

CANADA / JUDGMENT

R. v. Campbell

2023 BCCA 19

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 19 R. v. Campbell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Campbell,

2023 BCCA 19

Date: 20230117

Docket: CA47307

Between:

Rex

Respondent

And

David Bruce Campbell

Appellant

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Before:

The Honourable Justice Willcock

The Honourable Justice Dickson

The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated August 26, 2020 (conviction) (R. v. Campbell, 2020 BCSC 1423, Vancouver Docket 27802-A).

Counsel for the Appellant:

R.T. Gill

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

April 7, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 17, 2023

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Justice Willcock

The Honourable Justice Marchand

Summary:

The appellant was charged with sexual assault and sexual interference against his best friend's daughter when she was between 9 and 11 years old. He was convicted of sexual assault but acquitted of sexual interference. He appeals his conviction for sexual assault alleging that the trial judge erred by analysing the evidence on the sexual interference charge in a manner that was inconsistent with the sexual assault conviction; taking an unbalanced approach to assessing his evidence and the complainant's evidence; and misapprehending evidence related to his credibility. HELD: Appeal dismissed. The judge did not analyse the evidence on the sexual interference charge in a manner that was inconsistent with the sexual assault conviction; take an unbalanced approach to assessing the evidence; or misapprehend evidence related to the appellant's credibility.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

- [1] David Campbell was charged with sexual assault and sexual interference against J.J., his best friend's daughter. The charges related to a massage Mr. Campbell performed on J.J. about two decades ago, when she was a child. Mr. Campbell admitted that he once performed a massage on J.J., but described the incident differently than she did and claimed it happened after her 14th birthday. Following a three-day trial, Justice Brundrett rejected Mr. Campbell's testimony on the timing and circumstances of the massage and accepted J.J.'s account, including her testimony that it happened when she was between 9 and 11 years old.
- [2] The judge had a reasonable doubt as to whether Mr. Campbell touched J.J. for a subjectively sexual purpose when he massaged her as she described in her testimony. As a result, he acquitted Mr. Campbell on the sexual interference charge. However, he was satisfied that from any objective point of view the massage was committed in circumstances of a sexual nature. Given J.J.'s age at the time, he was also satisfied that the defence of consent did not apply to this case. Accordingly, he convicted Mr. Campbell of the sexual assault charge.
- [3] Mr. Campbell appeals from the sexual assault conviction. He submits the judge erred by reaching a conclusion on the sexual interference charge that was inconsistent with the conviction on the sexual assault charge. He also submits the judge erred by applying different standards of scrutiny as between his evidence and J.J.'s evidence, and by misapprehending the evidence related to adverse findings on his credibility. In consequence, Mr. Campbell says, we should allow the appeal, set aside the conviction and order a new trial.
- [4] In my view, the judge made no errors in his careful and nuanced analysis. For that reason and those that follow, I would dismiss the appeal.

Background

- [5] J.J. was born in Australia in 1987. In 1992, she moved with her parents and sisters to British Columbia, where they lived together until her parents separated in May 1999. J.J. was 11 years old at the time of the separation.
- [6] Between September 1996 and May 1999, J.J. and her family lived in a house on Upland Drive in Tsawwassen, B.C. After her parents separated, J.J.'s mother, K.A., and father, P.J., co-parented J.J. and her sisters in their respective homes.
- [7] When J.J. was 14 or 15 years old, P.J. moved into a house on Tsawwassen Beach Road. From that point forward, she stayed at the Tsawwassen Beach Road house when she was in his care.
- [8] Mr. Campbell was a close friend of J.J.'s family. He was a musician and J.J. idolized him. At trial, she testified that he was like an uncle to her and she spent a lot of time with him.

At Trial

- [9] The Crown called two witnesses at trial, J.J. and her mother, K.A. Mr. Campbell testified on his own behalf.
- [10] J.J. described the massage incident in detail in her testimony. She said the incident occurred one evening at the Upland Drive house before her parents separated in 1999. J.J. thought Mr. Campbell was babysitting her at the time because he was putting her to bed in her parents' bed when it happened. She could not remember who else was in the house, but said only she and Mr. Campbell were in the bedroom.
- [11] According to J.J., she was on her mother's side of the bed, the lights were off and a lamp was on. She was wearing one of her father's T-shirts but nothing else when the incident happened. She testified that Mr. Campbell asked if she wanted a back massage. She agreed, and he started to massage her back and shoulders over her T-shirt. However, a few minutes later he playfully suggested that the best way to give a back massage was to do the top and bottom at the same time. She agreed to this suggestion and, at Mr. Campbell's instruction, positioned herself on all fours on her parents' bed.
- [12] J.J. testified that when she was positioned on all fours her uncovered genitalia were exposed to Mr. Campbell, who was kneeling behind her. At that point, he began to massage her under her T-shirt. He rubbed her chest and stomach area with one hand by reaching under her body and between her legs. He rubbed her back with the other hand on top of her body. Within a few minutes, she began to feel uncomfortable and confused by what was happening. As a result, she told Mr. Campbell she wanted to go to sleep and he stopped the massage.
- [13] On cross-examination, J.J. testified that she first disclosed the massage incident to her sister in 2008. In 2017, she told the police. When defence counsel put it to her that Mr. Campbell gave her a massage at the Tsawwassen Beach Road house when she was about 14 years old after she modelled bathing suits for an upcoming trip to Australia, J.J. was adamant that no such incident occurred.
- [14] The other Crown witness, K.A., confirmed the relevant timelines and locations at which she, P.J. and their children lived after they moved to Canada. She also acknowledged that she had previously stated she would not have allowed Mr. Campbell to babysit her children based on her concerns about his questionable morals and boundaries. However, K.A. testified that, on reflection, she had come to believe she might have allowed him to babysit the children. She explained the change in this regard on the basis that it had previously been too painful for her to accept she might have failed J.J.
- [15] For his part, Mr. Campbell acknowledged that he massaged J.J. on one occasion. However, he stated, the massage happened at the Tsawwassen Beach Road house when J.J. was 14 or 15 years old, not at the Upland Drive house before her parents' separation in 1999. In particular, he testified, the incident began on the deck of the Tsawwassen Beach Road house when J.J. modelled swimsuits she was planning to take on a trip to Australia and asked for his opinion on which she should bring with her. It was in that context, he said, that J.J. told

him her back had been bothering her and asked for or agreed to a back rub.

- [16] Mr. Campbell testified that it was hot and dirty on the deck so they went inside the house, where he began to rub J.J.'s back, neck and shoulders. He went on to say that shortly after he began the massage he asked if J.J. wanted to try another style of massage, "like an energy transfer thing" that he had learned from "alternative friends". J.J. agreed and got onto all fours. He positioned himself at her side, and he reached around "like a wrestling move between her legs", closer to her left thigh. Then, he said, he briefly massaged J.J.'s back and stomach.
- [17] According to Mr. Campbell, the massage lasted a minute or two. However, he testified, he quickly realised "maybe this isn't the best idea" and gave J.J. a "scrunchie" on her back and stomach in an effort to "keep it fun". He described the massage as "a bit of an awkward moment" and stated that it was "getting inappropriate" because J.J.'s vagina "was right there". He stated further that it was "bordering with sexual" and that it occurred to him if J.J.'s father walked in he would not appreciate it. As a result, he said, the massage stopped and they both had a chuckle.
- [18] On cross-examination, Mr. Campbell denied that he ever gave J.J. a massage at the Upland Drive house. He also denied that he was ever alone with J.J. in her parents' bedroom, that he massaged her when she was wearing a long T-shirt and no underwear, or that he massaged her for a sexual purpose. Although he acknowledged the massage he described was inappropriate, Mr. Campbell maintained that he was "a little naïve" about it at first so it took a while for it to dawn on him. He stated that he had friends do the same type of massage on him before and he had done it for friends, which is why he thought at first that it was a good thing.
- [19] In closing submissions, Crown counsel argued that Mr. Campbell's version of events was not credible. For example, he submitted, Mr. Campbell's testimony that he reached between J.J.'s legs made no sense given that he said he was positioned at her side and thus had direct access to her stomach. He also emphasised the detailed quality of J.J.'s account.
- [20] For his part, defence counsel acknowledged that J.J. was a credible witness in his closing submissions. However, he argued her evidence was not reliable, especially as to the timing of the massage incident. He also argued that Mr. Campbell's version of events was no less credible and perhaps more reliable than J.J.'s version, and stated there was no basis to reject Mr. Campbell's evidence and accept the evidence of J.J.

Reasons for Judgment

- [21] The judge began by summarising the charges and highlighting the significance of the date of the alleged incident, namely, that if it happened after J.J.'s 14th birthday her consent would not be automatically vitiated by operation of s. 150.1 of the Criminal Code, R.S.C. 1985, c. C-46. He identified the main issues as the credibility and reliability of J.J. and Mr. Campbell, and whether the Crown had proven its case on the whole of the evidence beyond a reasonable doubt.
- [22] The judge reviewed the background facts, J.J.'s version of events, and Mr. Campbell's version of events. As to the latter, he commented that Mr. Campbell largely agreed with J.J. "as to the massage incident itself", but that his description of "the massage, the context, the date, and events leading up to it" was "markedly different". Then he outlined Mr. Campbell's version, noted that J.J. adamantly denied its contradictory details, and summarised K.A.'s evidence, which he accepted. In doing so, he found that K.A.'s evidence did not "foreclose the possibility of the accused having the opportunity to commit the offence".
- [23] Next, the judge set out the legal requirements of the offences, the assessment of credibility, and the evidence of adults testifying about childhood events. Turning to the application of those principles, he began by assessing the evidence of J.J. He observed that J.J. testified in a forthright manner and appeared to be "a careful witness with a sombre demeanour who was attempting to recall events as best she could". Among other things, he also stated her evidence was internally consistent and her narrative of the event was plausible. After noting the circumstances of her disclosure to her sister in 2008, he commented that he did not take anything from its delayed nature. He concluded this portion of his analysis by noting that "[t]he lack of confirmatory evidence as to the inculpatory aspects of the event makes the assessment of credibility more critical".
- [24] The judge went on to assess the evidence of Mr. Campbell. As with J.J., he found nothing in Mr. Campbell's demeanour that "told against his credibility". He described Mr. Campbell's narrative as "superficially believable", internally consistent and substantially in accordance with his police statement. However, he stated, there were "troubling aspects" to Mr. Campbell's version of events.
- [25] The judge provided a detailed explanation of the aspects of Mr. Campbell's narrative that he found troubling:
- [81] the accused did not offer an explanation for why a 14 or 15-year-old would complain of a sore back in the middle of showing him her swimsuits. While this gives me pause, and I find it to be improbable, it is certainly not fatal to his credibility. People behave in odd ways at times I would caution myself against making stereotypical assumptions about human behaviour: R. v. Kodwat, 2017 YKCA 11 at paras. 36-41.

- [82] More troublesome is the accused's explanation that he simultaneously rubbed the complainant's stomach and back area performing a "healing" or "energy transfer" type massage in order to alleviate her sore back. If he was truly giving her a massage, as he stated, it was unclear why it was necessary to have the complainant go up on all fours to perform the technique rather than merely inserting one hand beneath her stomach as she lay prone on the floor or couch, or perhaps having her elevate her stomach slightly.
- [83] Moreover, from a commonsense perspective, a stomach massage would seem to target the abdominal muscles, not the back. The therapeutic benefits of his supposed energy transfer technique seem questionable
- [84] The basis for the energy transfer procedure was not well-explained in his testimony other than that he had learned the technique from adult "alternative" friends. In cross-examination, he referred to it as an "energy transfer thing." His use of this language indicated that he was not well-versed in the method. The accused would have known he was in a trusted relationship with the family. It seems puzzling for him to place his close friend's pubescent daughter on all fours in such a vulnerable position, while they were alone together and while she was wearing a bathing suit, simply in order to be able to rub her stomach in addition to her back.
- [85] By the same token, on his narrative it was completely unnecessary for the accused to reach between the complainant's legs, yet he admitted that he did so by reaching into her legs close to her left thigh. His explanation that the act of reaching through the complainant's legs was in furtherance of some form of massage did not make sense and struck me as illogical.
- [86] Next, the accused testified that he realized after he reached through the complainant's legs and rubbed her stomach area that his behaviour could be construed as inappropriate, and he disengaged. This professed belated realization of the inappropriateness of the situation does not strike me as credible
- [87] I found the accused's descriptions both at trial and his statement to police to amount to a denial of the obvious point that he should have been alert to the objective impropriety of the situation far earlier than the point wherein he executed his energy transfer technique. The accused's repeated implausible explanations of his thinking and behaviour left the impression that he was attempting to minimize the more incriminatory aspects of the event.
- [26] The judge also commented on J.J.'s astonishment and adamant denial when Mr. Campbell's account was put to her on cross-examination. He found she was "not forgetful or mistaken on this point". Accordingly, he did not believe Mr. Campbell's version of events:
- [89] None of these difficulties are fatal to the accused's credibility in themselves. However, measuring the plausibility of the accused's narrative in the context of the surrounding circumstances, I find that there are several improbable aspects to his explanation of the massage incident that undermine his version of events. I would be careful to avoid

stereotypical reasoning and speculation regarding human behaviour on the part of either the accused or the complainant. However, having done so, the accused's narrative does not accord with common sense, what is reliably known about the relationship between the accused and the complainant, and the probabilities inherent in the events the accused described.

- [90] As a result, I do not believe the evidence of the accused about the events preceding the massage, or the timing, the specific location, or the incriminating aspects of the massage.
- [27] The final steps in the judge's analysis were deciding whether the required intent had been made out on each count and assessing the whole of the evidence. As to the former, he found the massage incident unfolded as J.J. described and he was satisfied on an objective level beyond a reasonable doubt that the sexual context of the assault was readily visible to a reasonable observer. However, given the short duration of the touching and the absence of any overt indication of sexual gratification or sexualized words, the judge declined to ascribe a subjectively sexual purpose to Mr. Campbell. As the offence of sexual interference requires a subjective intent to touch for a sexual purpose, he acquitted Mr. Campbell on count 1, the sexual interference charge.
- [28] In acquitting Mr. Campbell, the judge said this:
- [93] With respect to count 1, the count of sexual interference, I have more difficulty in finding that the touching was subjectively for a sexual purpose. Although highly suspicious, especially in light of his attempt at trial to describe the incident in a more favourable light, the touching was of relatively short duration, there was no overt indication of sexual gratification, and no sexualized words accompanied the act. Despite the areas of the body touched, and the act of reaching through the complainant's legs, I have difficulty in ascribing a sexual motive to the accused on the criminal standard of proof so as to ground a subjective intent to touch for a sexual purpose.
- [94] Despite what I said above in rejecting the accused's narrative, on the whole of the evidence I am left with a reasonable doubt as to whether the incident, which was sexualized from any objective point of view, occurred during a lapse of judgment in relation to the accused's very misguided massage technique. I am compelled to find, therefore, that the circumstances raise a reasonable doubt as to whether the touching the accused engaged in was done for a subjectively sexual purpose, and I would acquit him of sexual interference on count 1.
- [29] Although the judge acquitted Mr. Campbell on count 1, he convicted him on count 2, the sexual assault charge. He reached this conclusion based on the essential elements of the offence and the whole of the evidence:
- [95] I believe the evidence of the complainant. Her credibility was not seriously challenged. I cannot find a basis for finding that she had a mistaken memory. I found her narrative of events to be plausible, coherent, and reliable. I accept the complainant's evidence that the accused engaged in a single incident of massaging her under her clothing as she described. I

find as a fact that the incident occurred while she was living at the house on Upland Drive in Delta between September 1996 and January 1, 1999, when the complainant was between the ages of 9 and 11 years of age.

- [96] I do not believe the evidence of the accused on the critical aspects of the massage incident. His description of the context of the key massage event appeared to me to be strained and contrived in order to explain away the more incriminating aspects of the complainant's narrative, such as why he was touching the complainant, why she was partially clothed, and why he reached through her legs. I also find that the accused deliberately lied about the date of the massage incident in order to cast himself in a better light and perhaps to attempt to pinpoint the date of the offence at a date where the complainant was sufficiently advanced in age to nominally consent to the behaviour in question.
- [97] The evidence of the accused does not leave me with a reasonable doubt. Nor, after careful consideration of all the evidence, am I unable to decide whom to believe.
- [98] Having regard to the whole of the evidence, including the evidence of the complainant, her mother K.A., and the evidence of the accused that I do accept, I am not left with a reasonable doubt on count 2. In coming to this conclusion, I repeat my finding that the evidence of K.A. did not foreclose the opportunity of the accused being left alone with the complainant one evening with the opportunity to commit a sexual assault.

On Appeal

- [30] Mr. Campbell raises three grounds of appeal from the sexual assault conviction. First, and foremost, Mr. Campbell contends the judge erred by reaching a conclusion on the sexual interference charge that was inconsistent with the conviction on the sexual assault charge. Second, he contends the judge erred by taking an unbalanced approach to analysing his evidence, on the one hand, and J.J.'s evidence, on the other. Third, he contends the judge erred by misapprehending certain evidence related to his credibility.

Discussion

Did the judge err by reaching a conclusion on the sexual interference charge that was inconsistent with the conviction on the sexual assault charge?

- [31] Mr. Campbell contends the judge engaged in improper reasoning in analysing the evidence, which resulted in inconsistent verdicts. In advancing this contention, he concedes it is theoretically possible for a court to acquit on a sexual interference charge but convict on a sexual assault charge given that sexual interference is a specific intent offence. However, he says, the judge assessed the same evidence in this case in differing ways that were also incompatible. In his submission, this led him to reach an unsupportable verdict of guilt on the sexual assault charge.

- [32] In support of his submission, Mr. Campbell notes the judge described the issues related to his simultaneous rubbing of J.J.'s stomach and back as "troublesome". However, he emphasises, both he and J.J. testified that he suggested the technique and there was no substantive dispute between them on the general mechanics of the massage. Importantly, he says, the judge was unable to conclude beyond a reasonable doubt that he subjectively had a sexual purpose based on this undisputed evidence, despite reaching his negative credibility finding based on the same evidence. Mr. Campbell contends that the negative credibility finding undermined his ability to argue that his version of events raised a reasonable doubt with respect to the sexual assault charge because J.J. was over 14 years old when the massage took place and so may have consented to the massage.
- [33] Mr. Campbell goes on to argue that the judge's concerns regarding his credibility plainly related to whether his explanations of his motivation for the massage were plausible. In his submission, given that the judge found his explanations amounted to implausible attempts "to minimize the more incriminatory aspects of the event", it is difficult, if not impossible, to see how the same implausible explanations could leave him with a reasonable doubt on the sexual interference charge but not on the sexual assault charge. Accordingly, he argues, the differing verdicts were inconsistent and the guilty verdict was based on flawed reasoning. More specifically, Mr. Campbell says the judge's justification for his negative credibility assessment and lack of reasonable doubt on the sexual assault charge was inconsistent with his reasonable doubt on the sexual purpose issue.
- [34] In other words, Mr. Campbell contends the judge's reasoning and findings, considered as a whole, did not and could not support different verdicts on the two charges. If his "implausible" testimony was believable enough to raise a reasonable doubt on the sexual interference charge, he says that it should also have been believable enough to raise a reasonable doubt on the sexual assault charge on the basis that J.J. was 14 years old when the massage took place and so may have consented to it.
- [35] In addition, Mr. Campbell argues, there was nothing particularly implausible about his version of events and neither his version nor J.J.'s version was more plausible. Further, he says, the Crown did not cross-examine him meaningfully on issues such as the therapeutic benefits of a stomach massage or why J.J. was positioned on all fours, but the judge focused on those issues in reaching his negative credibility assessment. Moreover, Mr. Campbell explains, the negative credibility assessment was grounded in part in his failure to explain J.J.'s motivation for complaining of a sore back, which he characterises as an additional error that contributed to the judge's lack of reasonable doubt.
- [36] I do not accept these submissions. In my view, the judge's reasoning in convicting Mr. Campbell on the sexual assault charge was not illogical in light of his reasoning in acquitting him on the sexual interference charge. Nor were the conviction, on the one hand, and the acquittal, on the other, inconsistent or irreconcilable on the evidence.

- [37] Appellate courts engage in a functional and contextual analysis of reasons for judgment. In doing so, they accord significant deference to credibility findings and factual assessments made by trial judges, bearing in mind the distinct advantages trial judges enjoy in those realms. Where there is a reasonable basis for a trial judge's factual findings and inferences, an appellate court will not substitute its own view of the evidence. On the contrary, a trial judge's evaluation of the evidence will only be disturbed on appeal where a palpable and overriding error has been shown: *R. v. G.F.*, 2021 SCC 20 at para. 5; *R. v. M.D.*, 2021 BCCA 339 at para. 54; *R. v. Clark*, 2005 SCC 2 at para. 9.
- [38] An appellate court will overturn a guilty verdict if it was reached illogically or irrationally. This may occur if the judge finds a fact or draws an inference essential to the verdict that is plainly contradicted by the evidence relied on in support or is demonstrably incompatible with evidence that was not otherwise contradicted or rejected by the judge. A guilty verdict may also be overturned on the basis that it is inconsistent with a not guilty verdict on another charge. If the two verdicts are irreconcilable such that no reasonable trier-of-fact, properly instructed, could possibly have rendered them on the evidence, the guilty verdict will be set aside as unreasonable: *R. v. Beaudry*, 2007 SCC 5 at para. 98; *R. v. Sinclair*, 2011 SCC 40 at paras. 4, 15-21; *R. v. Pittman*, 2006 SCC 9 at para. 6; *R. v. R.V.*, 2021 SCC 10 at paras. 28-31.
- [39] In this case, the judge did not reach either verdict based on illogical reasoning. On the contrary, his reasoning was careful and nuanced. Nor were the verdicts based on contradictory evidence, inconsistent or irreconcilable.
- [40] As the judge explained, sexual interference is a specific intent offence requiring proof beyond a reasonable doubt that the accused touched the complainant for a sexual purpose. Sexual assault, on the other hand, is a general intent offence. A sexual assault is a non-consensual intentional application of force committed in circumstances of a sexual nature. The test is objective. It asks whether, viewed in light of all the circumstances, the sexual or carnal context of the assault is visible to a reasonable observer: ss. 151, 265, Criminal Code; *R. v. T.L.P.*, 2015 BCSC 618 at paras. 12-18; *R. v. Chase*, [1987] 2 S.C.R. 293 at 302.
- [41] At the relevant time, consent was not an available defence to a charge of either sexual interference or sexual assault where the complainant was younger than 14: s. 150.1, Criminal Code.
- [42] The judge assessed Mr. Campbell's credibility based on the entire body of salient evidence. This included his manifestly implausible narrative of the circumstances surrounding the massage, how it unfolded and why he massaged J.J. in the way that he did. The judge concluded that Mr. Campbell's narrative did not accord with common sense, what was reliably known about his relationship with J.J., and the probabilities inherent in the events as Mr. Campbell described them. As a result, he did not believe his testimony "about the events preceding the massage, or the timing, the specific location, or the incriminating aspects of the massage". He also found the incident unfolded as J.J. described in her

testimony, including when and where it happened, and its sexual context was readily visible on an objective level. The judge's credibility assessments and factual findings on these issues are consistent with respect to both counts and entitled to appellate deference.

[43] Based on his factual findings and negative credibility assessment, it was clearly open to the judge to infer further that Mr. Campbell touched J.J. for a sexual purpose when he massaged her. However, he was not obliged to do so as a matter of logic or law. Rather, in light of the criminal standard of proof applicable to Mr. Campbell's subjective intent, and despite rejecting his narrative and harbouring high suspicion, the judge was left with a reasonable doubt regarding his intent raised by the surrounding circumstances, namely, the short duration of the touching and the absence of any overt indication of sexual gratification or sexualized words. For this reason, he acquitted Mr. Campbell on the sexual interference charge. Given that the sexual assault charge did not require proof of subjective intent, there was no legal, logical or evidentiary inconsistency between that acquittal and the conviction for sexual assault.

[44] I would not give effect to this ground of appeal.

Did the judge err by taking an unbalanced approach to analysing Mr. Campbell's evidence and J.J.'s evidence?

[45] Mr. Campbell also contends the judge's credibility findings were unfairly skewed in the Crown's favour. In particular, he says, the judge assessed his credibility negatively based on improper speculation regarding his possible motive to lie and failed to appreciate that his account was significantly corroborated by the evidence of J.J. In doing so, he submits, the judge applied a different standard in assessing his credibility than he applied in assessing J.J.'s credibility.

[46] On the first point, Mr. Campbell submits the judge engaged in improper speculation in finding that he knew the age of consent at the time of the massage and deliberately lied about the date of the massage. However, he says, there was insufficient evidence to support such a finding, which could not properly be used to undermine his overall credibility. On the second point, Mr. Campbell submits the judge failed to give sufficient weight to J.J.'s evidence that she went on a trip to Australia with her father when she was between the ages of 14 and 16, which he contends corroborated his version of events and weighed in favour of his credibility.

[47] I am not persuaded by these submissions.

[48] In *R. v. Roth*, 2020 BCCA 240, this Court stated that it is an error of law for a judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown: at para. 47. Notably, however, in *G.F. Justice Karakatsanis* questioned whether "uneven scrutiny" is a helpful ground of appeal. Several Courts have recently observed that "uneven scrutiny" is a notoriously difficult ground to make out, its value as an analytical tool to demonstrate error in a judge's reasoning process on credibility findings is doubtful, and, if it

exists, it may not amount to an independent ground of appeal: G.F. at paras. 99-101; R. v. Mehari, 2020 SKCA 37 at para. 31; R. v. S.S., 2022 BCCA 392 at paras. 72-75. As Justice MacKenzie explained in S.S., Roth does not stand for the simple proposition that "uneven scrutiny" is a free-standing ground of appeal, nor did the Court treat it as such in Roth. Rather, the conclusion in Roth was that the judge's credibility assessment of the accused was tainted by three distinct and readily identifiable errors in principle: Roth at para. 54; S.S. at paras. 73-74.

- [49] In G.F., Justice Karakatsanis emphasised that "the focus must always be on whether there is reversible error in the trial judge's credibility findings": at para. 100. It is a reversible error of law for a judge to find facts or assess credibility based on speculative reasoning. Factual findings and credibility assessments must be context-specific and grounded in the evidence, not based on conjecture or stereotypical behavioural generalisations. When judges find facts and draw inferences, they must not rely on stereotypes or assumptions about what a person might normally do in a situation. Rather, they must engage with the case-specific evidence: R. v. R.K.K., 2022 BCCA 17 at para. 39; R. v. Conway, 2021 BCCA 460 at para. 44-45.
- [50] In my view, the judge did not take an unbalanced approach to assessing Mr. Campbell's credibility, on the one hand, and J.J.'s credibility, on the other. Contrary to Mr. Campbell's submission, he did not find that Mr. Campbell knew the age of consent at the time of the massage and, for that reason, lied about the date of the massage during his testimony. Rather, he found that Mr. Campbell lied about the date of the massage to cast himself in a better light, which finding was well-grounded in the evidence. While he also commented that perhaps Mr. Campbell attempted to pinpoint the date of the offence past J.J.'s 14th birthday so that she could "nominally consent to the behaviour in question", as the Crown emphasises, he expressly refrained from drawing any speculative conclusion on the point.
- [51] As to Mr. Campbell's submission that the judge failed to give sufficient weight to J.J.'s evidence regarding the trip to Australia, I do not accept that it significantly corroborated his account in the sense that it made a material aspect of that account more probable. In addition, and in any event, the judge expressly noted J.J.'s testimony on the point, which he described as confirming "a fact that is relevant to the accused's version of events". The weight to be accorded this evidence was entirely within the purview of the judge.
- [52] I would not give effect to this ground of appeal.

Did the judge err by misapprehending evidence related to Mr. Campbell's credibility?

- [53] Finally, Mr. Campbell contends that the judge misapprehended the evidence regarding his failure to explain "why a 14 or 15-year-old would complain of a sore back in the middle of showing him her swimsuits". In his submission, he was not asked to provide such an explanation and therefore an adverse inference or other negative credibility finding on this point was inappropriate and unfair. In addition, he says, Crown counsel did not argue this point in closing submissions and, given the importance of credibility, the judge should not have raised it on his own motion. Further, he argues, he could only testify as to his own

observations and state of mind, and could not reasonably be expected to interpret J.J.'s motivations to validate his own version of events.

- [54] I see no error in the judge's apprehension or treatment of the evidence on this point.
- [55] A misapprehension of evidence will warrant appellate intervention where the judge makes errors regarding the substance of material parts of the evidence and those errors play an essential part in the reasoning process that results in a conviction. A misapprehension of this kind may involve a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence. Where there has been such a misapprehension, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 218, 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at paras. 1-2; *R. v. Osinde*, 2021 BCCA 124 at paras. 17-18.
- [56] The test for a misapprehension of evidence is stringent. The appellant must demonstrate the misapprehension went to substance, was material to the judge's reasoning process, and played an essential part in the reasoning process resulting in conviction. In deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask whether the misapprehension, if removed, could plausibly have left the judge with a reasonable doubt. Differing interpretations of evidence do not amount to misapprehensions. The fact that a judge could have interpreted evidence differently does not mean that the judge misapprehended the evidence: *Osinde* at para. 20; *R.K.K.* at para. 52.
- [57] The judge did not draw an adverse inference or assess Mr. Campbell's credibility negatively because he offered no explanation for J.J.'s motivations in complaining of a sore back when modelling her swimsuits. On the contrary, he expressly cautioned himself against relying on any assumptions about why J.J. might have made such a complaint and commented that "[p]eople behave in odd ways at times". Nothing in the reasons that follow suggests any improper reliance on this point, which the judge noted but then immediately neutralised.
- [58] I would not give effect to this ground of appeal.

Conclusion

- [59] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Willcock"

I AGREE:

"The Honourable Justice Marchand"

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