

CANADA / JUDGMENT

R. v. Charlie

2020 BCCA 24

COURT

British Columbia Court of Appeal

DECIDED

24 January 2020

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2020 BCCA 24 R. v. Charlie

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Charlie,

2020 BCCA 24

Date: 20200124

Dockets: CA45605; CA45614

Docket: CA45605

Between:

Regina

Respondent

And

Nicholas Des Charlie

Appellant

- and -

Docket: CA45614

Between:

Regina

Respondent

And

Abraham Charlie Percy Louie

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Section 16(4) of the Sex Offender Information and Registration Act:

This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Goepel

On appeal from: Orders of the Supreme Court of British Columbia, dated November 29, 2017 (conviction) and August 29, 2018 (sentence)

(R. v. Charlie, 2017 BCSC 2549 (conviction) and 2018 BCSC 1800 (sentence), Duncan Docket 38273).

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Place and Date of Hearing:

Vancouver, British Columbia

October 29, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 24, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Goepel

Summary:

The appellants were convicted as parties to an aggravated sexual assault pursuant to ss. 21(1) and 273(2)(b) of the Criminal Code. The evidence against the appellant Louie was that he grabbed the complainant's arm to restrain her from leaving the room in which the assault took place. The evidence against the appellant Charlie was that semen and the complainant's blood were found on his shorts. The judge found, despite some uncertainty as to their respective roles, that the evidence established the appellants were at the very least parties to the offence. Held: Louie's appeal is allowed; Charlie's appeal is dismissed. The verdict against Louie was unreasonable because there was no evidence to sufficiently connect his restraint of the complainant to the subsequent sexual assault. With respect to Charlie, it was open to the judge to conclude he was a party to the assault based on the presence of the blood and semen on his shorts and it is discernable from the reasons for judgment that this was the basis for his conviction.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] At the conclusion of a trial before a Supreme Court Judge, Nicholas Charlie ("Charlie") and Abraham Louie ("Louie") were convicted of aggravated sexual assault contrary to s. 273(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46. Reasons for judgment are indexed as 2017 BCSC 2549. Each accused was sentenced to seven years' imprisonment, less appropriate credit for time in custody before trial. Reasons for sentence are indexed as 2018 BCSC 1800. Each accused appeals his conviction.

- [2] Louie contends the verdict is unreasonable, principally because the trial judge misapprehended the evidence when she found he intended to facilitate a sexual assault. He says the evidence could not support that inference. Further, he contends the trial judge erred in law by failing to consider whether intoxication precluded him from forming the specific intent required to convict him as a party to the offence under s. 21(1)(b) or (c) of the Code.
- [3] Charlie contends the verdict is unreasonable because the judge assumed facts that were not in evidence and drew improper inferences from those assumed facts. He further contends there was a miscarriage of justice because the judge erred in her assessment of the credibility of the complainant. Last, he says the trial judge erred in law by finding him guilty as a party to the offence without an analysis of the applicable law and without providing sufficient reasons upon which he could discern the basis for his conviction.

The Evidence

- [4] The complainant testified that on June 25, 2016, after consuming some alcohol at home in the afternoon and sleeping for a few hours, she went to meet her sisters (T.J. and C.C.) at a house on Whut'stun Road in Duncan in the evening. She remained at that house until the following morning.
- [5] On arriving she entered a downstairs bedroom and joined T.J., her cousin, Abraham Louie, Nicholas Charlie and Charlie's father. She had previously dated Louie. She did not know Charlie well but had seen him previously. Those present in the room were drinking from a 60 ounce bottle of vodka that was being passed around. The complainant, T.J., her cousin and Louie sat on a bed, Charlie on a bench, and his father was in a wheelchair.
- [6] The complainant learned that C.C. had passed out upstairs in a bedroom and she went to briefly check on her. When the complainant returned to the downstairs room, Charlie's father had left. She continued to drink with the others in the room. T.J. and Louie were holding hands and kissing. Louie tried to apologize to the complainant for cheating on her when they had dated, but the complainant did not want to speak about that and felt uncomfortable.
- [7] The complainant became intoxicated after considerable drinking. Her account of the events that followed consisted of discrete memories interrupted by periods of blackouts during which she was unable to recall what occurred.
- [8] She has a discrete memory of T.J. asking if she could use her phone. She remembers T.J. then making a call but does not remember the call ending.

- [9] The next thing she remembers is trying to leave the room. However, Louie, still sitting on the bed, grabbed her bicep and restrained her. She initially testified that she could not recall if T.J. or her cousin were still present in the room at this time, but later testified she did not think anyone other than Louie and Charlie remained when she was restrained from leaving. She admitted some uncertainty on this point in cross-examination.
- [10] She does not remember either accused saying anything when Louie grabbed her arm. She testified: "I tried to pull my arm away and I remember saying no and then I blacked out". In her first account of events at trial, she testified her next memory was taking a step or two outside the bedroom and collapsing on the floor in the hallway.
- [11] When examined in chief, the complainant initially said nothing about the assault that resulted in her injuries. After being referred by Crown counsel to a statement given to the police, at a break in her testimony, she gave the following evidence:
- Q. having reviewed your statement do you recall, or are you able to tell us, when [Louie] grabbed your bicep what you remember happening next, your next memory?
- A. I remember feeling penetration in my vagina.
- Q. And was that during the time that you were in the room, or was it when you were outside of the room?
- A. It was in the room.
- Q. And in terms of the timeline, just so we're all clear, when you say it was in the room, was that when you came to and got up and walked out of the room, or was it at some other point?
- A. I hadn't left the room because Abraham [Louie] had grabbed me.
- [12] In cross-examination, she adopted as true a prior statement in which she described being restrained as follows: "Nick [Charlie] must have been sitting on the bench but all I remember I was trying to say no. I was like don't. And like I said I blacked out after that. I can't remember anything else".
- [13] C.C. found the complainant lying on the hallway floor in the morning. The complainant was wearing no bottoms and there was blood on the floor. She was bleeding from her vagina and in great pain. Her sister helped her to walk up the stairs. The complainant phoned her partner and asked to be taken to the hospital. She then blacked out again. She has a memory of trying to use the washroom but couldn't "because it hurt". She next remembers being in the emergency room in the hospital.
- [14] Examination at the hospital revealed the complainant had suffered significant injuries to her vagina, anal and rectal areas. She had bruises on her face, head, arms and legs. There was a bruise on her bicep where she believes she was grabbed by Louie.

- [15] Constable Walsh and Corporal Gelderblom of the RCMP arrived at the house on Whut'stun Road at about 7:30 am on June 26. According to C.C., that was about 30 minutes after she found the complainant sitting on the hallway floor. On entering the downstairs hallway Constable Walsh observed blood on the floor and a blood-stained roll of toilet paper and a blood-soaked sponge. She spoke with C.C. and the complainant in an upstairs bedroom. Both appeared to be "quite intoxicated". The complainant told her "Abraham raped me" and mentioned the name Nick repeatedly. C.C. told Constable Walsh that Abraham Louie and Nicholas Charlie were in the downstairs bedroom. The officers entered the room and located two men there, asleep on a bare mattress. Constable Walsh advised them they were under arrest "for assault and sex assault". Charlie was wearing only shorts; they appeared to be blood-stained. Louie was wearing sweatpants and a long-sleeved shirt. There was a strong smell of alcohol in the room but Charlie did not appear to Constable Walsh to be intoxicated. No noticeable bloodstains, other than those on Charlie's shorts, were seen by the officers who entered the bedroom in which the appellants were arrested.
- [16] A DNA analysis was performed on what appeared to be a large bloodstain on the front of Charlie's shorts and underwear. DNA was identified in two areas tested on samples of fabric removed from Charlie's shorts. DNA found on the fabric from the upper front left of the shorts was from a strong sample, probably blood, and it produced a profile matching the complainant's. DNA found on the sample from the upper front right of the shorts was of mixed origin. It produced two profiles: one, probably blood, matching the complainant and the other, semen, matching an unidentified male. No male DNA was identified on vaginal and rectal swabs performed on the complainant.
- [17] Constable Ramsey of the RCMP attended at the house on Whut'stun Road on June 29 with a search warrant. He inspected the home and took photographs of what he considered to be significant evidence at the scene. These included photographs which showed spots on the floor of the downstairs bedroom in question that appeared to him to be blood. There also appeared to be a small red stain on the headboard of a bed in that room and a similar stain, appearing to be blood, on a light switch.
- [18] Louie testified in his own defence. It was his evidence that he began drinking at about four or five o'clock in the afternoon before the events in question with a group of four or five people in an upstairs bedroom at the Whut'stun Road house. He believed he had a 40 ounce bottle of vodka. There were also 24 cans of a 5% alcohol drink and another 26 ounce bottle of hard liquor shared by the group. In addition to consuming alcohol Mr. Louie smoked some marijuana. It was Louie's evidence that after most of the alcohol had been consumed in the upstairs bedroom he went to a downstairs bedroom to pass out. Charlie had said he could sleep on his bed.

[19] Louie did not remember sitting on a mattress and talking with T.J. in the downstairs bedroom. He did not recall apologizing to the complainant for his past behaviour, nor did he recall the complainant being in the downstairs bedroom while he was there. The following exchange occurred during his cross-examination:

Q. Nick Charlie was in the room with you, Junior, downstairs?

A. I believe so.

Q. You're not certain?

A. No, because I was going to bed.

Q. And you were drunk, right?

A. Yes.

Q. You were actually really like hammered from drinking all that alcohol, isn't that true?

A. You can say that.

Q. Well I am saying that. I'm saying that to you, sir. You were very drunk, isn't that true?

A. Yes.

Q. And do you recall who was in the room when you went into the bedroom, to go to sleep that is? You actually have a memory of that?

A. No, I don't.

Q. So it's fair to say, sir, that you blacked out at some point throughout the evening?

A. Yes.

Q. So you can't say whether or not once you got in there, because you blacked out, whether or not you continued drinking, is that fair to say?

A. I know I didn't. I can't drink that much. Like every time I drink I puke up blood. Like I honestly can't drink that much. And I drink over my limit, yes, I have.

Q. And so you can't say if [the complainant] was in that bedroom, isn't that true?

A. Yeah, I guess so. I cannot say.

[20] There was no evidence with respect to the concentration of alcohol in Louie's blood or urine at the relevant time. The only expert evidence with respect to alcohol intoxication was the report of an expert in toxicology filed in relation to the blood-alcohol analysis performed on a sample taken from the complainant on her admission to hospital. That indicated that there was a concentration of 224 mg% ethyl alcohol in the complainant's blood and 270 mg% ethyl alcohol in her urine. The expert provided the following opinion:

This BAC [blood alcohol concentration] range is generally associated with severe intoxication. Cognitive effects include: loss of restraint, decreased attention and concentration, decreased judgement, emotional instability (i.e. exaggerated emotions, labile emotions) and impairment of memory. At the high end of the range there may be mental confusion and disorientation. Physical effects include slurred speech, poor balance (e.g. swaying while standing, staggering while walking with reeling and lurching when called upon to make sudden turns or to carry out unexpected movements and possibly inability to stand or walk), gross muscular incoordination, possible vomiting and incontinence. At the higher end of the range there may be impaired consciousness, stupor and unconsciousness may occur.

Judgment

[21] When reviewing the evidence the trial judge, significantly in my view, described one aspect of the complainant's evidence as follows:

[42] After refreshing her memory from a statement she gave police the day following the incident, [the complainant] testified that after Mr. Louie grabbed her arm, she felt her vagina being penetrated. Then she blacked out again.

[22] The judge appears to have understood it to be the complainant's evidence that she had a continuous memory from the point she was grabbed on the arm until her vagina was penetrated, blacking out thereafter.

[23] The judge made the following findings of fact, at para. 84:

- (1) N.J. [the complainant] was sexually assaulted;
 - (2) The assault occurred in Mr. Charlie's bedroom;
 - (3) The attack was violent;
 - (4) She suffered bruises to her face, head, arms, torso and legs. Her vagina and anus were penetrated forcefully; with what is unknown;
 - (5) She bled heavily from her vaginal area;
 - (6) Mr. Louie and Mr. Charlie were in the bedroom before the assault;
 - (7) Mr. Louie and Mr. Charlie were in the bedroom after the assault;
 - (8) Mr. Charlie was wearing shorts and underwear that were covered in the front with N.J.'s blood and his semen; and
- (9) Both of the accused had been drinking that night. Mr. Louie testified that he was drinking heavily.

[24] The evidence against Charlie was summarized as follows, at para. 86:

- (1) He was in his bedroom with Mr. Louie when Mr. Louie grabbed N.J.'s arm to prevent her from leaving;
 - (2) N.J.'s vagina was then penetrated;
 - (3) She was violently sexually assaulted in his bedroom;
 - (4) She lost a lot of blood;
 - (5) He was in his bedroom after the assault; and
 - (6) He was wearing shorts and underwear that were saturated with N.J.'s blood and his semen.
- [25] The judge found, considering all the evidence, at para. 87: "[The] only rational conclusion is that Mr. Charlie was, at the very least, a party to the sexual assault of N.J."
- [26] The judge concluded Louie was not a credible witness, in part, as she noted at para. 90, because he was very drunk and blacked out during the course of the evening. She rejected his evidence where it conflicted with the complainant's.
- [27] The evidence against Louie was summarized as follows, at para. 95:
- (1) He was in the bedroom before the assault;
 - (2) He was in the bedroom after the assault;
 - (3) He was sleeping beside Mr. Charlie, who had N.J.'s blood all over the front of his shorts;
 - (4) The assault took place in that bedroom. It was violent;
 - (5) Mr. Louie grabbed N.J.'s arm when she tried to leave; and
 - (6) By grabbing N.J.'s arm, Mr. Louie prevented N.J. from leaving the bedroom. After that, she was sexually assaulted.
- [28] The judge, at para. 96, found Louie's purpose in grabbing the complainant was to facilitate the sexual assault: "He kept her in that room so she could be sexually assaulted".
- [29] She concluded, at paras. 97-98:
- [97] How she was assaulted is unknown. What each man did is unknown. What they assaulted N.J. with is unknown. What is known is that N.J. entered that room with no injuries and she left the room bruised, battered and seriously injured.
- [98] While I am uncertain as to whether Mr. Charlie or Mr. Louie personally sexually assaulted N.J. or whether they aided and abetted the sexual assault, having considered all of the evidence and all the circumstances, I am satisfied beyond a reasonable doubt that both the accused were parties to this attack on N.J. pursuant to section 21(1) of the Criminal Code.

- [30] There was no express consideration in the reasons for judgment of the party liability provisions of s. 21(1) of the Code nor of the extent to which, if at all, either accused had the specific intent necessary to be convicted under the aiding and abetting provisions.

Grounds of Appeal:

Louie

- [31] The appellant Louie contends the trial judge misapprehended the evidence with respect to the proximity of his restraint of the complainant to the sexual assault. He says that misapprehension was central to his conviction and resulted in a miscarriage of justice.
- [32] He contends the verdict was unreasonable because the trial judge drew an inference unsupported by the evidence: that his purpose in grabbing the complainant's arm was to facilitate a sexual assault.
- [33] He further contends the trial judge erred in law by failing to consider the defence of voluntary intoxication.

Charlie

- [34] The appellant Charlie contends the verdict was unreasonable because the trial judge failed to consider the whole of the evidence regarding the complainant's credibility. Further, he says, the verdict was founded upon assumed facts that were not in evidence and upon improper inferences from those assumed facts, particularly the inference that the complainant bled onto Charlie's clothing while she was being sexually assaulted and the inference that it was Charlie's own semen on his pants.
- [35] He contends the judge erred in law by finding him guilty under s. 21(1) of the Code without any analysis of the law of party liability and without any substantial argument in relation to the application of that section.
- [36] An argument advanced in his factum, that the trial judge erred in law by dismissing an application for the exclusion of evidence, was not advanced at the hearing of the appeal.

Applicable Law

Powers of the Court of Appeal

- [37] Section 686(1) of the Code provides, in part:

686 (1) On the hearing of an appeal against a conviction the court of appeal

- (a) may allow the appeal where it is of the opinion that
- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground there was a miscarriage of justice;
- (b) may dismiss the appeal where
- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred

Unreasonable Verdict or Miscarriage of Justice

- [38] The appellants contend the trial judge erred in the assessment of the evidence: in part, by misapprehending the evidence; in part, by drawing unwarranted inferences; and, in part, by erroneously assessing the reliability of the complainant's evidence. Some errors are said to undermine the verdict such as to render it unreasonable; others are said to give rise to a miscarriage of justice.
- [39] A challenge to the verdict as unreasonable pursuant to s. 686(1)(a)(i) on the ground that it is founded upon a conclusion unsupported by the evidence should be addressed by applying the test described in *R. v. Yebes*, [1987] 2 S.C.R. 168 and *R. v. Biniaris*, 2000 SCC 15. Where an error, either in failing to consider evidence relevant to a material issue or failing to give proper effect to evidence, is established, the appellate court must measure the verdict against the totality of the evidence adduced at trial, and determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered.
- [40] Deschamps J. for the majority in *R. v. R.P.*, 2012 SCC 22, described the appellate court's role, when faced with such an argument, as follows:
- [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40; [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).
- [41] Fish J., dissenting, but not on this point, observed:
- [24] It is well established that reviewing courts, in concluding that a verdict is unreasonable, must articulate as precisely as possible what features of the case support that conclusion.

- [25] To this end, a reviewing court must re-examine the entire evidentiary record at trial, consider the effect of its salient elements, and specifically identify aspects of the evidence — or lack of evidence — that are of particular concern (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 41-42; *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186). As McLachlin J. (as she then was) stated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131, "[i]t is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence."
- [42] Both appellants point to what they say are inadequacies in the trial judge's assessment of the credibility of the complainant. With respect to challenging the reasonableness of a verdict on this ground, Deschamps J. observed in *R. v. R.P.*:
- [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).
- [43] Smith J.A. addressed such submissions in *R. v. Ceal*, 2012 BCCA 19 as follows:
- [25] In determining whether a verdict is unreasonable or cannot be supported by the evidence, the focus of the inquiry is on whether there is any evidence to support the trial judge's findings based on the totality of the evidence before him or her, and whether the verdict logically flows from those findings. An appellate court will not interfere with a trial judge's assessment of credibility absent palpable and overriding error in the findings that support his or her assessment. As was noted in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621:
- [20] Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this court decided, most recently, in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.
- [26] This approach to appellate review under s. 686(1)(a)(i) was succinctly summarized by Mr. Justice Doherty in *Howe* at para. 47, cited with approval by this Court in *R. v. Turner*, 2010 BCCA 76 at para. 25:
- [47] Some arguments on appeal, ostensibly directed at the trial judge's reasoning process, are in reality thinly veiled invitations to the Court of Appeal to substitute its own credibility assessments for those made at trial. Where the essence of the argument advanced on appeal comes down to an assertion that the trial judge was wrong in accepting the evidence of the complainant and rejecting the evidence of the accused, this submission should be treated for what it is, an assertion that the verdict is unreasonable. The success of that assertion turns, ultimately, not on the reasoning process of the trial judge, although that process is

relevant, but on whether the verdict can withstand the limited review contemplated by s. 686(1)(a)(i) of the Criminal Code: *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.) at 20-24.

[27] Thus, absent palpable and overriding error in the findings that support a trial judge's assessment of a witness's credibility, appellate deference must be given to that assessment.

[44] As noted in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), and *R. v. Lohrer*, 2004 SCC 80, an erroneous appreciation of the evidence may result in a miscarriage of justice, and warrant an order for a retrial, even if there is some evidence upon which a properly instructed jury or a judge could reasonably have rendered a guilty verdict. In *Morrissey*, Doherty J.A., for the court observed:

Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[45] In *Lohrer*, Binnie J. began his judgment by citing that passage from the judgment in *Morrissey* and wrote, at para. 1:

[1] We agree with these observations. Where a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code, R.S.C. 1985, c. C-46, has been demonstrated an accused appellant is not bound to show in addition that the verdict cannot "be supported by the evidence" within the meaning of s. 686(1)(a)(i).

[46] In *R. v. Sinclair*, 2011 SCC 40 at para. 9, Fish J. held the Manitoba Court of Appeal had correctly identified a *Lohrer* error: the trial judge's reasons were generally cogent and consistent with the evidence but the trial judge had mistaken for evidence the Crown's theory and drawn an inference based in part on non-existent testimony. Because there may nonetheless have been evidence capable of supporting a conviction, a new trial, appropriately in the opinion of Fish J., was ordered.

[47] In *R. v. Swales*, 2014 BCCA 350, Stromberg-Stein J.A., for this Court wrote:

[47] A misapprehension of evidence may undermine the validity of the verdict and give rise to a miscarriage of justice under s. 686(1)(a)(iii) of the Criminal Code.

[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* ... 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.

[48] In *R. v. J.F.D.*, 2017 BCCA 162, Dickson J.A. surveyed the jurisprudence in relation to the review of credibility findings on appeal and the circumstances in which an error affecting the assessment of a witness's credibility may result in a miscarriage of justice:

[39] Where a case turns primarily on credibility assessments, the sufficiency of the judge's reasons should be considered in light of the deference afforded on findings of credibility: *R. v. Dinardo*, 2008 SCC 24 at para. 26. The judge must explain why the result was reached such that the foundations of the decision can be understood when considered in the context of the evidence, the argument and the trial: *R. v. Vuradin*, 2013 SCC 38 at para. 12, citing *R.E.M.* at paras. 16–17. Provided this standard is met, the judge need not advert to all of the evidence, answer every argument made, or set out every finding or conclusion reached in the process of arriving at a verdict: *Dinardo* at para. 30; *R.E.M.* at para. 18. Given the high degree of deference accorded to credibility assessments, deficiencies in a trial judge's credibility analysis will rarely merit appellate intervention: *Vuradin* at para. 11; *Dinardo* at para. 26.

[40] However, where a judge misapprehends material evidence that forms an essential part of the reasoning process leading to conviction, appellate deference is not warranted. A misapprehension of material evidence, which may include a failure to consider material evidence, constitutes a palpable and overriding error leading to an unfair trial and, thus, to a miscarriage of justice: *R. v. Lohrer*, 2004 SCC 80 at para. 1, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *Jacobs* at paras. 52, 53

Question of Law

[49] The appellants contend the trial judge found them to be parties to a sexual assault without considering the s. 21 jurisprudence. They say: there was an inadequate description of the basis for the conclusion they were parties to the offence; there was inadequate (or no) consideration of the requisite mens rea; and, finally, Louie says there was no consideration of a viable defence of intoxication.

[50] Section 21(1) of the Code provides:

21 (1) Every one is a party to an offence who

(a) actually commits it;

- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[51] This provision has the effect of treating those who actually commit the offence as indistinguishable from those who aid or abet another in the commission of the offence; all three avenues in s. 21(1) lead to the same consequences: *R. v. Briscoe*, 2010 SCC 13 at para. 13; *R. v. Elder*, 2015 ABCA 126 at para. 15. However, the actus reus and mens rea for aiding and abetting are distinct from those required in the actual commission of the offence: *R. v. Mercer*, 2005 BCCA 144.

[52] An accused "actually commits" a sexual assault where it is established beyond a reasonable doubt that their conduct satisfies the actus reus and mens rea requirements for the offence as set out in *R. v. Ewanchuck*, [1999] 1 S.C.R. 330 at paras. 24-25 and para. 41:

[24] The crime of sexual assault is only indirectly defined in the Criminal Code, R.S.C. 1985, c. C-46. The offence is comprised of an assault within any one of the definitions in s. 265(1) of the Code, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated: see *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909. Section 265 provides that:

265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[25] The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any mens rea with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.

[41] Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement. See *R. c. Daviault*, [1994] 3 S.C.R. 63.

[Emphasis added].

[53] More than one person may actually commit an offence for the purposes of s. 21(1)(a) "even though each has not performed every act which makes up the actus reus of the offence": *R. v. Ball*, 2011 BCCA 11 at para. 23. The case law refers to such actors variously as "co-principals, joint-principals, co-perpetrators or joint-perpetrators": *Ball* at para. 23. In the context of assault, a crime of general intent, there is no need for co-principals to share a common purpose to satisfy the requisite mens rea.

[54] In *R. v. Magoon*, 2016 ABCA 412, Paperny J.A. observed:

[85] The real test under [s. 21(1)(a)] is whether each principal directly participates in the offence. This can be made out by showing that each principal had direct physical contact with the victim. Where this is the case, the extent of participation does not need to be precisely determined. It is not necessary to prove who struck the final or fatal blow; the blow of one is the blow of all: *Elder*; *Ball* at paras 28 and 30; *R v Pickton*, 2010 SCC 32 at paras 64-66, [2010] 2 SCR 198.

[Emphasis added].

[55] The actus reus and mens rea for aiding or abetting were described by the Supreme Court of Canada in *Briscoe*. With respect to the actus reus, Charron J., for the Court, found:

[14] The actus reus of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(b) means to assist or help the actor. . . . To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed": *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 26.

[56] With respect to the requisite mens rea, the Charron J. noted:

[15] Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. "one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his used to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously use it to store drugs". The aider or abettor must also have the requisite mental state or mens rea. Specifically, in the words of s. 21(1)(b), the person must have rendered the assistance for the purpose of aiding the principal offender to commit the crime.

[16] The mens rea requirement reflected in the word "purpose" under section 21(1)(b) has two components: intent and knowledge. For the intent component it was settled in *R. v Hibbert* that "purpose" in section 21(1)(b) should be understood as essentially synonymous with

"intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed

- [17] As for knowledge, in order to have the intention to assist in the commission of a defence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense.
- [57] General intent may ground the conviction of one who actually commits an assault, but the conviction of one who aids or abets the commission of an assault hinges upon evidence of specific intent to assist: *R. v. Fraser* (1984), 13 C.C.C. (3d) 292 (B.C.C.A.); *R. v. Hunt*, [1993] B.C.J. No. 491 (C.A.) at para. 15.
- [58] This distinction has significant implications for the defence of intoxication in the context of party liability. It is well-established that self-induced intoxication is not a defence to a crime of general intent, and is therefore not available to an accused charged with actually committing an assault: *R. v. Leary*, [1978] 1 S.C.R. 29; *Fraser* at para. 6. The defence is, however, available to those charged with aiding or abetting such an offence: *Fraser*; *R. v. Chapin* (1978), 41 C.C.C. (2d) 300 (Alta. S.C.A.D.); *R. v. Cosgrove* (1975), 29 C.C.C. (2d) 169 (Ont. C.A.); *R. v. Waterfield* (1974), 18 C.C.C. (2d) 140 (Ont. C.A.).
- [59] In *R. v. Wobbles*, 2008 ONCA 567, the Ontario Court of Appeal specifically considered the circumstances in which the defence of intoxication should be considered in relation to the offence of being a party to a sexual assault. Writing for the court Epstein J.A. observed:
- [29] The authorities make it clear that it is not sufficient that the accused's actions had the effect of aiding the commission of the offence. The appellant must have acted for that specific purpose As well, mere awareness of and presence at the scene of an offence does not establish the requisite intent
- [30] The authorities also clearly establish that the defence of self-induced intoxication is available to an accused who is charged with aiding or abetting an offence. Specifically, an intoxicated individual may not have the specific intent necessary to aid or abet another's offence, despite the fact that his or her actions have that effect. Accordingly the defence of intoxication becomes relevant to the party offence provisions once the evidence establishes an air of reality to that defence
- [31] In determining whether a defence has an air of reality, the trial judge must ask whether there is evidence upon which a properly instructed jury acting reasonably could acquit the accused of the charged offence if it believed the evidence to be true. In considering whether there is any such evidence, the judge must consider the totality of the evidence; assume the evidence relied on by the accused to be true; and must not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw factual

inferences

- [32] For the intoxication defence to have an air of reality there must be some evidence to support the conclusion that the appellant was in a state of "advanced" intoxication. This state of intoxication occurs where an individual lacks specific intent - i.e. intoxication that results in impairment sufficient to raise a reasonable doubt that the accused did not foresee the consequences of his or her acts.
- [60] In *R. v. Daley*, 2007 SCC 53 at para. 44, the Supreme Court of Canada endorsed the description of the threshold for instructing juries on intoxication set out in *R. v. Robinson*, [1996] 1 S.C.R. 683: "[B]efore a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt".

Analysis: Louie's Appeal

Unreasonable Verdict

- [61] The judge found Louie kept the complainant in the downstairs bedroom "so she could be sexually assaulted". That inference followed from her description of the sequence of events. As I have noted above, the trial judge described the complainant's evidence as follows: "after Mr. Louie grabbed her arm, she felt her vagina being penetrated. Then she blacked out again".
- [62] In her evidence in chief, and on a number of occasions put to her in cross-examination, the complainant said she blacked out after Louie grabbed her arm. The only evidence with respect to when the sexual assault occurred was the complainant's evidence that feeling penetration of her vagina was the next thing she remembered or her next memory after Louie grabbed her. The statement put to her in cross-examination suggests she blacked out after she was restrained and later had a distinct memory of penetration, as does the complainant's response to Crown counsel's attempt to determine when the complainant felt penetration, cited at para. 11 above.
- [63] In my opinion, the judge erred in describing the sequence of events to which the complainant testified. The complainant did not say she was conscious between the time she was restrained and the time she felt penetration.
- [64] As I have noted at paras. 7-10 above, the complainants' memories were episodic. Through her testimony, she was asked to describe her "next memory" after each occasion when she blacked out. There is no evidence of how much time passed between these discrete memories. It is clear, however, that some significant time and significant events occurred between certain of the complainant's episodic memories. For example, her sister T.J. and her cousin left the downstairs bedroom at some point after using the complainant's cellphone and, presumably, before the assault. T.J. may still have been in the downstairs

bedroom when Louie grabbed the complainant to restrain her but logic tells us T.J. was not there during the assault. Hours passed between the time Louie restrained the complainant and the time she was awakened in the hallway by her sister at 7:00 AM.

- [65] The judge's inference that Louie grabbed the complainant's arm so that she could be sexually assaulted could only be drawn if the assault was facilitated by Louie restraining her. Otherwise, other plausible inferences, consistent with innocence, could have been drawn. In my view there is no basis in the evidence to support the inference the sexual assault followed immediately on the heels of Louie's restraint of the complainant.
- [66] There was no evidence of a discussion between any of the parties with respect to what was happening at the time the complainant was restrained. There was some evidence that earlier in the evening Louie had wanted to speak with the complainant about his relationship with her and she had been reluctant to do so. It is suggested he may have restrained her from leaving the room with a view toward, for example, initiating that discussion.
- [67] The conclusion that Louie restrained the complainant with the purpose of sexually assaulting her or permitting Charlie to do so was central to the judge's reasoning, because there was no evidence Louie actually committed the sexual assault. Guilt as an aider or abetter hinged upon evidence of Louie's intent to assist in the commission of the offence.
- [68] In my respectful opinion, the trial judge failed to give proper effect to the evidence. Having measured the verdict against the totality of the evidence adduced against Louie at trial, in my opinion, the verdict is not one that a properly instructed jury or a judge could reasonably have rendered. The critical inference of intent on Louie's part could not properly be drawn. Louie's conviction on the count of sexual assault should be set aside.
- [69] By restraining and thus injuring the complainant Louie may have assaulted her, but that is not the offence charged in the indictment. Given that the proximity of the simple assault to the aggravated sexual assault charged cannot be established, I am of the view the simple assault cannot be treated as a lesser included offence: *R. v. Rocchetta*, 2016 ONCA 577; *R. v. G.R.*, 2005 SCC 45.; *R. v. Ovcarić* (1973), 11 C.C.C. (2d) 565 (Ont. C.A.); *R. v. Olson* (1997), 114 C.C.C. (3d) 374 (B.C.C.A.).
- [70] I would allow the appeal, set aside Louie's conviction and enter an acquittal in its place.

Question of Law

- [71] Given my conclusion that a misapprehension of the evidence led to an unreasonable verdict, it is unnecessary to address Louie's submission that the trial judge committed "a serious error of law" by failing to consider whether intoxication was a viable defence to the charge. I would say only, with respect to that argument, that having rejected the appellant's evidence in part because she accepted that he was very drunk, the trial judge should have considered whether Louie was so intoxicated at the material time as to have been incapable of forming

the intention to aid or abet the commission of the offence.

Analysis: Charlie's Appeal

Unreasonable Verdict or Miscarriage of Justice

[72] Charlie contends the trial judge failed to consider numerous inconsistencies in the evidence of the complainant and submits the judge:

[In] deciding the inconsistencies surrounding the Complainant's drinking were minor and inconsequential, failed to recognize the inconsistencies on the central issue of the sexual assault and her memory of it. When considered in the totality of all the evidence and the totality of all the inconsistencies, the appellant submits that the evidence of the Complainant cannot be found to be reliable. The Trial Judge failed to engage with the evidence as required in [R. v. R.W.B., [1993] B.C.J. No. 758 (C.A.)]. In doing so the Trial Judge effectively shifted the burden of proof on the issue of the reliability of the Complainant's evidence.

[73] It is Charlie's position that an inadequate assessment of the credibility of the complainant resulted in an unreasonable verdict or a miscarriage of justice. I would not accede to this argument.

[74] The judge recognized the complainant's evidence should be treated with caution [at para. 74]. That caution evidently arose as a result of evidence of the complainant's intoxication, because the judge was otherwise impressed by the complainant's demeanour. She found the complainant to be clear about what she recalled and equally clear about what she did not recall and she did not exaggerate or make assumptions. The trial judge recognized frailties in the complainant's evidence and expressly set out the factors that caused her to consider her testimony to be reliable. For example, the complainant accurately described the room in which she was sitting before the assault occurred, confirmed by photographs taken by the police. Importantly, her evidence was corroborated in many respects by Louie.

[75] On critical questions there was little conflict between the evidence of witnesses in this case. None had intact memories. The only appellant who testified, Louie, was not in a position to deny much of the complainant's evidence.

[76] In my view, it cannot be said in this case that there was a failure to properly weigh the complainant's evidence or that there was a misapprehension with respect to its reliability. I cannot identify an error in relation to the consideration of the complainant's evidence that would undermine the judgment or constitute a miscarriage of justice of the nature described in R. v. J.F.D.

- [77] Charlie also challenges the inference drawn by the trial judge that it was his semen on his shorts; and the inference, from the fact semen and the complainant's blood were found on his shorts and underwear, that Charlie participated in the sexual assault. He says it was an error on the part of the trial judge not to consider inferences consistent with his innocence. In particular he relies upon the statement of Cromwell J. in *R. v. Villaroman*, 2016 SCC 33 at para. 35:
- [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, *aff'd* without discussion of this point, [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
- [78] I would not accede to the argument that the trial judge erred in drawing an inference that the semen on Charlie's shorts was his. That is so likely to have been the case that the inference could properly have been drawn in the absence of any evidence to the contrary.
- [79] Nor would I accede to the argument that the trial judge erred in drawing an inference from the presence of that semen and the complainant's blood on Charlie's shorts and underwear that he was "at the very least, a party to the sexual assault".
- [80] In the course of submissions at trial it was suggested to the trial judge that the complainant may have laid upon Charlie or he might have picked her up after she began to bleed profusely. The trial judge was aware of that suggestion but clearly discounted it. While there was no evidence from either the complainant or Charlie with respect to how his shorts and underwear became saturated with the complainant's blood, it is my view that the circumstantial evidence supported the trial judge's conclusion that Charlie was present while the sexual assault was committed and involved in the commission of the offence to some extent.
- [81] It is open to us to consider the accused's silence as indicative of an absence of an exculpatory explanation (in this case an explanation of the blood and semen on his pants) when considering an unreasonable verdict argument on appeal: *R. v. Noble*, [1977] 1 S.C.R. 874 at para. 103; *R. v. George-Nurse*, 2019 SCC 12, *affirming* 2018 ONCA 515).

- [82] Applying the deferential standard of review that is appropriate where an appellant challenges the inferences drawn by a trial judge (as described recently by DeWitt-Van Oosten J.A. in *R. v. Bransford*, 2019 BCCA 408 at paras. 31-34), I would dismiss the appeal on this ground.

Question of Law

- [83] Charlie argues the reasons for judgment insufficiently describe the basis for his conviction and do not permit meaningful appellate review. That submission should be read in light of the principles described in *R. v. R.E.M.*, 2008 SCC 51:
- [20] [T]he trial judge need not expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.
- [21] This is what is meant by the phrase in *Sheppard* "the path taken by the trial judge through confused or conflicting evidence" (para. 46). In *Sheppard*, it was not possible to determine what facts the trial judge had found. Hence, it was not possible to conclude why the trial judge had arrived at what he concluded -- the verdict.

[Emphasis added.]

- [84] The Crown contends the judge was satisfied beyond a reasonable doubt that Charlie 'directly participated' in the sexual assault. However, as counsel for Charlie notes, at paras. 97 and 98 of the judgment, cited above, the judge expresses uncertainty "as to whether Mr. Charlie or Mr. Louie personally sexually assaulted N.J. or whether they aided and abetted the sexual assault". In that passage, the judge addresses the distinct aspects of party liability set out in s. 21(1) of the Code. She juxtaposes "personal involvement" in the commission of the sexual assault with aiding and abetting. She was uncertain, in effect, whether Mr. Charlie was a party to the offence by: (a) actually committing the offence; (b) by doing or omitting to do anything for the purpose of aiding any person to commit it; or (c) by abetting any person in committing it. For that reason, Charlie says the reasons for judgment in this case do not provide the "clear articulation of the factual findings" referred to in *R.E.M.*
- [85] In my view, the evidence adduced at trial was capable of supporting the conclusion that Charlie was a party to the offence and the basis for this conclusion is discernable from the reasons for judgment based on the findings of fact articulated by the trial judge.
- [86] As the Crown suggests, there was some evidence that Charlie actually committed the offence under s. 21(1)(a): physical evidence that Charlie had "direct physical contact" with the complainant as she was assaulted (sufficient, pursuant to the principles described in *Ball* and *Magoon* to support a conviction founded upon actual commission of the offence). The judge's finding of uncertainty with respect to "what each man did" would not be a barrier to a conviction on this basis, because the extent of participation does not need to be precisely determined. However, I would read the trial judge's uncertainty with respect to whether

Charlie "personally sexually assaulted" the complainant to be uncertainty with respect to whether he actually committed the offence.

[87] Given the evidence of blood and semen on Charlie's shorts and underwear, it was also open to the judge to draw the inference that Charlie was so close to the commission of the offence as to encourage, instigate or assist in its commission. The blood and semen on his shorts are strong evidence that he was not merely present at the scene of an offence but a participant. In my view, that finding is implicit in the trial judge's conclusion that Mr. Charlie was, "at the very least, a party to the sexual assault".

[88] While some uncertainty is introduced by the wording of the reasons, para. 98 in particular, I would not accede to the argument that an error of law has been made out on the basis of insufficiency of reasons. The findings linking the evidence to the verdict can be logically discerned.

Conclusion

[89] Insofar as the appropriate order on this appeal is concerned, I note the following observations of the Supreme Court of Canada in *R. v. Pittiman*, 2006 SCC 9:

[14] Section 686(2) of the Criminal Code provides that where a court of appeal allows an appeal from conviction, it may direct an acquittal or order a new trial. Where a conviction is set aside on the ground that the verdict is unsupported by the evidence, the court of appeal, absent legal errors in respect of the admissibility of evidence, will usually enter an acquittal. As noted by Doherty J.A. in *R. v. Harvey* (2001), 160 C.C.C. (3d) 52 (Ont. C.A.), at para. 30, "[a]n acquittal is the appropriate order because it would be unfair to order a new trial and give the Crown a second opportunity to present a case on which a reasonable trier of fact could convict."

[90] For reasons set out above, I would set aside the conviction of Louie and enter an acquittal on the ground the verdict is unsupported by the evidence. I would dismiss Charlie's appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Goepel"

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Prepared on 29 October 2026 · Esheria