

CANADA / JUDGMENT

R. v. C.M.M.

2020 BCCA 56

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 56 R. v. C.M.M.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. C.M.M.,

2020 BCCA 56

Date: 20200213

Docket: CA45723

Between:

Regina

Respondent

And

C.M.M.

Appellant

Restriction on Publication: A publication ban has been automatically imposed under s. 110(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person referred to in this judgment by the initials C.M.M. This publication ban applies indefinitely, unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Restriction on Publication: A publication ban has been automatically imposed under s. 111(1) of the Youth Criminal Justice Act restricting the publication of information that would identify young persons, referred to in this judgment by the initials S.F. and B.P., as having been victims or witnesses. This publication ban applies indefinitely, unless the information is published by those young persons under s. 111(2) or the court has ordered publication.

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated November 15, 2017
(R. v. C.M.M., 2017 BCPC 443,

Vancouver Dockets 23534-1 and 2354-2-C).

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Place and Date of Hearing:

Vancouver, British Columbia

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Written Submissions Received:

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Place and Date of Judgment:

Vancouver, British Columbia

February 13, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

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Summary:

The appellant was found guilty of aggravated sexual assault, unlawful confinement, and sexual assault. The charges arose from incidents that occurred four months apart and involved different complainants. The appellant seeks to overturn the convictions on all three counts. He alleges the trial judge made a number of errors that rendered the trial unfair. Held: Appeal allowed in part. The convictions for aggravated sexual assault and unlawful confinement are set aside and a new trial is ordered on those counts. The trial judge erred in failing to qualify a defence medical expert to testify about injuries sustained by the complainant and the inferences that could (or could not) be drawn from her injuries. In assessing credibility on the first two counts, the judge also erred in failing to consider the evidence as a whole. The appeal on the third count is dismissed. The trial judge did not misapprehend the appellant's evidence. Nor did he improperly use an out-of-court statement made by the complainant shortly after the sexual assault.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

I. OVERVIEW

- [1] The then 16-year-old appellant was tried in the Provincial (Youth Justice) Court for aggravated sexual assault, unlawful confinement and sexual assault.[1] The offences involved two complainants, both of whom were 17 years of age. The trial judge entered convictions on all three counts.
- [2] The events surrounding the aggravated sexual assault and unlawful confinement occurred at a nightclub. The trial judge found that the appellant forcibly confined the complainant in a washroom cubicle and sexually assaulted her, causing a significant vaginal injury that required medical intervention. The circumstances surrounding the third count on the Information, sexual assault, took place four months earlier and involved a different complainant. The judge found that the appellant forced sexual contact on that complainant after inviting her to his home.
- [3] The appellant seeks to overturn all three convictions. Among other things, he says the judge wrongly disqualified a defence medical witness from giving expert opinion evidence; failed to consider the whole of the evidence in assessing credibility on the first two counts; and used an out-of-court statement for an improper purpose.
- [4] Credibility was a critical issue at trial. The appellant agreed he had sexual contact with each complainant. There was no dispute over when that contact occurred, or where it took place. However, the complainants testified that they did not consent. They said the appellant was in control, physically forced sexual activity on them, and ignored their resistance, expressed or physical.
- [5] The appellant put forward a different version of events, testifying that each complainant actively participated in the sexual activity. He argued that their testimony to the contrary was neither credible nor reliable.

- [6] For the reasons that follow, I would allow the appeal from conviction for aggravated sexual assault and unlawful confinement and order a new trial on those counts. The necessity of a new trial does not stem from concerns about the reasonableness of the verdict; rather, the judge made errors on the first two counts that undermined the fairness of the trial. Persons accused of a crime, no matter how serious, are entitled to a fair trial and the right to make full answer and defence. Regrettably, the judge's approach to the evidence unduly compromised those principles.
- [7] I would dismiss the appeal on the third count. The appellant has not established a reversible error on that conviction.

II. BACKGROUND

A. Trial Evidence

- [8] It is not necessary to detail the entirety of the evidence for purposes of the appeal. Instead, I will summarize that which I consider salient to the issues on review or necessary to establish an explanatory backdrop for the analysis.

Counts 1-2: Sexual Assault and Unlawful Confinement of S.F.

- [9] On February 28, 2016, S.F. and the appellant separately attended a private function for high school students at a Vancouver nightclub. The event was "dry"; however, each consumed alcohol before they arrived. The trial judge found neither was intoxicated to the degree that it affected their behaviour.
- [10] The appellant and S.F. knew one another, socially and through work. S.F. testified they had never dated and she did not have romantic or sexual interest in the appellant.
- [11] S.F. said that from the time she arrived at the nightclub, the appellant initiated physical contact with her. He controlled her physically, holding on to her and moving her around the nightclub. She resisted his advances, but he persisted in holding and kissing her. At one point, S.F. reluctantly kissed him back, thinking he would let her go. She was afraid and trying to figure out what to do without making a scene. She did not reach out to anyone, feeling helpless. The appellant eventually dragged or pulled S.F. into the women's washroom, pushed her into one of the cubicles and locked it behind him.
- [12] S.F. said she tried to leave the cubicle, but the appellant would not let her. She felt trapped. The appellant was aggressive. He kissed S.F., touched her body, and removed her shirt and her bra. He digitally penetrated her and forced her to perform fellatio, pushing her down by her shoulders and telling her to "suck [his] dick". S.F. told him "no", but he shoved his penis in her mouth. S.F. began to cry. The appellant was in control and S.F. felt terrified and powerless. She testified that the appellant then sat on the toilet, grabbed her by the waist and lowered her onto him. She tried to squirm away, but he forcefully penetrated her vagina with his penis. She instantly felt significant pain, looked down, and saw blood on the floor.

- [13] S.F. has only a vague memory of what happened after that. She does not recall the appellant leaving the cubicle. However, she remembers being in the cubicle alone, feeling anxious and afraid to leave. She also remembers a security guard wiping blood from her legs. One of S.F.'s friends came into the washroom. S.F. began to cry and hyperventilate. She was taken to a hospital by ambulance and received treatment for a vaginal injury, including stitches. S.F. testified that she did not consent to any sexual activity with the appellant, in either the interior of the nightclub or the washroom cubicle.
- [14] The appellant provided a very different version of events. He testified that all of the sexual contact was consensual. He saw S.F. at the nightclub, hugged her and they began to kiss. He said they "made out" in the club, including on a couch, with S.F. straddling him. The appellant said S.F. was a willing participant. He asked her if she wanted to go somewhere to be alone and she agreed, suggesting the washroom.
- [15] The appellant testified that the two of them walked around the nightclub, arm in arm, trying to find the washroom. They located the women's washroom and went into one of the cubicles. S.F. closed the door and locked it.
- [16] The appellant said they began kissing while standing in the cubicle. He then sat on the toilet seat, S.F. straddled him and they continued kissing. They stood up. S.F. got on her knees and performed oral sex on him. There was no conversation. S.F. took off his shirt and he took off her shirt. The appellant said he tried to remove S.F.'s bra, but was not able to do so. S.F. swung her bra to the side, unfastened it and took it off. She also removed her skirt and underwear. The appellant took off his pants and underwear.
- [17] The appellant testified that he asked S.F. if she wanted to have sex and she said "yeah". S.F. sat on top of him as he digitally penetrated her vagina. S.F. then inserted the appellant's penis in her vagina. He said it felt strange and uncomfortable. They had sex until the appellant lost his erection. S.F. again performed oral sex. As she did so, he saw blood on the ground and all over his clothes. The appellant said he "freaked out" and thought S.F. was on her period. He grabbed his things and put on his pants. The appellant asked S.F. if she was all right. She told him she was fine. He left the cubicle and told S.F. he would come back. He went into the men's washroom to clean his shirt and shoes because they had blood on them.
- [18] According to surveillance video from the nightclub, the appellant left the women's washroom at 10:58 p.m. This was 26 minutes after first entering the washroom with S.F. When the appellant exited, he was shirtless and carrying his shoes. Initially, he tried to enter a locked washroom for the physically disabled. He was unsuccessful and entered a janitor's closet. The janitor directed him to the men's washroom. The appellant remained there for over 20 minutes. Police arrived and arrested him.

Independent Witnesses at Nightclub

- [19] The Crown called witnesses who were in the women's washroom after the incident. One of them testified that they saw a male come out of a stall. He was walking fast and had his head down. This witness noticed a pool of blood on the floor. Along with others, she knocked on the cubicle door. There was no response. Climbing on to the back of a friend, the witness looked over the top of the door. S.F. was sitting on the toilet, without a shirt or bra. She was hunched over, with what appeared to be shorts around her ankles. The witness asked what happened and if S.F. was okay. S.F. looked up and told the witness to "fuck off". She was expressionless. Other witnesses made similar observations.
- [20] A police officer who arrived 20 minutes after the appellant left the women's washroom described S.F. as shaking and crying hysterically. There was blood in the toilet and on the cubicle floor. A bra and underwear were in the cubicle. A paramedic at the scene made similar observations of S.F.'s emotional state.
- [21] The Crown also called witnesses who testified that they saw the appellant and S.F. in the nightclub before the events in the women's washroom.
- [22] These witnesses confirmed that the appellant approached S.F. when she first entered the club and gave her a hug. One of the witnesses described the appellant as getting close to S.F., touching her. She pulled away from him and did not look interested. Later, the witness saw the appellant and S.F. kissing, first while standing, and then while sitting on a couch. In cross-examination, the witness agreed that the kissing seemed mutual and the appellant and S.F. were touching each other. The witness testified that while on the couch, S.F. had her legs draped across the appellant's legs.
- [23] B.P., the second complainant in this case, was also at the nightclub. She testified that she saw the appellant and S.F. kissing. They were standing while this occurred and then moved to a bench. The appellant was sitting and S.F. was straddling him. B.P. saw S.F. slide off the appellant and the appellant move her back. She saw his hands on S.F.'s legs and going up her skirt. S.F. moved his hands from her legs, but continued kissing him.

Medical Evidence

- [24] The Crown called three medical witnesses, two of whom were qualified to give expert opinion evidence.
- [25] Dr. Forsyth examined S.F. at the hospital following the events at the nightclub. She was qualified as an expert in medicine, the forensic examination of sexual assault victims, and the mechanism of vaginal injuries. The defence took no issue with the doctor's qualifications.
- [26] Dr. Forsyth testified that S.F. was bleeding from her vagina and in pain, such that immediate treatment was necessary. S.F. had sustained a vaginal injury that Dr. Forsyth described as a four-to-six-centimetre laceration extending from the opening of the vagina at the six o'clock

(bottom) position and running along the posterior wall. The wound was deep, extended into muscle tissue and was actively bleeding. The tear required extensive suturing. Dr. Mui, a resident gynaecologist, sutured the tear and stopped the bleeding. Dr. Forsyth also saw a hematoma on the left labia minora, consistent with applied pressure. This injury was also causing S.F. pain and she was in obvious distress.

- [27] Dr. Forsyth testified that she does not often see vaginal injuries during her examinations of sexual assault complainants. Typically, there will be tenderness to palpation around the genital area. Sometimes, there will be bruises or cuts on the knees, hands, or elbows. The most common pelvic finding, when a vaginal injury is noted, is a very small tear/abrasion of the genitals, measuring less than one centimetre.
- [28] Dr. Forsyth had not seen a vaginal tear like this one outside the birthing context. Dr. Forsyth concluded there had been recent significant trauma to the area. However, she was not comfortable providing an opinion on whether S.F.'s tear resulted from consensual or non-consensual penile penetration.
- [29] Dr. Mui was the Crown's second medical witness. He estimated the vaginal tear to be two to three centimetres in length and described it as a second degree tear because he could see muscle fibres. He felt it necessary to prescribe additional intravenous pain medication for S.F. He did not notice a hematoma to the labia minora.
- [30] The Crown's third medical witness was Dr. Jurenka. She is a family physician, with experience in treating sexual assault patients. She was qualified to give expert opinion evidence on: (1) family medicine; (2) the emergent or acute care of sexual assault patients, including forensic examination and the documentation of injuries; (3) the likely mechanism of injuries, including possible causes of vaginal injuries; and (4) whether vaginal injuries are consistent or inconsistent with consensual or non-consensual sexual activity.
- [31] The defence did not object to Dr. Jurenka providing an opinion on consistencies between S.F.'s injury and non-consensual penetration. However, Dr. Jurenka testified that in her family practice, she had not personally seen a vaginal tear resulting from consensual intercourse that required surgical intervention. The defence said this lack of clinical experience precluded the doctor from opining on whether the tear sustained by S.F. was consistent or inconsistent with consensual penetration. The trial judge did not give effect to the objection, holding that "[i]f a doctor can give an opinion that the injuries are consistent with non-consensual intercourse, she can also be asked whether those injuries are consistent, equally, or inconsistent with consensual intercourse". He concluded that Dr. Jurenka's lack of clinical experience with serious consensual penetration injuries would affect the weight of her opinion, not its admissibility.

[32] Dr. Jurenka testified that most vaginal injuries, whether from consensual or non-consensual penile penetration, are at the base of the vaginal opening. Injuries to the inside of the vagina are less common. Dr. Jurenka said that according to the medical literature, injuries are seen in non-consensual penetration scenarios at a rate of "four to 20 times as often as in consensual".

[33] Dr. Jurenka testified about factors that protect against vaginal injury when the penetration is consensual:

First of all, the vagina is meant to accommodate a penis or a birth, so in order to do that, it optimally is doing that between the ages of sort of 15 and 50, and in those ages you have estrogen onboard, which makes the mucosa and the musculature behind resilient and elastic.

So on top of that, you also have a sexual response. So if there's a consensual act happening, presumably the woman is aroused and is physiologically going through changes of her vagina to accommodate the penis. So her vagina is lengthening and widening and she's producing lubrication. And then you also have partners who are presumably cooperating in positioning and in force used. And those things together tend to protect the area.

[34] She acknowledged that non-consensual penetration does not always result in injury. However, in circumstances involving force and a lack of arousal on the part of the woman: "You will not have the lubrication or the lengthening, you will not have the partner's cooperating in position, you will not have the male partner cooperating in terms of how much force he's using".

[35] Dr. Jurenka did not personally examine S.F. She reviewed Dr. Forsyth's materials, as well as a will-say outlining Dr. Mui's observations. She described the vaginal tear sustained by S.F. as a "very significant" injury. She understood, from the medical literature, that these injuries are rare in both consensual and non-consensual penetration scenarios. As a result, she considered it "a very remarkable significant extreme injury from vaginal penetration".

[36] Dr. Jurenka opined on the likelihood of the injury arising from consensual penetration as "exceedingly unlikely". The injury sustained by S.F. is much more likely to occur from giving birth than consensual penetration. Dr. Jurenka acknowledged the existence of published case reports suggesting that this type of injury can happen with consensual penetration; however, she could only find a handful of reports to that effect. She accepted that consensual penetration may cause injuries that require surgical repair; however, it does not happen very often.

[37] Before Dr. Jurenka testified, the defence notified the Crown that it would call its own medical expert, a gynaecological surgeon (Dr. Doersam). The Crown received a will-say report from this witness. Dr. Jurenka was asked to comment on the report in her testimony. After the Crown closed its case, the defence sought to tender Dr. Doersam as an expert witness. The trial judge did not allow Dr. Doersam to provide opinion evidence, finding that the doctor was not qualified to give the opinion sought by the defence. As a result, the only

evidence called by the appellant on the counts involving S.F. consisted of his own testimony.

Count 3: Sexual Assault of B.P.

- [38] The second complainant was B.P. She and the appellant were "interested" in each other, occasionally spent time together, and exchanged text messages.
- [39] B.P. testified that on October 24, 2015, she invited the appellant to join her and some friends for pizza. He told her that his parents would not allow him to leave the house. Instead, he invited her to his place. In text messages exchanged between them, the appellant told B.P. that only she was invited (not her friends). The appellant was unhappy with B.P.'s behaviour at a birthday party they attended the week before, and B.P. understood that the purpose of getting together was to talk about that situation.
- [40] B.P.'s friends took her to the appellant's house after midnight. She was not sure if the appellant would get mad at her because of the birthday party. She planned with her friends that if she was uncomfortable, she would text them and they would return. B.P. testified that the appellant met her on the lawn of his residence. He brought a hoodie for her to wear because it was cold. B.P. apologized for the events at the birthday party. They hugged and began to kiss.
- [41] B.P. said while they were kissing, the appellant took out his penis and it was apparent to her that he wanted her to perform oral sex on him. She did not want to and said "no". He continued to ask and she refused. B.P. said the appellant kept moving her hands towards his penis and she kept moving them away. He put his hand behind her head, pushed her head down to his penis and stuck it in her mouth while tightly holding her head. She tried to force her way out, but could not. It lasted for about 15 seconds. B.P. began to gag. The appellant released his grip and removed his penis from her mouth. B.P. was in shock and did not know what to think. She began spitting. She texted her friends to pick her up and they arrived within five minutes.
- [42] The appellant testified that the fellatio was consensual. He said B.P. arrived at his house, they talked for a bit and started kissing. He asked her if she wanted to "give [him] head". She said, "not right now". They kept kissing and he asked again. B.P. agreed. He pulled down his pants and B.P. began performing oral sex. He had his hand on the back of her head, "kind of holding her hair back". It lasted for a couple of minutes and then she started to gag. He "got a bit of a feeling that she didn't want to do it anymore", so he stopped and pulled up his pants. They talked for a bit. She texted her friends to pick her up.
- [43] At 1:14 a.m., the appellant texted B.P. and described what happened between them as "terrible". When B.P. asked him why, the appellant said it was because B.P. "shoulda just came in" and "seemed so sad". Further text messages were exchanged the next day, in which the appellant again said that he felt bad about what happened. B.P. told him she was "not very happy" because she "felt kinda used".

- [44] B.P. was asked about the text messages, including messages in which she denied being sad and told the appellant that he does make her happy. She explained that she "didn't know how to talk to him. [She] didn't know how to handle the situation". "Something like [that had] never happened to [her] or [her] friend group before I just was acting civilized. I didn't - I didn't know what else to do."

Independent Witness after Incident

- [45] The Crown called one of the friends who picked B.P. up from the appellant's house. When the friends approached the residence, B.P. and the appellant were sitting close to each other. B.P. stood up and got into one of two cars that had arrived. As that car drove away, she was in the back seat with the window rolled down. She had her head out the window and was spitting. The witness testified that they went to S.F.'s house (who was friends with B.P.). While there, B.P. told the witness that the appellant "just made [her] suck his dick". B.P. seemed confused and a little down. According to the witness, B.P. made the statement about 20 minutes after her friends retrieved her.
- [46] S.F. also testified that B.P. told her that night about what happened, but did not indicate when the conversation occurred in proximity to the alleged assault. In her testimony, B.P. confirmed that she told her friends about what happened. She could not remember exactly where she was when she did so. It was after they all met up.
- [47] Following the incident, B.P. did not tell her parents about what happened, the police, or any other person in authority (such as a teacher). After the nightclub events involving S.F. in February 2016, she provided a statement to police. When asked about the delay in reporting, B.P. said she "didn't know it was a big deal. I just knew I felt really uncomfortable. I didn't know I could do anything about it".

B. Reasons for Conviction

- [48] The reasons for conviction are indexed as R. v. C.M.M., 2017 BCPC 443 ("RFJ").
- [49] The trial judge began with an analysis of the first two counts. The sexual activity in the women's washroom formed the basis for the alleged aggravated sexual assault and unlawful confinement. In its closing submissions, the Crown described the events in the cubicle as the "key to [the] offence" of aggravated sexual assault. The appellant admitted that the vaginal tear sustained by S.F. met the test for an aggravated sexual assault if the Crown proved all other elements of that offence (RFJ at para. 5). Consequently, the primary issues at trial were identified as: (1) whether the sexual activity in the washroom was consensual; and (2) whether S.F. had been unlawfully confined in the cubicle.
- [50] The judge accepted S.F.'s testimony about the appellant's conduct in the cubicle. He had concerns about her testimony that the appellant was the one who removed her bra, but it did not cause him to doubt the overall credibility and reliability of S.F.'s evidence (RFJ at paras. 59, 74A).

[51] The judge did not believe the appellant's version of what happened in the cubicle. Nor did it raise a reasonable doubt for him. This included the testimony that S.F. "was a willing participant at the start and also continued as a willing participant while he was trying to penetrate her further" (RFJ at para. 62). The judge provided multiple reasons for finding the appellant not credible, including:

- it did not make sense that the appellant would ask S.F. if she wanted to have sexual intercourse after they were already naked and there had been other forms of sexual contact between them (at para. 60(a));
- the appellant's testimony that S.F. performed oral sex when his penis was covered with her blood was not believable - "this would not be something that she would offer to do" (at para. 60(b));
- the appellant's decision to leave the washroom while S.F. was naked and bleeding in the cubicle, and not seek assistance, was callous behaviour that was "more consistent with him having just forcibly sexually assaulted [S.F.] rather than having had a consensual sexual encounter with her" (at paras. 60(c)-(e));
- the appellant's testimony that he did not seek help for S.F. because he thought she was okay was not believable in light of the evidence of other witnesses who said S.F. was "hyper-ventilating, 'out of it', unfocused, rocking back and forth, sobbing uncontrollably and all the while, blood was streaming non-stop down her legs" (at para. 60(f));
- the appellant's behaviour in the interior of the club, prior to entering the washroom, "demonstrate[d] that from the very first encounter with [S.F.], he was the one initiating the sexual advances" (at para. 60(g));
- prior to the night in question, the appellant and S.F. had never dated and S.F. said she was not sexually attracted to him (at para. 60(h));
- S.F. testified that when the appellant put his penis in her vagina, it was uncomfortable and painful. This experience was consistent with the expert evidence of Dr. Jurenka, who said this is what occurs when a vagina has not lubricated or enlarged in anticipation of consensual intercourse (at para. 60(j));
- it must have been obvious to the appellant that S.F. was uncomfortable while he was having intercourse with her, but he did nothing to alter his position or "stop forcing his penis into her" to avoid the discomfort. This fact was inconsistent with Dr. Jurenka's evidence that persons who are engaged in mutual consensual intercourse "will each try to change positions or stop entirely if it becomes evident that they were hurting their partner" (at para. 60(k)); and,
- the appellant acknowledged that the intercourse felt "really strange"; nonetheless, he continued with the penetration and did not ask S.F. how she was feeling or whether she wanted to continue (at para. 64).

[52] In addition to rejecting the appellant's testimony, the judge found corroboration for S.F.'s evidence. First, S.F. testified that she experienced overwhelming pain when the appellant put his penis in her vagina (RFJ at para. 65). The Crown's medical witnesses confirmed that the "very severe and deep tearing injury to [S.F.'s] vagina would have caused her excruciating pain" (at paras. 65-66). Second, the judge believed the witnesses who interacted with S.F. shortly after the events in the washroom. They described her as obviously distressed (at para. 60(f)).

[53] After analysing the evidence on the sexual assault, the judge turned to the count of unlawful confinement. He accepted S.F.'s testimony that she tried to get out of the washroom cubicle as soon as she realized the appellant wanted her to perform oral sex (RFJ at para. 70). He also accepted that the appellant blocked the door and he was too big and too strong for S.F. to be able to shove him out of the way (at para. 70). Finally, the judge accepted S.F.'s evidence that while seated on the appellant's lap, he held her "hips so tightly that she just felt like a rag doll and had no power or ability to extricate herself from [the appellant's] hold and escape from the cubicle" (at para. 70). He did not believe the appellant's testimony that S.F. stayed in the cubicle because she wanted to (at para. 70).

[54] The judge found the appellant guilty of both counts involving S.F.:

I have no reasonable doubt that [S.F.] was sexually assaulted in an aggravated manner by [the appellant] when he forcibly digitally penetrated her against her will, when he twice forced fellatio on her against her will and when he forced her to have sexual intercourse with him against her will.

I have no reasonable doubt that [S.F.] was overpowered by [the appellant] while in the cubicle and he forced [S.F.] to remain locked in the cubicle against her will and submit to all of the sexual acts.

RFJ at paras. 75A and B.

[55] The judge then turned to the third count, the alleged sexual assault of B.P. The appellant did not dispute that fellatio occurred on his lawn. The issue for the judge to determine was whether the Crown proved that the appellant "forced [B.P.] to perform fellatio and thereby committed a sexual assault" (RFJ at para. 93).

[56] The judge described the evidence as uncomplicated. From his perspective, this was a "she said, he said case" (RFJ at para. 94). Ultimately, he believed B.P.'s evidence and did not believe the appellant (at paras. 97-98). Nor did the appellant's evidence raise a reasonable doubt. The judge rejected the appellant's evidence for a number of reasons, including:

- the appellant said he was getting together with B.P. to talk about what happened at the birthday party about a week prior. However, other than an initial greeting, the appellant made no effort at discussion. Instead, "he pulled out his penis and requested that [B.P.] kiss it" (at para. 118);

· the appellant's explanations for why he apologized to B.P. after the incident were "totally unbelievable". One of the reasons he gave for feeling "terrible" was that "he had not invited her into the house". This explanation did "not make any sense because he had already told [B.P.] before she came over, that he couldn't invite her into the house because it was too late and his parents wouldn't permit it" (at para. 119); and,

· the appellant testified that he stopped the fellatio because it was cold and "when [B.P.] started to gag, [the appellant] 'kind of got a bit of a feeling that she didn't want to do it anymore'". The "idea that one of the reasons he stopped was because he was cold, [was] completely unbelievable". Moreover, the absence of concern the appellant showed for B.P.'s well-being when he heard the gagging "would be consistent with someone who had just forced the other person into fellatio, compared with a caring concern one would expect someone to have for [a] person with whom they were having consensual fellatio" (at paras. 121-122).

[57] The judge found B.P.'s evidence corroborated. First, the fact that she immediately sent a text to her friends and asked them to pick her up after the appellant "pulled his penis out of her mouth" was consistent with her testimony that the fellatio was forced (RFJ at para. 128). Second, she was "spitting continuously" out the car window after her friends retrieved her. She was in a "distraught emotional state" and told her friends the appellant "had just forced her to suck his dick". The trial judge found that this evidence served to "confirm the incident" (at para. 129).

[58] Friendly text messages sent by B.P. after the incident did not cause the judge to doubt her testimony. He accepted that she "was only a 17 year old young woman and she felt totally confused about her own feelings about what had happened" (RFJ at para. 130). He was also not concerned about the fact that B.P. did not tell the police about the appellant's sexual misconduct until four and a half months after the fact. He accepted that B.P.'s reasons for not reporting until then were logical, and he rejected the defence propositions that B.P.'s assertion of non-consent was the product of peer pressure and she "[carried] on with the deceit in order to save face with her friends" (at paras. 132-33).

[59] The trial judge convicted the appellant of sexual assault against B.P.

III. ISSUES ON APPEAL

[60] At trial, the defence argued that the Crown failed to establish the absence of consent in respect of both complainants, a required element in proving the offence of sexual assault. Alternatively, the appellant said he was entitled to an acquittal based on an honest but mistaken belief in consent (s. 273.2 of the Code).

[61] If the judge had a reasonable doubt based on S.F.'s credibility, or did not know whom to believe about the events in the washroom cubicle, the charge of unlawful confinement would necessarily collapse. This count was dependent on acceptance of S.F.'s testimony that the appellant restrained her in the cubicle during the forced sexual contact.

[62] As noted, the appellant challenges the convictions on all three counts. He does not allege error on the judge's understanding of the legal elements of the offences; challenge the admissibility of the Crown's medical evidence; or suggest that the judge erred in his appreciation of the appellant's defences. Rather, the appellant says:

- a) the judge was wrong to find that Dr. Doersam was not qualified to give expert opinion evidence;
- b) the judge erred in not considering the entirety of S.F.'s evidence when assessing the credibility of her testimony about the sexual activity in the washroom cubicle;
- c) the judge relied on impermissible stereotypes to assess the appellant's credibility and decide the issue of consent on the counts involving S.F.;
- d) the judge wrongly relied on an out-of-court statement made by B.P. to her friends as corroborative of non-consent; and,
- e) the judge misapprehended the appellant's evidence on the allegation involving B.P.

[63] At the hearing of the appeal, the Court raised an additional issue with counsel, namely, whether the admissibility of evidence of sexual activity between the appellant and S.F. preceding the events in the washroom should have been assessed with reference to the principles embodied in s. 276 of the Code (Evidence of Complainant's Sexual Activity). Section 276(1) renders evidence that a complainant "has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge" presumptively inadmissible. Counsel provided supplemental written submissions on this issue, addressed below.

[64] The Crown did not invoke s. 686(1)(b)(iii) of the Code in response to any of the errors alleged by the appellant, making no submissions on its possible applicability: *R. v. Van*, 2009 SCC 22 at para. 34; *R. v. Jolivet*, 2000 SCC 29 at para. 46.

IV. ANALYSIS

A. Did the judge err in not qualifying Dr. Doersam?

1. Alleged Error and Parties' Positions

[65] The appellant applied to have Dr. Doersam qualified to give expert opinion evidence in gynaecology, including the types, causes, and repair of vaginal injuries from sexual intercourse.

[66] Defence counsel told the trial judge that within the scope of this qualification, he would seek an opinion from Dr. Doersam on whether significant vaginal injuries can occur with both consensual and non-consensual penile penetration. It was not the purpose of this opinion to establish that S.F.'s injury was more consistent with one scenario than the other. Rather, Dr. Doersam would testify that a physician cannot infer consent or a lack of consent to penetration based solely on the existence and degree of vaginal injury:

[Defence counsel]: he [will] not testify that it was from - the injury was from consensual sex. He [will] say these injuries can happen from consensual or non-consensual, and we can't work backwards and determine the issue of consent, just because there was an injury.

[67] The Crown was asked whether it objected to Dr. Doersam's evidence. The response was equivocal:

[Crown counsel]: I'm not objecting to Dr. Doersam giving you his evidence and I'm not suggesting we need a voir dire, because I'm not going to ask you to make a ruling that you're not going to hear him, but I do have some questions for him about his training and clinical experience and the manner in which it will affect his ability to give this sort of evidence, and ultimately the weight that Your Honour should give to his opinion.

THE COURT: Well, are you challenging, though him being qualified as an expert to give evidence in whatever area counsel is going to say he is -

[Crown counsel]: No.

THE COURT: - about to give evidence on? So what are you saying, then? You're going to challenge the weight to be given his evidence -

[Crown counsel]: Yes.

THE COURT: - but not his qualifications?

[Crown counsel]: I take issue with his ability to speak to whether or not injuries are consistent or inconsistent with consensual and non-consensual intercourse.

[Crown counsel]: If Dr. Doersam is going to speak to how injuries have happened to his patients that he's observed during sexual intercourse I don't take issue with that

[Emphasis added.]

[68] The judge held a qualifications voir dire. The evidence established that Dr. Doersam has been a certified gynaecologist since 1985. Since 2009, he has practiced exclusively in gynaecology. Dr. Doersam stated that he is "primarily a surgeon", but performs a full range of gynaecological services. This includes approximately 40 to 50 vaginal examinations per week.

- [69] Dr. Doersam has experience assessing and treating serious vaginal injuries understood to have arisen from consensual sexual intercourse. He described two cases from Whitehorse, both of which involved substantial blood loss and required treatment. In one of those cases, the patient required sutures. He also relayed a case from the last two or three years, in which a woman attended the emergency department with vaginal bleeding from penetration, as well as one from several years ago, in which the patient required superficial stitches to close a tear at the opening of the vagina.
- [70] In cross-examination, Dr. Doersam acknowledged that he does not have formal training on the types and causes of vaginal injuries that can arise from penile penetration; injuries from consensual versus non-consensual sexual activity; or the treatment of genital or vaginal injuries attributable to sexual assault. He has not received training in "forensic" anogenital examinations. However, in the course of his daily practice, he attends to women who complain of genital injury and necessarily turns his mind to whether consensual or non-consensual penetration led to the injury, depending on the reported history.
- [71] In preparation for his testimony, Dr. Doersam reviewed medical literature on consensual and non-consensual penetration injuries. He agreed that any opinion he could offer on consistencies between the type of injury sustained by S.F. and injuries attributable to consensual or non-consensual penetration would be largely, although not entirely, based on that literature review. He also accepted that the authors of the material he reviewed admit the potential for flaws in their studies because of impacting variables, as well as differences in definitions of what constitutes an injury and differences in the investigative techniques used for the research.
- [72] On completion of the voir dire, the judge ruled that Dr. Doersam was not qualified to give the expert opinion evidence sought by the defence. He took no issue with the doctor's qualifications as a gynaecologist. However, he was concerned that Dr. Doersam's expertise "has not included anything in relation to sexual assault and vaginal injuries":
- [5] he has dealt with only four [of] what can be called serious injuries, and has never had, to his knowledge, an injury that he can say for sure was a sexual assault injury. He has not trained in Forensic Gynaecology or Forensic Examinations ...
- [7] We have a situation here where he has no specific training or course of study in causes of vaginal injury
- [8] He has not studied sexual assault patient care procedures. He has not specialized or done indeed any sexual assault cases for patients that he knows about. He has never examined a sexual assault patient at any of the hospitals that he has been in, and over his career he has really only dealt personally with superficial tear injuries, some occurring from sexual involvement, others from the use of obstetric and gynaecological tools in examining women where younger doctors, presumably, have caused some minor injuries to the women.

- [9] He has no clinical experience in Forensic Gynaecology. He has no specialized training with respect to serious injuries which might be caused by consensual or non-consensual intercourse, and in his honest acknowledgment that his opinion that he would give in this case, comes largely from the simple reading of the medical journals which he studies based on a comparison between sexual assault injuries versus consensual sexual injuries.
- [10] In my view, the opinion that Dr. Doersam would be able to give me on the cause of the injuries to [S.F.] in this case, is largely based on his reading of the literature
- [11] With respect, Dr. Doersam's opinion would be based on his lack of specific experience or training in this area and therefore would not add to my understanding of the case. To receive Dr. Doersam's opinion on the literature is not, in my view, something that I require an expert to help me with to interpret the literature.
- [12] Accordingly, I find that although Dr. Doersam is a very well-qualified, experienced and valuable Gynaecologist, he does not in my view with all due respect to Dr. Doersam, qualify as an expert entitled to give opinion evidence here as to the causes and repair of vaginal injuries from sexual intercourse, be it consensual or forced intercourse.

[Emphasis added.]

- [73] The refusal to qualify Dr. Doersam appeared to catch both sides by surprise. The Crown was not opposed to the doctor giving evidence about vaginal injuries he had observed in practice, including ones reported to have arisen from sexual intercourse. Furthermore, in anticipation of the defence expert, the Crown put portions of Dr. Doersam's will-say report to Dr. Jurenka for comment. This included Dr. Doersam's anticipated evidence on the "likely [physical] cause" of S.F.'s injury (not disputed by Dr. Jurenka), and whether it is possible to determine from the existence and nature of a vaginal injury, standing alone, that the penile penetration leading to injury was consensual or non-consensual. The latter issue formed an integral part of the defence reason for calling its own expert.
- [74] In response, the judge explained that he understood the "most important" evidence sought from Dr. Doersam was an opinion on the "cause of injuries of the vagina in relation to sexual intercourse, including whether they were caused by forcible or non-forcible injuries" (emphasis added). It was that evidence that the judge found the doctor was not qualified to give. Although he described himself as functus on the ruling, the judge indicated that if the parties were jointly of the view he had erred, he was open to reconsidering the matter.
- [75] After a recess, the appellant's trial counsel advised the judge that the defence would be closing its case. The defence had planned to call a urologist who conducted a physical examination of the appellant and would provide evidence about penis size. However, that evidence was "tied in and related to Dr. Doersam's opinion" (presumably about factors that might contribute to injury in a consensual penetration scenario). In light of the judge's ruling on the voir dire, the defence declined to call the urologist.

[76] In response to the defence position, Crown counsel told the judge that she had no concerns about the outcome of the voir dire. However, if the defence was uncomfortable with the way things had unfolded, the Crown was not opposed to re-opening the voir dire and the appellant making further submissions. When asked what he wanted to do, defence counsel said he would not apply to reopen:

we had a process. There's been evidence. There's been a ruling. We're not applying to reopen it. We're not seeking to bring any other applications I asked for the lunch break to think through was there an application or step that we felt was appropriate within the trial, and there isn't.

[77] The appellant says the precise basis on which the judge disallowed Dr. Doersam's evidence is not clear. However, the primary concern appears to have been that the evidence did not meet the threshold criteria for admissibility set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. Specifically, the judge found that Dr. Doersam did not have the training or clinical experience to give the opinion sought. In addition, any evidence he could give was not necessary, in the sense that it would not assist in deciding matters at issue.

[78] It is the appellant's position that the judge's refusal to qualify Dr. Doersam as an expert wrongly deprived him of material evidence on the counts involving S.F. and undermined his ability to make full answer and defence.

[79] On the appeal, the Crown agrees that the judge found Dr. Doersam was not a properly qualified expert within the meaning of *Mohan*. However, it goes on to say that the judge was also satisfied the evidence was not sufficiently probative to justify its admission, a determination made under the second stage of the admissibility analysis: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 2. It is the Crown's position that both conclusions were reasonably open to the judge.

2. Legal Principles

[80] The admissibility of expert opinion evidence attracts a deferential standard of review. As a result, absent an error in law, misapprehension of evidence, failure to consider relevant evidence or factors, or an abdication of the gatekeeper function, an appellate court will decline to interfere with the decision: *R. v. Nield*, 2019 BCCA 27 at para. 76; *R. v. Orr*, 2015 BCCA 88 at para. 65, citing *R. v. Pearce*, 2014 MBCA 70 at para. 74; *R. v. D.D.*, 2000 SCC 43 at paras. 11-13.

[81] Admissibility is determined under a two-step inquiry. First, the expert opinion evidence must meet four threshold admissibility requirements: logical relevance; necessity; the absence of an exclusionary rule; and the proposed witness must be a properly qualified, independent and impartial expert with specialized knowledge or expertise: *Mohan* at para. 20; *White Burgess* at para. 53; *R. v. Bingley*, 2017 SCC 12 at para. 14. Second, the benefits of admitting the evidence must outweigh its potential risks: *White Burgess* at para. 24; *Bingley* at para. 14.

[82] A properly qualified witness is someone "who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify": Mohan at 25. The witness must have "expertise outside the experience and knowledge of the trier of fact": Bingley at para. 19. Experts "are not barred from assisting the court with their special knowledge simply because they are not trained in the underlying science of the field. Such knowledge is required only where the science is novel": Bingley at para. 22. However, the evidence on qualifications must establish that the proposed expert is "qualified to express the specific opinion proffered": Orr at para. 67.

3. Application of Principles

[83] I agree with the appellant that the judge found Dr. Doersam not qualified at the first stage of the admissibility enquiry. His ruling focused on the doctor's areas of practice, his training, and his absence of clinical experience in assessing and treating vaginal injuries in the context of sexual assault. At no point did the judge ask whether the benefits of admitting Dr. Doersam's evidence outweighed its potential risks, the question that lies at the heart of the second stage of the analysis: White Burgess at para. 24; Bingley at para. 14. He made brief reference to Dr. Doersam's opinion not adding to his understanding of the case and said the evidence was not necessary to assist with interpreting the medical literature before the court. However, I see these references as specific to the Mohan necessity criterion, not the second prong of the admissibility analysis.

[84] I also agree that the judge committed legal error in not allowing the defence to call Dr. Doersam as an expert witness. In my view, he erred in two ways: (1) he misapprehended the nature and scope of the proposed testimony; and (2) he applied too restrictive of an approach in his assessment of whether Dr. Doersam met the threshold requirement of a properly qualified expert. Because of these errors, the appellant was deprived of evidence that was material to his defence.

[85] On the first error, the judge appeared to be of the view that the defence sought to have Dr. Doersam opine on whether S.F.'s injury was caused by consensual or non-consensual penetration. That was not the intent. The purpose of his evidence was to say that although rare, serious vaginal injuries can occur in both contexts and, standing alone, one cannot infer from the fact of injury, its nature, its location, or its extent, that the penetration leading to the injury was consensual or non-consensual.

[86] Moreover, Dr. Doersam's proposed evidence was not limited to that issue. He was also expected to testify that the "likeliest mechanism of [S.F.'s] injury was the expansion of the vaginal diameter by the penetrating penis"; address whether insufficient vaginal lubrication, clumsiness, intoxication, a physical "mismatch" between penis and vagina, positioning, or sexual inexperience can cause vaginal injury; discuss the relationship between vaginal injury, pain, and the likely origin of that pain; testify that substantial blood loss, on its own, is not evidence of an assault; and, based on his review of the medical notes in this case, question the accuracy of the estimates given of the size of S.F.'s laceration.

- [87] On the second error, the Crown says Dr. Jurenka and Dr. Doersam were fundamentally different witnesses and the judge's decision that one met the Mohan threshold requirement of a properly qualified expert, but not the other, is sound. I disagree.
- [88] The main difference between the Crown and defence expert in opining about injuries from penile penetration, consensual or non-consensual, was the context in which the witnesses have seen and treated injuries. However, both experts have conducted a significant number of pelvic examinations; both have peculiar knowledge about the mechanism of vaginal injury; and, both witnesses would offer opinions based on their personal observations and review of medical literature. In addition, Dr. Doersam has seen and treated injuries from penile penetration that required medical intervention, including sutures. Most importantly, Dr. Doersam had "expertise outside the experience and knowledge of the trier of fact": Bingley at para. 19; *R. v. Marquard*, [1993] 4 S.C.R. 223 at 243.
- [89] At trial, the Crown's objection to Dr. Doersam's evidence had four main components: (1) the doctor had not personally seen the extent of injury sustained by S.F.; (2) he was not "forensically" trained; (3) he had not treated sexual assault patients; and (4) Dr. Doersam would testify about injuries that can arise from penile penetration, including non-consensual penetration, based predominantly on his review of medical literature.
- [90] In my view, the first of these concerns applied with equal force to Dr. Jurenka, who acknowledged that she had not seen the extent of injury experienced by S.F. outside the birthing context in her practice as a family physician. Nor had she seen this extent of injury in her involvement with sexual assault patients.
- [91] The second and third concerns--that Dr. Doersam lacked forensic training and had not treated sexual assault patients--were not prohibitive of the opinion proposed by the defence. As I understand the evidence, the forensic training that both Dr. Jurenka and Dr. Forsyth received as sexual assault examiners does not focus on the physical causes of an observed injury, the mechanism by which it would have occurred, or the degree of force required to produce it. Rather, it concentrates on patient care and evidence-gathering processes for the purposes of a police investigation. As explained by Dr. Jurenka:

It's training in how to care for the sexual assault patient from providing medications for - prophylactics for sexually-transmitted infections, pregnancy, and so on. Also how to collect - how to discuss the fact that there is forensic evidence and collect that evidence if the patient allows. How to transfer that to police, how to write a report for police and court purposes, and ultimately how to testify in court.

the purpose of the forensic examination [is] to do two things document injuries and to provide samples that might have the DNA of the person who's been accused of the sexual assault to the police and to the courts

[92] In her testimony, Dr. Forsyth described her forensic training in generally similar terms. She furthermore testified that anogenital examinations undertaken in the sexual assault context are "similar to getting a pap smear or having a pelvic examination done". Pelvic examinations form a routine part of Dr. Doersam's practice.

[93] It is apparent from Dr. Jurenka's evidence that the difference between treating someone as a sexual assault patient and a patient in a different context, is based primarily on the patient's reporting, not the nature of the sustained injuries:

[Defence counsel]: if a patient presented to the emergency room, say with a vaginal tear, and said this was sexual assault and they wanted the Sexual Assault Service to be involved, then you or that service would be involved; is that right?

A: Yes

[Defence counsel]: If a patient attended at the emergency room with a vaginal tear and said, "This was from consensual sex," then the Sexual Assault Service would not be called; is that fair?

A: Yeah, it wouldn't be offered.

[94] In light of this evidence, I fail to see how Dr. Doersam's lack of forensic training or clinical experience specific to sexual assault complainants prevented his having the qualifications to opine on vaginal injuries that can arise from consensual or non-consensual intercourse. He is a gynaecological surgeon who performs pelvic examinations and repairs vaginal injuries, including ones reported to have arisen from penile penetration.

[95] Finally, the Crown expressed concerns about the extent to which Dr. Doersam would rely on medical literature to provide his opinion. Dr. Jurenka also relied heavily on medical literature. She described herself as "immersed in the literature" about forensic pelvic exams and the care of sexual assault patients. She invoked medical literature when opining on the rate of injury observed with non-consensual, as opposed to consensual, penetration; the rarity of significant vaginal injuries, even in cases of non-consensual penetration; the most commonly reported injuries arising from consensual penetration; and the likelihood of particular factors addressed by Dr. Doersam in his will-say having the capacity to cause or contribute to an injury such as that sustained by S.F.

[96] Moreover, like Dr. Doersam, Dr. Jurenka acknowledged that the medical literature has its weaknesses when comparing injuries in the consensual and non-consensual contexts. There are differences in investigative methodology, with a resulting inability to ensure that the research is "actually comparing apples to apples and so on".

- [97] In convicting the appellant, the trial judge did not give Dr. Jurenka's opinion on consistencies between S.F.'s injury and injuries associated with non-consensual intercourse "significant weight". However, he did give her evidence "some weight" and held that it carried "probative value in assessing [the appellant's] testimony and the Crown's evidence as a whole" (RFJ at para. 60(i)).
- [98] The trial judge also found Dr. Jurenka's testimony about physiological responses to consensual intercourse, the pain associated with penetration when a vagina is neither lubricated nor enlarged, and the altering of positions to accommodate comfort was of "significant probative value in favour of the Crown's argument that the intercourse was non-consensual (forced)" (RFJ at para. 60(j)). Dr. Jurenka's evidence clearly played a material role in the decision to convict. Indeed, on the appeal, the Crown describes the medical evidence surrounding S.F.'s injury, along with her emotional condition after the fact and the state of the washroom cubicle, as "determinative" on the issue of consent.
- [99] Because of the admissibility ruling, the defence was not able to call evidence about significant injuries Dr. Doersam has observed in reportedly consensual penetration scenarios, including ones that required medical intervention. This evidence was relevant to challenging the reliability of Dr. Jurenka's opinion that it was "exceedingly unlikely" S.F.'s vaginal tear resulted from consensual penetration. As noted by the trial judge in discussions with counsel before his ruling, the defence "legitimate[ly]" intended to use Dr. Doersam's evidence to "[try] to attack the other witness for the Crown, and [say] when she opines that you can tell, this witness is going to say no, you can't".
- [100] The testimony from Dr. Doersam would bring a different perspective to the factual inferences the judge might reasonably draw from the vaginal injury, based on his experience as a gynaecological surgeon and review of related medical literature. In his testimony, the appellant admitted that S.F.'s injury resulted from penile penetration; however, he said he did not think it was solely the result of force applied by him. Instead, he thought what happened was a result of the combination of S.F. moving up and down during intercourse while the appellant was seated on the toilet, him "trying to reposition", and "his hand on her left hip". The defence sought to tender Dr. Doersam's evidence as support for that possibility and, at the very least, a means by which to cast doubt on the definitiveness of Dr. Jurenka's view to the contrary.
- [101] The judge was also deprived of Dr. Doersam's evidence on the extent to which the theory about vaginal lubrication, distension, and elongation protecting against injury has changed, or been refined over time. Dr. Jurenka relied upon this theory in her evidence and, importantly, it attracted "significant probative value" at trial (RFJ at para. 60(j)).
- [102] The judge did not hear about the conclusions drawn by Dr. Doersam from his review of the literature on consensual and non-consensual injuries. The latter evidence was relevant to assessing the weight of Dr. Jurenka's opinion to the extent that she also relied on literature to inform her opinion. Finally, the judge did not hear from Dr. Doersam about the degree of

pain one might reasonably expect with an injury of the type sustained by S.F., or its cause, an issue also addressed by Dr. Jurenka and the other medical witnesses, and taken into consideration by the judge in his assessment of the Crown's case.

- [103] It may be that even with Dr. Doersam's evidence, the judge would have preferred the evidence of Dr. Jurenka. However, the errors committed here detrimentally affected the fairness of the trial process. Because of the qualifications ruling, only the Crown's medical experts were able to testify on a material aspect of the case. Moreover, the Crown was given opportunity to not only advance expert opinion evidence relevant to the issue of consent, but to rebut propositions anticipated from the defence expert, without the defence having opportunity to contextualize or explain those propositions for a fully informed determination on their validity. In my view, the appellant was unfairly deprived of his entitlement to make full answer and defence by not allowing Dr. Doersam to testify.
- [104] On this point, I find *R. v. S. (L.)* (1999), 125 O.A.C. 173, instructive. There, a 15-year-old accused was found guilty of sexually assaulting a child. The Crown tendered an expert in child behavioural and clinical psychology to address two issues: (1) the competency or capacity of the child complainant to testify; and (2) the necessity and reliability of statements made by child victims and witnesses, relevant to the admissibility of those statements in court.
- [105] The defence conceded the qualifications of the Crown expert. It then sought to qualify its own expert to give opinion evidence in the area of forensic psychological assessments of child sexual abuse victims, specific to the reliability of their statements (at para. 9). The trial judge held that although the defence expert was qualified as a forensic psychologist, he was not qualified to give evidence about sexually abused children because, in part, he was not sufficiently experienced in dealing with child victims. Instead, he dealt primarily with perpetrators. The judge denied the defence request to tender their expert, and, as a result, there was no evidence to refute the Crown expert. The evidence of the Crown expert was accepted, the hearsay statements of the child complainant were admitted as evidence, and the complainant did not testify at trial.
- [106] On appeal, the appellant argued the judge was wrong to disqualify the defence psychologist. The court agreed, finding that the trial judge over-emphasized the fact that the defence expert was not a child psychologist and failed to account for his extensive experience with child victims within a different context:

18 In our view, [the defence expert] was qualified to give the expert opinion evidence for which he was being tendered as a witness. The concerns raised by the trial judge about the extent of his experience and the focus of his involvement in the field would go to the weight to be accorded his evidence by the trier of fact, rather than to the threshold issue of his qualification to testify.

[Emphasis added.]

I find the erroneous approach to the defence expert in S. (L.) functionally similar to the one taken in this case. Dr. Doersam's lack of clinical experience and training specific to sexual assault complainants should have gone to the weight of his opinion, not its admissibility. See also R. v. R. (W.D.) (1994), 77 O.A.C. 59, in which the trial judge was found to have erred in principle when he held that a proposed defence expert was required to have clinical experience in the particular subject matter in dispute before he could be qualified to testify (at paras. 4-5).

[107] The Crown says the defence could have applied to re-open the qualifications voir dire and persuade the judge to take a different approach. Its failure to do so should weigh against the appellant on appeal.

[108] There is no question the judge had authority to reconsider his ruling (contrary to his suggestion that he was functus). For a helpful discussion of the applicable principles, see R. v. R.V., 2018 ONCA 547 at paras. 98-103; rev'd on other grounds, 2019 SCC 41.

[109] I also appreciate that in some cases, declining to seek reconsideration of an interlocutory ruling may weigh against appellate intervention. However, in the circumstances of this case, I do not agree that it should.

[110] Although the Crown said it was not opposed to revisiting the matter, the judge left the impression that he was only open to reconsideration if both sides agreed he had erred in his ruling. Furthermore, there was no change in circumstance the defence could point to as a principled basis for reconsideration. In any event, the prejudice to trial fairness is too significant to leave unaddressed on appeal because the appellant did not seek an additional opportunity to address the impugned ruling. The right to make full answer and defence is a principle of fundamental justice. It is dependent on being able to call the evidence considered necessary to support one's defence and challenge the Crown's case: R.V. (SCC) at para. 38.

B. Did the judge err in his approach to assessing S.F.'s credibility?

1. Alleged Error and Parties' Positions

[111] At trial, the Crown argued that the judge should accept S.F.'s testimony about the events in the nightclub preceding the sexual activity in the washroom, and "utilize those findings to help decide what ultimately happened inside of the cubicle" (RFJ at para. 21). In its closing submissions, the Crown described the events in the washroom as part of "one long continuing course of conduct" by the appellant. Accordingly, the judge's determination on consent should take into account the entirety of the interaction between the appellant and S.F.

[112] After considering the evidence of both the appellant and S.F. on the pre-cubicle events, the judge said this:

I cannot totally reject what [the appellant] said had happened prior to entering the cubicle and I cannot totally accept what [S.F.] said had happened prior to entering the cubicle. Indeed, I have some serious concerns with respect to each of their versions as to whether their interactions were consensual or non-consensual.

RFJ at para. 26. [Emphasis added.]

- [113] The judge said he was not able to determine whether the "kissing, hugging, [or] making out" in the interior of the nightclub was consensual. Furthermore, he was not able to determine whether S.F.'s entry into the washroom was "done with or without her consent" (RFJ at para. 50).
- [114] Because of his inability to determine what occurred prior to the sexual activity in the cubicle, the judge decided that he could not (and would not) use the "pre-cubicle activities to assist in assessing credibility nor to assist in determining what happened inside of the cubicle" (RFJ at paras. 51-53).
- [115] The appellant says it was an error for the judge to set aside his concerns about S.F.'s pre-cubicle evidence when assessing her testimony about the sexual activity and confinement in the washroom. He should have considered the whole of her evidence in deciding whether the Crown proved counts one and two beyond a reasonable doubt. Instead, he took a piecemeal approach, dividing the night's events into two parts: "I am dealing with two very distinct and separate situations" (RFJ at para. 53).
- [116] Then, because of the bifurcation, the judge's credibility concerns arising out of the first "situation" were ignored in assessing S.F.'s evidence on the second "situation". The appellant submits he was entitled to receive the benefit of all credibility and reliability concerns surrounding S.F.'s evidence in deciding whether the Crown proved the absence of consent to the sexual activity in the washroom, as well as the alleged confinement, whether those concerns arose out of events that occurred prior to entering the cubicle, during that activity, or after the fact.
- [117] Although the judge accepted S.F.'s assertion of non-consent in the washroom and her testimony that the appellant would not allow her to leave the cubicle, he did not believe everything she said. The judge "had some doubt as to who took off [S.F.'s] bra" (RFJ at paras. 59, 74). (In her testimony, S.F. acknowledged that when removing her bra, she sometimes twists it around her body for access to the clasp. This is what the appellant said happened in the cubicle). The appellant says this disputed fact formed a material part of the complainant's assertion that the appellant controlled not only the entry into the washroom and cubicle, but all that happened in the cubicle. It was essential, in determining whether the Crown met its burden of proof, that the judge assess this assertion and all other material parts of the complainant's narrative with reference to the entirety of the evidence.

[118] It is the Crown's position that the trial judge fully considered the pre-cubicle evidence and correctly determined it was of no assistance in assessing S.F.'s credibility or whether the Crown proved non-consent and confinement in the washroom. As the trier of fact, he was entitled to accept some, none, or all of S.F.'s testimony, whether related to the pre-cubicle events, what happened in the cubicle, or otherwise: *R. v. M.R.H.*, 2019 SCC 46, endorsing the dissenting judgment in 2019 BCCA 39 at paras. 30, 50, 52. The Crown says there is nothing inherently wrong with the judge having a doubt about S.F.'s testimony on the pre-cubicle events, but accepting her testimony about what happened after she entered the cubicle with the appellant and finding that her testimony, along with corroborating evidence, proved an aggravated sexual assault and unlawful confinement beyond a reasonable doubt.

[119] As noted earlier, the Crown also says the "condition of S.F. and the cubicle and the significant vaginal injury to S.F. were determinative of the issue of consent". In other words, credibility concerns about S.F.'s evidence of the events leading up to entry into the cubicle, even if taken into account on the issue of guilt or innocence, would not have made a difference.

2. Legal Principles

[120] A failure to consider all of the evidence in determining guilt or innocence constitutes an error of law: *R. v. J.M.H.*, 2011 SCC 45 at para. 31, citing *R. v. Morin*, [1992] 3 S.C.R. 286 at 295-96; *R. v. B. (G.)*, [1990] 2 S.C.R. 57.

[121] Ordinarily, a trial judge's assessment of credibility will attract substantial deference; however, a "credibility assessment that is tainted by an error of law may displace the deference and warrant appellate intervention": *R. v. Lacombe*, 2019 ONCA 938 at para. 32 (internal references omitted).

[122] It is well-established that a "jury's determination of which witnesses to find credible is a holistic exercise that involves assessing the plausibility and coherence of a given witness's testimony throughout the course of the trial": *R. v. Goldfinch*, 2019 SCC 38 at para. 123, Moldaver and Rowe JJ., concurring (emphasis added). A legally incorrect approach to that assessment runs the risk that the final step in the trial process, the weighing of the evidence, will be flawed: *R. v. B. (G.)* at 77.

3. Application of Principles

[123] In its closing submissions at trial, the Crown acknowledged that the credibility of the complainants and the appellant was a critical issue. Specific to the counts involving S.F., the Crown submitted that if the judge believed S.F. when she said she did not consent to sexual activity with the appellant, that was the end of the analysis on consent and the Crown met its burden for the actus reus of sexual assault. When she testified, S.F. was emphatic that she did not consent. The Crown submitted that whether the judge accepted that assertion was "a matter of credibility, to be weighed in light of all of the evidence, including any

ambiguous conduct" on the part of S.F.

- [124] In his reasons, the judge noted there was considerable testimony and argument on the pre-cubicle events (RFJ at para. 21). He acknowledged that he had to address that evidence "because the Crown ... asked the Court to accept [S.F.'s] version of all their 'pre-cubicle' behaviours and utilize those findings to help decide what ultimately happened inside the cubicle" (at para. 21). He did so, concluding that he could not "totally accept" what either S.F. or the appellant had to say about that part of the night (at para. 26).
- [125] The judge had "serious concerns with both of their testimonies" (RFJ at para. 27; emphasis added). Specific to S.F., he found that her description of how she kissed the appellant in the interior of the nightclub, and why, was contradicted by the evidence of other witnesses (at paras. 28-33). He also found inconsistencies between her testimony that she did not dance with the appellant and the evidence of another witness, who described them "slow dancing, with their arms around each other and they were kissing" (at para. 36). S.F. testified that the appellant forcibly pulled her around the nightclub. However, video surveillance appeared to show a "couple of times where [S.F.] put her arm around" the appellant (at para. 43), suggesting that the interaction may have been more amicable than described. The pre-cubicle evidence established that when S.F. entered the women's washroom with the appellant, "there were a number of young women standing at the mirrors and [S.F.] did not in any way try to attract their attention to seek their help" (at para. 46). The judge accepted that S.F.'s explanation for not reaching out was plausible, but on the evidence, including the video surveillance, could not "discount the possible alternative" that she voluntarily entered the washroom (at para. 48).
- [126] Because of his inability to determine the facts surrounding the pre-cubicle events, the judge decided that he could not use those events "to assist in assessing credibility nor to assist in determining what happened inside the cubicle" (RFJ at para. 53).
- [127] The judge correctly noted that even had he found that the activity in the interior of the nightclub was consensual, the fact of that consent "could not be used in any way, to infer or serve as evidence that [S.F.] might have consented to the fellatio, the digital penetration and the intercourse inside of the cubicle" (RFJ at para. 54). To do so would have engaged impermissible twin myth reasoning, namely, that a complainant's consent to sexual conduct on one occasion makes it more likely that she would have consented to the sexual activity that forms the subject matter of the charge, or renders her less worthy of belief: *R. v. Barton*, 2019 SCC 33 at para. 56.
- [128] However, I am of the view it was a legal error for the judge to set aside the pre-cubicle evidence in assessing the credibility of S.F.'s testimony about the events in the cubicle, and, importantly, the "serious concerns" he had about her evidence. He was duty bound to consider S.F.'s testimony about the sexual activity in the cubicle, as well as her alleged confinement, within the context of the evidence as a whole, ensuring that his findings on credibility for both charged offences accounted for frailties in her trial testimony generally.

This was not an evidentiary foundation involving "two very distinct and separate situations" (RFJ at para. 53). Rather, the activity in the interior of the nightclub and the activity in the washroom formed part of a continuum of interaction between the appellant and S.F. They entered the washroom only six to seven minutes after S.F. arrived at the nightclub and, on the evidence, were together for the entirety of that time.

- [129] The credibility of S.F.'s testimony that she was forced into the washroom and the cubicle, prevented from leaving the cubicle, and that she did not consent to any of the sexual activity that occurred there, was vigorously challenged. In closing submissions, defence counsel argued that the judge should find the complainant's evidence less than credible. Among other things, he pointed to the video evidence, which was said to contradict S.F.'s testimony about the pre-cubicle events and her entry into the washroom; her testimony that she did not recall parts of the evening; contradictions between her evidence and a statement to police; and S.F.'s evidence that things unfolded very quickly in the cubicle, while the video showed that the appellant and S.F. were in the women's washroom for 26 minutes.
- [130] It may be that the trial judge's "serious concerns" surrounding S.F.'s pre-cubicle testimony, once addressed and taken into account, would not have affected his ultimate assessment of her evidence on the issue of consent and confinement. As the Crown correctly notes, a judge is entitled to accept all, none, or only portions of a witness' testimony. There was also a body of compelling circumstantial evidence in this case from which a trier of fact could reasonably find support for S.F.'s assertion of non-consent in respect of some or all of the activity in the cubicle. This included the state of the cubicle after the fact, the vaginal injury, observations made of the complainant's emotional state, and the appellant's post-offence conduct in leaving the cubicle, not seeking assistance for S.F., and then spending over 20 minutes in the men's washroom, cleaning his clothing and shoes.
- [131] However, the judge adopted an approach to his assessment of S.F.'s evidence on the first and second counts that does not accord with the analytical principles he was bound to apply. He did not assess her testimony on the cubicle events with reference to the evidence as a whole. Rather, he explicitly limited that assessment to S.F.'s testimony about events that occurred after she entered the cubicle and found as a fact, based on that evidence, that S.F. did not consent to any of the sexual activity in the cubicle, was "overpowered" by the appellant, and that he forced her to "remain locked in the cubicle against her will" (RFJ at para. 75).
- [132] In my view, the judge's intentional choice to compartmentalize the pre-cubicle and post-cubicle events, analyze them separately, and not allow his assessment of the evidence of one to inform the determinations made about S.F.'s testimony on the other, tainted his credibility determination overall, and, ultimately, his weighing of the evidence on the aggravated sexual assault and unlawful confinement. As a result, the appellant cannot be sure that the entirety of the evidence on counts one and two was taken into account in the determination of guilt.

C. Did the judge use impermissible stereotypes in deciding the case?

- [133] The appellant says the trial judge relied on speculative reasoning and impermissible stereotypes when rejecting his evidence on the counts involving S.F.
- [134] First, the judge rejected the appellant's evidence, in part, on the grounds that it "does not make sense" the appellant would have asked S.F. if she consented to sexual intercourse just before the intercourse occurred, rather than at the start of the activity in the cubicle (RFJ at para. 60(a)). The appellant says there is nothing inherently far-fetched or improbable about this assertion and the "common sense" proposition applied by the judge finds no support in the evidence, legal principle, or reason.
- [135] Second, the appellant says one of the factors considered in deciding that the activity in the washroom was "more consistent" with forced sexual activity than consensual penetration, is that the appellant "showed no concern at all" for S.F.'s well-being. The judge found this behaviour "at odds with what someone would reasonably expect any man to do if he just had engaged in consensual sex with a woman" (RFJ at para. 60(c); emphasis added). The appellant says this reasoning not only wrongly adopted a stereotypical understanding of how an adult male would behave in similar circumstances, but unfairly applied it to the conduct of a 16 year old.
- [136] I note that in expressing concern about S.F.'s testimony that the appellant removed her bra, the judge similarly assessed her evidence against his understanding of what constitutes "usual" behaviour in a consensual encounter. The appellant testified that S.F. rotated her bra to the side of her body and then unfastened the clasp. S.F.'s denial that this took place caused the judge concern "because it would be an unusual way for a man to take off a woman's bra" (RFJ at para. 59(a)); emphasis added.)
- [137] In light of the conclusions reached on the first and second grounds of appeal, it is not necessary to determine whether the judge's impugned comments amount to unfairly prejudicial speculative reasoning, or an erroneous application of generalizations and stereotypes that resulted in palpable and overriding error, justifying appellate intervention: *R. v. Gagnon*, 2006 SCC 17 at para. 10.
- [138] I will note, in passing, that when assessing credibility, trial judges must keep in mind that speculative reasoning relying on "common sense" propositions that are not grounded in the evidence can give rise to reversible error. See, for example, *R. v. P. (T.)*, 2007 ONCA 585.
- [139] The law is also clear that a negative assessment of credibility based on an unfounded stereotype constitutes an error of law: *R. v. A.R.D.*, 2017 ABCA 237 at paras. 28, 50, 57, aff'd on appeal, 2018 SCC 6; *Lacombe* at para. 33. Moreover, this principle applies to both complainants and the accused. Rejecting an accused's testimony based on a "stereotypical assumption or generalization lacking in an evidentiary foundation" can necessitate a new trial: *R. v. Kodwat*, 2017 YKCA 11 at para. 41. See also *R. v. Thompson*, 2019 BCCA 1 at paras. 52-69; *R. v. Quartey*, 2018 ABCA 12 at paras. 2, 21, aff'd on appeal, 2018 SCC 59.

D. Did the judge improperly use an out-of-court statement?

1. Alleged Error and Parties' Positions

[140] This ground of appeal is exclusive to the second of the two sexual assault allegations. As noted, one of B.P.'s friends testified that after they picked up B.P. from the appellant's residence, she told them the appellant "just made [her] suck his dick". The appellant says the trial judge not only misstated this evidence (he thought B.P. used the word "forced", rather than "made"), but more importantly, he wrongly used B.P.'s statement to corroborate the truth of her assertion that the sexual activity was non-consensual. As part of his explanation for why he found B.P.'s "version totally credible" (RFJ at para. 124), the judge made specific reference to the statement:

[129] Within 5 minutes, her friends arrived and it is totally credible that she would be spitting continuously out the car window due to what had just happened to her. Her explanation to H.D. in the car, that Mr. M. "had just forced her to suck his dick" serves to confirm the incident, the reason for all the spitting, and also her distraught emotional state, just moments afterwards.

[Emphasis added.]

[141] Relying on *R. v. Ellard*, 2009 SCC 27, the appellant contends that although B.P.'s statement may have been admissible to rebut a claim of recent fabrication, it could not be used to support a fact in issue, or to assess B.P.'s credibility or reliability as a witness. The appellant says the trial judge did precisely that and with reference to the statement, drew a prohibited inference; namely, that B.P.'s testimony was truthful because she told others that the appellant "forced" her to engage in sexual contact.

[142] The Crown says B.P.'s out-of-court statement was admissible on more than one basis. First, it was admissible to rebut an implied allegation that B.P. reconstituted the consensual nature of the sexual activity after the fact and turned it into a false complaint of sexual assault as support for S.F. Second, the statement provided important context for understanding the spitting that occurred while B.P. was with her friends, as well as her emotional state.

[143] The Crown also says the trial judge did not improperly rely on the statement for its truth, or to bolster B.P.'s testimonial credibility based on consistencies between the content of the statement and her evidence at trial. Instead, he used it for reasons that were permitted in cases such as *R. v. Le*, 2003 BCCA 391; *R. v. Hughes*, 2001 BCCA 424; and *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C. C.A.). There, the Crown was entitled to lead evidence of a prior consistent statement to rebut allegations of recent fabrication (*Hughes* at para. 47). In addition, the fact that "a prior complaint was made, when it was made, and why it was or was not made in a timely fashion" was admissible to establish the "conduct of the complainant", from which the trier of fact could then draw inferences "relative to the credibility of that complainant's evidence": *Ay* at 471.

2. Legal Principles

- [144] The admissibility and use of a complainant's out-of-court statements raise questions of law. The standard of review is correctness: *R. v. E. (M.)*, 2015 BCCA 54 at para. 41; *R. v. Kaswandik*, 2013 YKCA 8 at paras. 12-13.
- [145] The appellant is correct that out-of-court statements consistent with a witness' testimony are presumptively inadmissible. This evidence is generally self-serving and lacking in probative value. Among other things, presumptive inadmissibility mitigates the possibility of enhanced testimonial credibility based solely on the fact of repetition: *Ellard* at para. 31.
- [146] However, there are recognized exceptions to the rule: *Ellard* at para. 32. To begin with, "where a party has made an allegation of recent fabrication, the opposing party can rebut the allegation by introducing prior statements made before the alleged fabrication arose, that are consistent with the testimony at trial": *Ellard* at para. 32 (*italics in the original*). For this exception to apply, the alleged fabrication must have arisen after the event the witness testifies about: *Ellard* at para. 33. See also *R. v. Stirling*, 2008 SCC 10 at para. 5.
- [147] Another exception involves the admission of a witness' "narrative" (spoken or written account) as circumstantial evidence: *R. v. Khan*, 2017 ONCA 114 at paras. 29-40, leave to appeal ref'd, [2017] S.C.C.A. No. 139; *R. v. Angel*, 2019 BCCA 449 at paras. 63-74; *R. v. Dinardo*, 2008 SCC 24 at para. 37. In *Angel*, Fisher and Abrioux JJ.A. explained that the narrative exception:
- [72] recognizes that prior statements can assist the trier of fact in assessing the truthfulness or reliability of the declarant's in-court testimony. A statement admitted under this exception is not received as evidence of the truth of its contents, but rather, for the fact it was made. The circumstances in which it was made, its timing, or the context it provides may assist the trier of fact in assessing the truth of the declarant's in-court testimony

[Emphasis added; internal references omitted.]

3. Application of Principles

- [148] I am satisfied that B.P.'s statement to her friends was admissible to rebut an allegation of recent fabrication. It was also admissible under the narrative as circumstantial evidence exception.
- [149] In cross-examination, it was suggested to B.P. that after the events involving the appellant and S.F., B.P. started to "look back" and "re-examined what had happened" between herself and the appellant the previous October, seeing things in a "different light." This line of questioning implied that B.P. reconstituted the sexual interaction with the appellant after the fact and was influenced in doing so by S.F.'s disclosure. In these circumstances, the fact that B.P. told her friends within 20 minutes of the incident, and four months prior to the events at the nightclub, that the appellant made her perform fellatio was admissible to rebut the allegation of recent fabrication. The fact of the disclosure and its timing was

highly relevant to assessing the merits of the defence proposition that B.P.'s characterization of the sexual activity as non-consensual arose only once S.F.'s story had been made known to her.

[150] When the statement was adduced at trial, the defence objected. Crown counsel took the position that she was entitled to lead the fact of the statement as "part of the narrative" (emphasis added). She went on to suggest that the trial judge could:

receive that evidence as part of the narrative and for evidence that the complaint was made, and just by virtue of the fact that the complaint was made [he could] use it as one piece of circumstantial evidence to assess the credibility of the complainant

[Emphasis added.]

[151] In my view, Crown counsel correctly noted that the narrative as circumstantial evidence exception was in play. B.P. disclosed what happened shortly after the alleged sexual assault, during a time when her demeanour was "confused" and "off". Prior to making the impugned statement, she repeatedly spat from a car window. She texted her friends to pick her up, consistent with a pre-existing plan that she would reach out if uncomfortable in her interaction with the appellant. The statement formed part of a backdrop of events in close proximity to the alleged offence, from which inferences could be drawn that B.P.'s conduct, including her physical and emotional reaction, and the fact of disclosure, supported her truthfulness and credibility that what happened on the lawn of the appellant's residence was unexpected, forced upon her, and she was unsure how to respond.

[152] The more controversial issue is whether the trial judge used B.P.'s prior statement for an improper purpose. The fact that a prior consistent statement has been properly admitted does not insulate that statement from review. The trial judge must also ensure its proper use: *R. v. Langan*, 2019 BCCA 467 at para. 53.

[153] Ellard makes clear that statements admitted to rebut an allegation of recent fabrication must be used for that purpose and "not to support the fact at issue or the general reliability of the witness" (at para. 42). See also *Stirling* at para. 7. This same limitation governs the narrative as circumstantial evidence exception. The prior statement may not be relied on to infer that a witness is more likely to be telling the truth because they said the same thing more than once: *Langan* at para. 42; *R. v. Gill*, 2018 BCCA 275 at para. 68.

[154] However, notwithstanding these limitations, the law recognizes that prior consistent statements can have a positive impact on a witness' overall credibility without that impact amounting to legal error. Where admission "removes a motive for fabrication", that factor can be considered as part of the trial judge's "larger assessment of credibility": *Stirling* at para. 11. Similarly, admitting a statement under the narrative as circumstantial evidence exception can provide important context for a witness' overall credibility and, ultimately, the truthfulness of that person's testimony at trial: *Khan* at para. 44; *Dinardo* at para. 37. This is because the timing and circumstances surrounding the disclosure may positively

inform the determination on whether to accept that witness's evidence: Langan at para. 44, referencing Gill at para. 76.

- [155] The appellant has not persuaded me that the trial judge used B.P.'s prior statement for an improper purpose. I accept that at first glance, the language used in para. 129 of the reasons for judgment, that the statement "serve[d] to confirm the incident," is problematic. The trial judge also misstated the timing of the statement. On the evidence, B.P.'s disclosure was not made in the car; rather, it occurred after the two groups of friends met up once they travelled away from the appellant's residence. However, the reasons must be read as a whole and I am satisfied that B.P.'s disclosure was considered as but one piece of a larger body of circumstantial evidence surrounding her conduct in the aftermath of her interaction with the appellant.
- [156] The judge referred to B.P.'s statement when explaining why he found her testimony credible, but the reference to what she said formed part of a broader discussion of B.P.'s "prearranged escape plan"; the fact she was retrieved by her friends in accordance with that plan; her spitting from the car window; and B.P.'s "distraught emotional state" (RFJ at paras. 128-29). In my view, it was this circumstantial evidence, as a whole, that the judge found "confirm[ed] the incident" (at para. 129). The judge did not single out consistency between the actual content of B.P.'s statement and her testimonial version of events as a basis for finding truthfulness in the assertion of non-consent, which was the predominant issue in dispute. Indeed, at the end of his judgment, when he pronounced his finding of guilt on the third count, the judge listed the evidence he considered "confirmatory" of "what [B.P.] said she had just gone through with [the appellant]" and made no mention of the statement or its content (at para. 134, emphasis added).
- [157] As the trier of fact, the judge was entitled to consider the fact of B.P.'s disclosure, the circumstances in which she disclosed, and its closeness in time to the alleged assault in assessing credibility. This was a case with delayed reporting that the defence said involved fabrication in support of another complainant's disclosure. In these circumstances, it was open to the judge to look to a statement made within 20 minutes of the alleged sexual assault as a fact that could assist in assessing the truthfulness of the explanations provided for the delayed reporting; whether there was merit to the suggestion of recent fabrication; and the complainant's overall credibility. The judge was allowed to place the statement "on the scale" because it carried probative value beyond the fact of repetition: Khan at para. 44. It removed the suggested "motive to fabricate" (Stirling at para. 11). It also formed part of a body of evidence surrounding the "sequence and timing of events and the emotional state of the complainant at the time of the utterance": Khan at para. 44. In the latter role, the evidence provided important context that the judge was entitled to consider: Khan; Dinardo at para. 37.

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

E. Did the judge misapprehend the appellant's evidence?

1. Alleged Error and Parties' Positions

[159] In his factum, the appellant says the trial judge rejected his testimony in relation to B.P. based on a misapprehension of his evidence.

[160] In support of that argument, the appellant points to the evidence surrounding the appellant's text messages to B.P. following the incident. As noted, the appellant described what happened with B.P. as "terrible". In his testimony, he explained the texts in two ways: (1) he felt bad because he did not invite B.P. into his home; and (2) he was worried that their interaction would have seemed like nothing more than a "hook-up" to B.P. and he did not want to leave that impression.

[161] The judge found that the reasons given for the texts were "totally unbelievable" (RFJ at para. 119). He then focused on the explanation about not inviting B.P. into the appellant's house and said it did not make sense "because he had already told [B.P.] before she came over, that he couldn't invite her into the house because it was too late and his parents wouldn't permit it" (at para. 119). The appellant says this was only one of the explanations provided by the appellant and before not believing him on the issue of consent, the trial judge should have considered the second explanation.

[162] At the hearing of the appeal, appellant's counsel raised a second alleged misapprehension. He says the judge wrongly understood the appellant to testify that the purpose of getting together with B.P. at his residence was to talk about the birthday party from a week earlier. The judge then took the absence of discussion about that event into account in rejecting the appellant's evidence, and concluded that he "took advantage of the opportunity of being alone with [B.P.] to sexually assault her" (RFJ at para. 118). The appellant says this was a material error. The judge was mistaken about a fact against which he then negatively assessed the appellant's credibility.

[163] The Crown says there was no misapprehension of the evidence and, in any event, the matters raised by the appellant under this ground of appeal did not play an essential role in the conviction on count three.

2. Legal Principles

[164] A misapprehension of evidence can result in a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Code. The test for appellate intervention was summarized in *R. v. Swales*, 2014 BCCA 350:

[48] The threshold to be met in demonstrating a misapprehension of evidence warranting appellate intervention is stringent. The misapprehension must be a question of substance; must be "material" to the trial judge's reasoning process; and must play an essential role, not just in the narrative of the judgment, but in the reasoning process resulting in conviction: *R. v. Lohrer* at para. 2, 2004 SCC 80, [2004] 3 S.C.R. 732. All three elements of the test must be satisfied to establish a material misapprehension of evidence. The trial judge must be shown to have erred by actually misapprehending the evidence. As LeBel J. explained in *R. v.*

Sinclair, 2011 SCC 40, [2011] 3 S.C.R. 3 at para. 53, "[t]he plain language or the thrust of the reasons must disclose an actual mistake".

[49] It is not enough for the appellant to merely suggest a different interpretation of the evidence, or merely point to some evidence which arguably weighs against the trial judge's finding. Mere differences in interpretation on factual matters are not misapprehensions but simple disagreement with the judge's differing view of the evidence.

See also R. v. Wright, 2019 BCCA 327 at paras. 20-22 and R. v. Kaemmer, 2019 BCCA 136 at paras. 25-29 for more recent articulations of the governing principles.

3. Application of Principles

[165] It is apparent from his reasons that the trial judge understood the appellant provided two distinct explanations for the texts he sent to B.P. after the fact, one of which was that he felt badly because he did not invite B.P. into his home (RFJ at paras. 100, 119).

[166] This is what the appellant said about the texts in direct examination:

[Defence counsel] I want to go back and ask you, when you - when there's this comment about that was terrible--

A Mm-hmm.

Q - what was - what was terrible?

A I should invite her inside. It became clear to me after that she wanted to talk a lot more and progress our relationship a lot more.

Q Okay.

A And I guess I just kind of felt like just a hook-up.

Q It felt like just a hook-up?

A Yeah, but I -

Q That was the - was that what you were thinking or -

A Yeah, that's what I felt afterwards at least.

Q And so why were you texting with her?

A Because I didn't want it to be just a hook-up.

[167] The issue was canvassed again in cross-examination:

[Crown counsel] But the plan was never for her to come in the house?

A No, but I kind of felt like I should have just let her inside.

Q Right. But you didn't?

A No. That's why I -

Q And you snuck out -

A - texted her.

Q - the window?

A Yeah.

Q Your mom and dad were asleep?

A Yeah.

Q The house was dark?

A Yes.

Q So when [B.P.] just gets there, it's already 12:42 in the morning?

A Mm-hmm.

Q And you brought her a hoodie because it was understood that you were going to be outside?

A Yes.

Q So it's not terrible that you didn't invite her into the house, is it?

A That's not it. That's not only it, no.

Q No. It's not only it.

A Yeah.

Q What's terrible is that you forced her to perform oral sex on you, and this is what you're starting to apologize for -

A No.

Q - in this text message?

A No.

A No. She felt used.

Q Right. She felt used because you made her perform oral sex?

A She felt used because we hooked up instead of talking.

Q So what's "terrible" is what happened on the lawn, right?

A Yeah, it felt like just a hookup.

A I'm apologizing for the fact that it was a hookup and not us talking all night.

Q So why are you apologizing for that?

A Because it felt like it was only a hookup, and that I had no feelings for her, and that - and that I just didn't care about her, and that wasn't the case.

[168] In my view, the contention that the trial judge misapprehended the evidence surrounding the explanations for why the appellant felt bad is without merit. The above excerpts from the record show that the judge correctly identified the two explanations at para. 100 of his reasons. He was alive to both of them, but rejected one as not credible and articulated his reasons why. The appellant does not suggest that the rejection was illogical or otherwise tainted by legal error. The fact that the judge explicitly addressed one of the explanations, and not the other, does not mean that he misapprehended the evidence. A trial judge does not have to address every piece of evidence in their reasons: J.M.H. at para. 32. I note that the judge provided additional reasons for finding the appellant not credible and, even if he did misapprehend this part of the appellant's testimony, I would have found that it did not play an essential role in the reasoning process that led to a conviction.

[169] I also disagree with the appellant that the judge's reasons for conviction reveal a second misapprehension of evidence. It is correct the appellant did not testify that the reason for inviting B.P. to his house was to talk about the birthday party. The judge misspoke when reciting the evidence on that point (RFJ at paras. 116 and 118).

[170] However, it was not disputed that in the days leading up to the incident on the lawn, the appellant and B.P. were exchanging text messages about the birthday party, the appellant's thoughts on B.P.'s behaviour, and its impact on their relationship. The appellant testified that he was initially angry about what happened, and, although his anger had dissipated, the issue remained on his mind. B.P. said she thought the matter would be discussed when she got to his house. She was nervous about that fact and developed a plan for her friends to retrieve her if necessary. At least one of her friends confirmed B.P.'s nervous demeanour in her evidence. B.P. testified that she apologized to the appellant as soon as she arrived at his home. In his evidence, the appellant acknowledged that B.P. likely came to his residence wanting to talk about their relationship. However, no discussion took place.

[171] As I read the impugned portions of the judge's reasons, he did not find that the appellant's evidence lacked credibility based on a discrepancy between what he thought the appellant said about the purpose of getting together with B.P., and the absence of conversation about the relationship. Rather, the judge found that the whole of the surrounding circumstances, including B.P.'s expectations and her anxiety about seeing the appellant, the lack of response to her apology, the absence of discussion about the relationship, and the quickness with which the appellant began kissing B.P. and asking for oral sex, were inconsistent with a mutually consensual progression in physical contact. The judge accepted that B.P. did not go to the appellant's house to have sex or "make out" (RFJ at paras. 118 and 127). In that context, he found the appellant's version of consensual fellatio without any discussion about the outstanding issues between B.P. and the appellant was lacking in

credibility.

- [172] In my view, what the appellant puts forward as a misapprehension of evidence is, in substance, a disagreement with how the judge interpreted the evidence. As noted in Swales, "[m]ere differences in interpretation on factual matters are not misapprehensions" (at para. 49).
- [173] To establish a misapprehension of evidence justifying intervention, an appellant must show that the reasons disclose an actual mistake as to the substance of the evidence, a failure to consider evidence relevant to a material issue, or that the judge failed to give proper effect to the evidence: *R. v. Sinclair*, 2011 SCC 40 at para. 53; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at 538. It is a stringent standard and, in my view, the appellant has not met the test.
- [174] On this count, I am satisfied the judge "did the job trial judges are to do: he assessed the evidence of each of the appellant and [B.P.], and, in the context of the legal principles about which he correctly instructed himself, [he] drew conclusions about their credibility and reliability": *R. v. Anand*, 2013 BCCA 303 at para. 6. Based on those conclusions, he found that the Crown proved a sexual assault beyond a reasonable doubt. I see no principled basis for interfering with that determination and would not accede to this ground of appeal.

F. Did s. 276 apply to this case?

- [175] At trial, the Crown did not seek a ruling or direction from the trial judge on the admissibility of sexual contact or communication that occurred between the appellant and S.F. prior to the events in the women's washroom. Nor did the appellant make an application under s. 276.1 of the Code in relation to that evidence. An application was filed in respect of one or more text messages involving S.F.; however, it was later withdrawn.
- [176] In her evidence, B.P. was asked about having kissed the appellant in a park approximately two weeks prior to the night in question. The appellant also testified to this fact. On a review of the record before the Court, that evidence does not appear to have been subjected to a s. 276 review.
- [177] At the hearing of the appeal, the Court asked whether s. 276 was engaged on the counts involving S.F. In response, counsel provided supplementary written submissions.
- [178] The Crown acknowledges it is not exempt from s. 276(1) in leading evidence of a complainant's prior sexual activity. This type of evidence, when adduced by the Crown, is subject to a common law process and analysis that tests admissibility by weighing its probative value against the danger of unfair prejudice: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 634-5; see also *R.V. (SCC)* at para. 78; *Goldfinch* at paras. 75, 142; *Barton* at para. 80; *Langan* at para. 65.

- [179] However, the Crown says that on the facts of this case, the admissibility analysis would not have precluded receipt of the impugned evidence. The pre-cubicle evidence "closely preceded the offences, was relevant to an understanding of context and narrative and had significant probative value". Furthermore, there was "no prejudice to S.F.'s personal dignity and right of privacy".
- [180] The appellant says an admissibility hearing was not required on the counts involving S.F. The sexual contact preceding the washroom formed part of the chronology of events leading to the activity in the cubicle and was, therefore, the "subject-matter of the charge". As such, it did not constitute evidence of prior sexual activity within the meaning of s. 276 or the common law framework in *Seaboyer*. In any event, the evidence was admissible: "Evidence of what the parties were doing in the time leading up to, or after, an alleged assault will often be important in making credibility and factual findings".
- [181] The conclusions reached on the first two grounds of appeal involving S.F. render it unnecessary to resolve the application of s. 276 principles to those counts, or to address the merits of the related submissions made by counsel.
- [182] It will be up to the trial judge at any new trial to determine the extent to which s. 276 principles may be engaged on the counts involving S.F. (whether statutorily or at common law), including what portions of the anticipated evidence fall within scope. As part of that analysis, the trial court may need to consider the issue raised by appellant's counsel, namely, whether sexual contact or communication with the accused that occurs close in time to the charged conduct is exempt from consideration as prior sexual activity on the grounds that it forms part of the "subject-matter of the charge". For present purposes, I simply note that this issue has attracted attention in the lower courts, with reported analyses. See, for example, *R. v. B. (T.)*, 2013 ONCJ 542 (Ont. Prov. Ct.) and *R. v. S. (D.R.)*, 1999 ABQB 330.
- [183] On the count involving B.P., the appellant did not raise the absence of an admissibility analysis on the prior kissing as a ground of appeal. This is not surprising in light of the fact that the evidence went before the judge, and was available to the defence in making full answer and defence. In his supplementary written submissions, which focused on the application of s. 276 principles to this case, the appellant did not express concern in relation to the count involving B.P. or allege prejudice resulting from the lack of an admissibility assessment. There is no indication of speculation, discriminatory generalizations or twin-myth reasoning relating to this evidence in the reasons for judgment. Although the judge made reference to the kissing when reciting the evidence on the third count (RFJ at para. 84), there is no further mention of it and no indication that the kissing played a role in the decision to convict. In the circumstances of this case, the absence of an admissibility assessment on the prior sexual activity was harmless. Non-compliance with s. 276 principles will not always undermine the integrity of the trial and constitute a reversible error. The individualized features of the case may militate against that conclusion: *R.V. (SCC)* at paras. 83-98.

V. DISPOSITION

[184] For the reasons provided, I have found that the trial judge committed reversible errors on the counts of aggravated sexual assault and unlawful confinement. I would allow the appeal on those counts, set aside the findings of guilt and order a new trial.

[185] I would dismiss the appeal on the third count involving the sexual assault of B.P.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Butler"

[1] Sections 273(2), 279(2)(a) and 271 of the Criminal Code, R.S.C. 1985, c. C-46, respectively.

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