

CANADA / JUDGMENT

R. v. Clarke

2026 ONCA 233

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Clarke

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COA-24-CR-0615

Judges

Huscroft, Grant; George, Jonathon C.; Gomery, Sally A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Clarke, 2026 ONCA 233[1]

DATE: 20260401

DOCKET: COA-24-CR-0615

Huscroft, George and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Alex Clarke

Appellant

Jeffrey Fisher, for the appellant

Deepa Negandhi, for the respondent

Heard: November 13, 2025

On appeal from the conviction entered by Regional Senior Justice Mark L. Edwards of the Superior Court of Justice on March 8, 2024, with reasons reported at 2024 ONSC 924.

Huscroft J.A.:

- [1] The appellant was convicted of one count of sexual assault against the complainant, an acquaintance from high school. The assault occurred in the appellant's car, following a drive to a local park.
- [2] This was a two-witness trial in which the complainant and appellant testified to different versions of the incident. The main issue at trial was whether the complainant consented to the sexual activity. The trial judge did not believe the appellant's evidence and accepted the complainant's evidence. He found that the evidence established the appellant's guilt beyond a reasonable doubt and found him guilty.
- [3] The appellant argues that the trial judge misapprehended the evidence, engaged in illogical or irrational reasoning, relied on stereotypes and unfounded common-sense assumptions, and failed to reconcile material contradictions between his factual findings and credibility determinations.
- [4] I am satisfied that the trial judge made no such errors. I would dismiss the appeal for the reasons that follow.

Background

- [5] The complainant was approximately 18 years old at the time of the offence; the appellant was approximately 19 years old.
- [6] The appellant texted the complainant on June 25, 2020 between 3 and 4 a.m. asking her to go for a drive with him. The complainant declined. On June 29, 2020 the appellant sent a text message to the complainant at approximately 11:45 p.m. asking her to hang out, and whether she smoked weed. The complainant agreed, and the appellant picked her up shortly after midnight on June 30, 2020. They drove to a local park, which was next to a lake.

- [7] The complainant testified that they smoked weed when they arrived at the park. The appellant asked her whether she would be interested in going skinny-dipping. The complainant said no and instead suggested that they go for a drive. They went for a short drive, returned to the same location, and again smoked weed. The complainant testified that, out of nowhere, the appellant leaned over and kissed her. She asked him what he was doing, and he apologized. The appellant then reached over and reclined her seat. He got onto her side of the vehicle, straddling her legs. The complainant testified that she was crying and told him to stop and tried to push him back. The appellant undid the clasp of her bra and partially removed her jeans. He touched her both inside and outside of her jeans and underwear. The appellant partially removed his pants and attempted to insert his penis into her vagina. The complainant never consented. She kept crying and asking him to stop. Ultimately, the appellant stopped of his own volition and returned to the driver's seat. He said that he was sorry.
- [8] The appellant testified that everything that occurred was consensual. He testified that he asked the complainant whether she wanted to engage in "ghosting", which is the practice of blowing smoke into each other's mouth. The appellant testified that he blew smoke into the complainant's mouth and that while ghosting he kissed her, and she kissed him back. He testified that the complainant took off her sweater and that she leaned forward to allow him to unclip her bra and that she helped him unbutton her jeans. The appellant testified that he put his fingers in the complainant's vagina and that she touched his exposed penis and told him "please just take it slow". He tried to penetrate the complainant with his penis. The appellant testified that the complainant told him to get off of her. He testified that he stopped and returned to his seat and then apologized. The appellant testified that he had no reason to apologize but he did so because she seemed upset. He drove the complainant around before dropping her off at her home, where he apologized again because the night had ended "so awkwardly."

DISCUSSION

The trial judge did not misapprehend the evidence

- [9] The appellant argues that the trial judge misapprehended his evidence about the complainant's non-verbal consent. Specifically, the appellant argues that the trial judge erred in finding that he described equivocal behaviour on the complainant's part and erred in finding that he had agreed that the complainant was "passive throughout".
- [10] I do not accept this argument.

- [11] The appellant testified that, during the incident, the complainant shifted in her seat to accommodate his advances, removed her clothes or assisted him in removing them, and touched his penis when he exposed it. He agreed, however, that he was “testing the waters” throughout; that the complainant was at times passive; and that he relied on her lack of objection or resistance as signs he should proceed further. He also testified that she said: “please just take it slow” when he presented his penis.
- [12] It was open to the trial judge to characterize the complainant’s conduct, on the appellant’s own version of events, as equivocal. The trial judge’s recounting of the appellant’s description of the complainant as “passive throughout” and “essentially passive” was not a misapprehension. The appellant accepted in cross-examination that the complainant was “completely passive”, at various points, “lying there, doing nothing”.

The trial judge’s reasons are not illogical or irrational

- [13] The appellant argues that the trial judge drew an illogical or irrational inference from the appellant’s evidence that the complainant had told him to “please just take it slow”. He argues that the words “take it slow” are words of consent, indicating a direction to proceed, and that the trial judge erred in concluding otherwise.
- [14] I do not agree.
- [15] The complainant denied that she asked the appellant to “please just take it slow”. Although the trial judge made no specific finding in this regard, it is clear that he rejected the evidence of the appellant in favour of the complainant’s testimony.
- [16] The trial judge concluded that the statement the complainant was alleged to have made was ambiguous and was not an unequivocal expression of consent in any event. This conclusion was open to him and reveals no error. The trial judge was not bound to adopt the appellant’s characterization of the statement simply because the complainant denied making it. Even if the complainant did say “please just take it slow”, these words can legitimately be interpreted in several ways. They could mean that she did not want the sexual activity to escalate further, that she wanted the appellant to slow down, or to stop. They could also have been, as the appellant argued, a direction to proceed, albeit with caution or simply at a desired pace. Thus, even assuming that the statement was made, the trial judge’s reasons in concluding that it was not an unequivocal expression of consent are neither illogical nor irrational.

The trial judge did not rely on stereotypes or unfounded common-sense assumptions

- [17] The appellant argues that the trial judge erred in relying on the parties' lack of a prior dating history or sexual relationship in finding that it was less likely or believable that the complainant had consented, contrary to the Supreme Court's decisions in *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, and *R. v. Kinamore*, 2025 SCC 19, 448 C.C.C. (3d) 427. The appellant asserts that this is inverse twin-myth reasoning.
- [18] This argument must be rejected.
- [19] It is well established that a trial judge's reasons must be read as a whole, having regard to the submissions of the parties. The trial judge's finding that the complainant did not consent was not made simply on the basis that she and the appellant were only acquaintances and had no prior sexual relationship. He considered the parties' relationship together with the text messages that preceded the alleged offence, which indicated that their plan was only to hang out and smoke weed. This was the context in which the trial judge found "good common sense" in the complainant's testimony that the appellant's initial kiss surprised her, and that she was interested only in doing what had been agreed on in their text messages. This was a finding grounded in the evidence, not an assumption that a person would not consent to sex with a mere acquaintance.
- [20] The appellant argues, further, that the trial judge erred in relying on the three-minute timeframe in which the incident occurred in concluding that it was implausible for the complainant to have consented to the sexual activity.
- [21] This argument, too, must be rejected.
- [22] The trial judge relied on the three-minute timeframe in the context of rejecting the appellant's argument that he had moved carefully, one step at a time, while ensuring that he had the complainant's consent to each sexual act before proceeding. The trial judge's rejection of this argument was grounded in the other evidence in the case, including the evidence that the complainant and the appellant had arranged only to hang out and smoke weed, and that this was their first time being alone together. Read in the context of the submissions of the parties and the evidence as a whole, the trial judge's reliance on the three-minute time frame reveals no error.

The trial judge did not fail to reconcile material contradictions between his factual and credibility findings

- [23] The appellant argues that the trial judge's analysis confuses the issues of consent and honest but mistaken belief in communicated consent, and that his reasons do not explain the basis for his verdict – the "what" and "why" – in a logical fashion. He places particular significance on the trial judge's reference to a passage from *R. v. T.S.* (1999), 88 O.T.C. 33 (Ont. Ct. J. (Gen. Div.)), dealing with honest but mistaken belief. The parties did not focus on the potential for the appellant to have had an honest but mistaken belief in communicated

consent; the trial judge referred to the passage from T.S. in the context of a discussion of the actus reus of the offence and whether the complainant had consented.

[24] This argument must be rejected.

[25] I accept that the reasons could be clearer. At points, the consent and honest but mistaken belief analyses appear to be blurred, and the trial judge's descriptions of the evidence and factual findings are not always carefully separated. But reasons are not judged against a standard of perfection and, again, must be judged in the context of the parties' submissions. The passage from T.S. was urged on the trial judge by defence counsel, despite its irrelevance to the issues before the court.

[26] The trial judge found that the complainant did not consent to any sexual activity with the appellant because he accepted that she was surprised by his initial kiss and "conveyed from the outset that she was not interested in doing anything inside the car other than hang out and smoke weed." He found, further, that the appellant knew that the complainant was not consenting based on his apology after he got off of her – an apology to which both he and the complainant testified.

[27] No other essential element of the offence was in dispute. The appellant's evidence disclosed no reasonable steps on his part that could lend an air of reality to a defence of honest but mistaken belief.

[28] Although the trial judge made no clear finding as to whether the complainant was passive and uncommunicative during the sexual activity, or whether she cried, protested and resisted throughout, either type of conduct is consistent with a lack of consent. It is clear, however, that the trial judge rejected the appellant's testimony, which included his claim that the complainant actively facilitated his advances.

[29] I am satisfied that the "what" and the "why" of the trial judge's reasons are clear. At the end of the day, there is no doubt as to why the appellant was found guilty: The trial judge accepted the complainant's evidence, rejected the appellant's evidence, and was left with no reasonable doubt that the sexual assault had occurred.

CONCLUSION [30] I would dismiss the appeal.

"Grant Huscroft J.A."

"I agree. S. Gomery J.A."

George J.A. (dissenting):

[31] I have read the reasons of my colleague, Huscroft J.A. I agree with him that the appellant's third ground of appeal – that the trial judge's reasons do not allow for meaningful appellate review – should be rejected.

[32] However, I am of the view that the trial judge misapprehended the appellant's evidence and relied on stereotypes and unfounded "commonsense" assumptions. These errors were material to his decision to reject the appellant's evidence and find him guilty. Accordingly, I would allow the appeal and order a new trial.

I. Additional Background Facts [33] The appellant and the complainant were the only two witnesses at trial. In order to understand why I would allow the appeal and remit the matter for a new trial, it is necessary that I review their evidence in some detail, which, while I will try to avoid it, may repeat some of the facts already noted by my colleague.

[34] On the night in question, the appellant and the complainant texted each other about meeting. The plan was to "hang out" and "smoke weed". The appellant picked the complainant up from her home shortly after midnight and travelled to a nearby beach. This is where their stories diverge.

[35] The complainant testified that after arriving at the beach they smoked marijuana and that the appellant asked her to go "skinny dipping". She said no and suggested they go for a drive instead. The complainant testified that they drove around for about 20 minutes before returning to the beach and smoking more marijuana. While they were sitting in the car and talking about "life and covid and things" the appellant kissed her "out of nowhere". When she asked him what he was doing, the appellant responded, "I'm sorry I couldn't help it."

[36] The complainant testified that the appellant then "forcefully" climbed on top of her and reclined her seat back while kissing her. The complainant asked him to stop and was crying. She said that she resisted and tried to push him away, but he continued. He unclasped her bra, unbuttoned her pants, and slid her pants down to her ankles. She testified that she had taken her sweater off earlier, before the encounter became sexual. Then, she said, the appellant digitally penetrated her. She repeatedly told him to stop while crying. According to the complainant, the appellant told her that, "it was okay, [we are] just kissing." The appellant eventually stopped on his own accord and returned to his seat. He told the complainant that he was sorry.

[37] The appellant testified that the encounter was entirely consensual. When they arrived at the beach, he asked the complainant if she wanted to go swimming, but she did not have a bathing suit so declined. They drove around for a while and returned to the beach. He testified that while they were "ghosting" – which apparently is the practice of one person inhaling smoke and blowing it into another person's mouth – he leaned over and kissed the complainant. She kissed him back. He said that as they kissed, he reached over and lowered her seat. The complainant gave him a "little smile". The appellant climbed over the center console at which point the complainant repositioned her body to accommodate him. The appellant said the complainant took her sweater off and leaned forward so that he could unclasp her bra, which he did. The complainant unbuttoned her pants, put her foot on the dashboard, kicked her shoes off, and lifted her body. The appellant helped lower her pants.

[38] The appellant testified further that the complainant rubbed his penis while he digitally penetrated her. She told him to “please just take it slow”, which he took to mean “don’t force it in, don’t go too fast or rough”. After several unsuccessful attempts to penetrate her with his penis, the complainant told him to “just get off of me.” He said he immediately stopped, returned to his seat, and apologized. He testified that he did not believe he had any reason to apologize but did so because the complainant seemed upset. After driving her home, the appellant apologized again “for the night ending up so awkwardly.”

II. Misapprehension of Evidence [39] The appellant argues that the trial judge misapprehended his testimony, and that this misapprehension played a central role in the decision to reject his evidence and find him guilty. I agree.

[40] A misapprehension of evidence occurs when a trier of fact fails to consider evidence relevant to an issue, makes a mistake about the substance of evidence, or fails to give proper effect to evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 538. The standard for establishing that a misapprehension of evidence has caused a miscarriage of justice is high, met only where the misapprehension impacted the outcome of the trial: *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 7. The misapprehension cannot be peripheral and must occupy an essential place in the reasoning process leading to the finding of guilt: *Lohrer*, at paras. 1-2; *Morrissey*, at p. 541.

[41] When a principal issue at trial is the credibility of witnesses, and the evidence of one party is accepted to the virtual exclusion of the evidence of others, “it is essential that the findings be based on a correct version of the actual evidence”: *Morrissey*, at p. 541, citing *Whitehouse v. Reimer* (1980), 1980 ABCA 214, 116 D.L.R. (3d) 594 (C.A.), at p. 595. There may be a miscarriage of justice in such a case even if the evidence adduced at trial is capable of supporting a conviction: *R. v. Alboukhari*, 2013 ONCA 581, 310 O.A.C. 305, at para. 30; *Morrissey*, at p. 541.

[42] As noted above, the appellant testified that the complainant was an active and consenting participant until she asked him to stop, which he immediately did. His evidence was clear and unequivocal that their sexual encounter involved mutual kissing, fondling, undressing, and expressions of non-verbal consent. However, the trial judge’s review of the appellant’s evidence is markedly different. In his reasons, he indicates that:

(i) the appellant “acknowledged [in cross examination] that the complainant was passive throughout”;

(ii) the appellant “relied on his self-serving interpretation of what at best can be described as equivocal and or contradictory behaviour on the part of [the complainant]”;

(iii) “the evidence of [the appellant] fundamentally does not make sense. He goes from an unwanted kiss to attempted penile penetration in 3 minutes – and according to him she’s fine with everything”; and

(iv) “on his version of events, [the complainant] is essentially passive. Her conduct does not unequivocally communicate consent. Quite the opposite, her comment ‘take it slow’ suggests she is not comfortable with what is happening.”

[43] This is not an accurate description of the appellant’s evidence. The appellant’s account of the complainant’s behaviour cannot be fairly described as “contradictory” or “essentially passive”. Nor did he testify that the sexual activity began with an “unwanted kiss”. Moreover, the complainant denied ever saying “take it slow” or “just get off me”; she testified that her objection to the sexual activity was clear from the outset. Accordingly, those words must be read in the context of the appellant’s evidence, where, on his telling, the complainant said “take it slow” while in the throes of mutual kissing and undressing and said “just get off of me” only after the appellant was having difficulty penetrating her, to which he immediately complied.

[44] Of course, consent cannot be implied just because a complainant did not object. However, the appellant disagreed that the complainant was passive throughout when that proposition was put to him in cross-examination:

Q. She was pushing you away at points...

A. I disagree.

Q. ...and she was completely passive at other points.

A. What was that word, sorry?

Q. She was completely passive?

A. And what do you mean by that? Like, what do...

Q. She was lying there, doing nothing.

A. Yes.

[45] It is clear from this back and forth that the appellant was responding specifically to the Crown’s suggestion that the complainant was actively fighting back. The appellant agreed that the complainant was “passive”, but only in the sense that she was not resisting by pushing him away.

[46] The trial judge relied on his understanding that the appellant implied or acknowledged that the complainant was “passive” to conclude that she did not consent. He confirms as much by referring to and relying on *R. v. T.S.*, 88 O.T.C. 33 (Ont. Ct. J. (Gen. Div.)) for the proposition that “[i]t is dangerous to interpret passivity or acquiescence as conveying consent” and “non-verbal behaviours when relied upon as expressions of consent, must be unequivocal”: para. 157-58. The trial judge reasoned that the appellant did not have “an honest belief” that the complainant’s actions were demonstrative of consent. Ultimately, he preferred the complainant’s evidence, at least in part, for this reason:

I do not accept evidence the evidence that [the appellant] had an honest belief that all of the responses of [the complainant] as he progressed from a kiss to attempted penile penetration were demonstrative of [the complainant's] consent and reflective of her enjoying what was happening. It was only when she yelled at him to get off of her that he stopped – and he apologized. I accept the of [the complainant] that she never gave any form of consent to what happened.

[47] During oral submissions, the Crown on appeal argued that the trial judge did not mischaracterize the appellant's evidence, but found that the complainant was "passive" in a legal sense, meaning, she did not consent. The Crown argued that the disputed passages were not misstatements of the appellant's evidence but rather findings open to him on the evidence.

[48] I would begin by pointing out that the trial judge's observation that the appellant had accepted the complainant was "passive throughout" appears in the section titled "The Evidence of Mr. Clarke" and not "The Legal Principles and Analysis", a heading that appears later in his reasons.

[49] In any case, even if the trial judge's comment was simply a prelude to his subsequent analysis, the Crown's explanation makes little sense as the actus reus of the offence can only be established on the complainant's evidence. As the Supreme Court held in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 25, "the complainant's testimony is the only source of direct evidence as to her state of mind". Furthermore, "[t]he accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the mens rea stage of the inquiry": para. 30.

[50] The problem with the trial judge's approach to this is that the appellant did not raise the defence of honest but mistaken belief in communicated consent. The appellant's evidence about what he believed the complainant was thinking was not capable of either contradicting or corroborating the complainant's evidence that she was not consenting in her own mind: *Ewanchuk*, at para. 30; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 89. Using the appellant's testimony, which the trial judge made clear he rejected in its entirety, to confirm the complainant's evidence was especially problematic as the two provided diametrically opposed versions of events: *R. v. Saha*, 2025 ONCA 488, at paras. 14-15.

[51] The trial judge was, of course, entitled to reject the appellant's testimony and to find that the complainant did not consent. However, it was not open to him to do so on an erroneous understanding of the appellant's evidence or by using the test for an honest but mistaken belief in consent, which was not raised nor even available on the evidence.

III. Commonsense ASSUMPTIONS AND STEREOTYPES

- [52] The trial judge also erred by making credibility findings that rested on the fact the parties “were not in a boyfriend/girlfriend relationship” and “were at most acquaintances”.
- [53] A trier of fact is entitled to draw reasonable, context-specific inferences in assessing credibility in sexual assault cases. An error is committed when those inferences amount to clearly illogical or unwarranted assumptions: *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at para. 97; *R. v. Steele*, 2021 ONCA 186, 154 O.R. (3d) 721, at paras. 52, 57-58. And the error becomes overriding when it goes to the very core of the outcome of the case: *Kruk*, at para. 98. Furthermore, drawing inferences based on generalizations about human behaviour may mask impermissible stereotypical or discriminatory reasoning: *Steele*, at paras. 19, 56; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3.
- [54] The trial judge in this case used the parties’ relationship, or more specifically the lack of a prior relationship, to find that the two had agreed to “hang out and smoke weed - nothing more and certainly not what happened in the span of 3 minutes.” In the end, he preferred the complainant’s evidence because as “merely an acquaintance”, her “evidence that she did not consent to anything that happened in the car makes sense.”
- [55] The trial judge’s assumption about how two young people, who had no prior romantic involvement, would interact in circumstances like this was unwarranted. This is a generalization about human behaviour that goes far beyond the bounds of commonsense. There is nothing implausible about two people, with no romantic history, kissing and engaging in sexual activity. Indeed, in today’s day and age a “one-night stand” involving mere acquaintances, and even complete strangers, is not unusual.
- [56] The appellant refers to and relies on *R. v. Kwon*, 2024 SKCA 50, 438 C.C.C. (3d) 196, where the trial judge was found to have erred by rejecting the accused’s version of events because it was implausible that a married woman would ask a man she did not know to have sex and “engage in sexual intercourse for two minutes without foreplay”.^[2] In fairness, the trial judge’s reasoning in our case differs in that he emphasizes consent could not reasonably be obtained in the span of three minutes. However, as in *Kwon*, there was no basis for the trial judge’s broader assumption that sexual relations between two acquaintances is implausible and far-fetched.
- [57] I am also of the view that the assumptions made by the trial judge crossed over into stereotypical reasoning: *Kruk*, at para. 96. Given the above determination about ungrounded commonsense assumptions, I need not dive into this question much further. I note only that in *Goldfinch*, the Supreme Court held that using evidence of a sexual relationship to conclude that consent was more likely is generally prohibited unless the specific relevance of the sexual activity evidence can be identified “with precision”: para. 57. And more recently, in *R. v. Kinamore*, 2025 SCC 19, 503 D.L.R. (4th) 385 the Supreme Court explained that relying on evidence of a lack of a relationship or sexual inactivity to conclude that consent was less likely is similarly an error of law. This “flawed reasoning” based on sexual

inactivity, which is “particularly disadvantageous to [an] accused”, must be “prohibited to ensure a trial that is fair for the accused, the complainant, and the broader public”:
Kinamore, at para. 37.

IV. Conclusion

[58] For these reasons, I would allow the appeal and order a new trial.

Released: April 1, 2026 “G.H.”

“J. George J.A.”

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The Saskatchewan Court of Appeal unanimously agreed that the trial judge erred in her assessment of the appellant’s evidence and in relying on myths and stereotypes. However, the court was divided on the issue of remedy. In *R. v. Kwon*, 2025 SCC 1, 446 C.C.C. (3d) 419, the Supreme Court considered an appeal of the decision as of right. It allowed the appeal, overturning the unreasonable verdict finding and acquittal, and ordered a new trial.

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