to rule on an objection.
- [61] Mr. Boodhoo argues that this aspect of the cross-examination was improper, citing *R. v. White*, [1999] 42 O.R. (3d) 760, 1999 CanLII 3695 (C.A.). In *White*, the Court concluded that the Crown's cross-examination of the accused in a jury trial wrongly suggested that the accused tailored his evidence because he had the benefit of Crown disclosure prior to testifying, and had not been subject to cross-examination before testifying. This was improper because it was prejudicial and turned "fundamental constitutional rights into a trap for accused persons": at 768. Nevertheless, the judge's direct admonitions to the jury corrected the problem and did not justify appellate interference.
- [62] Here, unlike in *White*, the Crown suggestion of tailoring evidence was not related to the accused's right to Crown disclosure or the accused's right to remain silent. Rather, it was related to Mr. Boodhoo's efforts to try to minimize or reconcile his prior inconsistent statements, which he gave voluntarily.
- [63] In any event, in his very detailed Reasons, the judge did not consider the particular question and answer concerning whether Mr. Boodhoo was being untruthful to obtain an acquittal, but instead focused on the whole of Mr. Boodhoo's evidence. Importantly, the judge did not infer that Mr. Boodhoo had a motive to lie in order to obtain an acquittal.
- [64] I do not see merit to any argument that improper questioning by the Crown tainted the fairness of the trial or the judge's analysis of the evidence and Mr. Boodhoo's credibility.
- c. Judge's Findings Regarding Mr. Boodhoo's Credibility
- [65] As mentioned, Mr. Boodhoo had prior inconsistent statements that provided fodder for his cross-examination. In addition, he sought to explain away these inconsistencies in ways that provided additional material for cross-examination.

- [66] There was an evidentiary foundation for the judge to find, at para. 62, that Mr. Boodhoo's statement to the police the day he was arrested was deliberately misleading, and that his effort at trial to minimize his misleading statements was disingenuous. It was open to the judge to observe, at para. 64, that Mr. Boodhoo told the police and the court what he thought was to his advantage as opposed to the truth.
- [67] Mr. Boodhoo also submits that the judge erred in how he treated his evidence regarding his inability to have an erection during the interaction with the complainant, and his delayed disclosure of this to the police. On the one hand he submits that the judge drew on inferences regarding male sexual behaviour that were unfounded on the evidence; on the other hand, he submits that the judge failed to give due consideration to the fact an ordinary man would be embarrassed describing this situation to the police and that would explain delayed disclosure.
- [68] I do not read the judge's Reasons as based on anything other than a careful analysis of the changing statements of Mr. Boodhoo. The judge did not suggest his analysis was based on assumptions about male behaviour generally; nor did he fail to appreciate the context of Mr. Boodhoo's statement to police. Rather, it was based on a comparing and contrasting of Mr. Boodhoo's variable evidence on this topic, which the judge found to be misleading to police. I do not see any error in the judge's approach.
- [69] Mr. Boodhoo also submits the judge erred in his analysis of Mr. Boodhoo's statements related to DNA evidence.
- [70] In the first part of the police interview, Mr. Boodhoo tried to convey the impression that no sexual activity took place, all he could remember was playing video games, and waking up fully clothed, but if he woke and his pants were off, he would have called the complainant and asked her what happened. When asked in the police interview if his DNA could be on the complainant, he replied that maybe the fact at one point he put his arm around her when they were singing and dancing, and the fact she was lying on his bed, could have added some DNA. At trial, he denied this was a lie in the police interview, saying it was true that these things could have added DNA.
- [71] The police interview continued after the break, when Mr. Boodhoo says he prayed to God and resolved to tell the truth. He was asked if there was a chance his DNA would be on the complainant's vagina. He responded "no". When asked if there would be a chance his DNA would be on her underwear, he said "I don't think so". When asked about this at trial, he at first denied this was a lie, and said there was still "truth" in it when he suggested his DNA could have been transferred through the bed.
- [72] The judge referred to this evidence as an example of Mr. Boodhoo misleading the police in his police statement, despite his claim that after his prayer to God he resolved to tell the truth: paras. 66, 67, 70, 71.

- [73] On appeal, Mr. Boodhoo submits the judge improperly speculated as to what the average person would know about DNA, in concluding that he was misleading the police on this topic. I do not agree. The judge did not need to speculate. Mr. Boodhoo clearly believed DNA can be left on a person from another person touching them, and made an effort to mislead the police into thinking any touching was innocent and non-sexual. I see no error in the judge's consideration of this evidence as but one example of Mr. Boodhoo's attempt to mislead the police in his interview.
- [74] Mr. Boodhoo has not demonstrated an error in the judge's approach to his evidence and I would not accede to this ground of appeal.

Disposition

[75] I would dismiss the appeal.

"The Honourable Justice Griffin"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Voith"

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