

CANADA / JUDGMENT

R. v. H.S.

2026 ONCA 184

COURT

Court of Appeal for Ontario

DECIDED

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COA-23-CR-0836

Judges

van Rensburg, Katherine; Thorburn, Julie; Gomery, Sally A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. H.S., 2026 ONCA 184[1]

DATE: 20260313

DOCKET: COA-23-CR-0836

van Rensburg, Thorburn and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

H.S.

Appellant

H.S., acting in person

Naomi M. Lutes, appearing as duty counsel

Étienne Lacombe, for the respondent

Heard: February 3, 2026

On appeal from the conviction entered by Justice M.J. Lucille Shaw of the Superior Court of Justice, on August 3, 2022, and from the sentence imposed on July 6, 2023.

REASONS FOR DECISION

- [1] H.S. appeals his sexual assault conviction and sentence.
- [2] With respect to his conviction appeal, the appellant advances three grounds of appeal, each based on an alleged flaw in the trial judge's final jury charge. While he did not abandon it, the appellant did not advance arguments regarding his sentence appeal.

First ground: The trial judge failed to instruct the jury that it should consider whether the appellant had an honest but mistaken belief in the complainant's consent

- [3] The appellant contends that the trial judge erred by failing to instruct the jury to consider that the appellant could have had an honest but mistaken belief in the consent of the complainant, K.P. We disagree. On the evidence, there was no air of reality to this defence. As such, no instruction was required.

Governing legal principles

- [4] An accused may respond to a sexual assault charge by seeking to establish that they had "an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct" (emphasis in original): *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 91. If accepted, this defence negates the mental element or mens rea necessary to prove the offence: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 43-44.
- [5] An accused's "belief that silence, passivity or ambiguous conduct constitutes consent" cannot give rise to a defence of honest but mistaken belief in consent: *Ewanchuk*, at para. 51. The defence is available only where there is an evidentiary basis to support it. The required evidentiary basis includes:

evidence not only of non-consent and belief in consent, but in addition evidence capable of explaining how the accused could honestly have mistaken the complainant's lack of consent as consent. Otherwise, the defence cannot reasonably arise. There must, in short, be evidence of a situation of ambiguity in which the accused could honestly have misapprehended that the complainant was consenting to the sexual activity in question: *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 63, per McLachlin J. (dissenting), but cited with approval in *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 86.

- [6] Section 273.2 of the Criminal Code, R.S.C. 1985, c. C-46, further limits the availability of the defence of honest but mistaken belief in consent. It cannot be relied upon if the accused “did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting” or in the absence of “evidence that the complainant’s voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.”
- [7] Mistaken belief in consent must be put to the jury if the defence has an air of reality, that is, if “the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted”: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, para. 60, quoting *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 682; see also *R. v. J.B.*, 2024 ONCA 465, at para. 14.
- [8] An evidentiary basis for the defence may be absent where witnesses’ accounts of an alleged sexual assault are diametrically opposed. As noted in *R. v. Park*, [1995] 2 S.C.R. 836, at para. 26:[2]

[C]ourts have generally refused to put the defence of honest but mistaken belief in consent to the jury when the accused clearly bases his defence on voluntary consent, and he also testifies that the complainant was an active, eager or willing partner, whereas the complainant testifies that she vigorously resisted. In such cases, the question is generally simply one of credibility, of consent or no consent.

- [9] As elegantly stated by Zarnett J.A., the defence is not available where “the cobbled together scenario consists of strands of evidence that are mutually exclusive in the sense that acceptance of one would involve the rejection of the other”: *R. v. Othman*, 2025 ONCA 449, 450 C.C.C. (3d) 100, at para. 61.
- [10] In deciding whether an instruction on the defence should be included in a jury charge, a trial judge must determine whether “a reasonable jury could cobble together some of the complainant’s evidence and some of the accused’s evidence to produce a sufficient basis for such a defence”: *Park*, at paras. 25-26. The trial judge must ask herself:

Would the acceptance of one version necessarily involve the rejection of the other? Put another way, is it realistically possible for a properly instructed jury, acting judiciously, to splice some of each person's evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent? If the stories cannot realistically be spliced in such a manner, then the issue really is

purely one of credibility -- of consent or no consent -- and the defence of mistaken belief in consent should not be put to the jury: Park, at para. 25.

- [11] The determination of whether to put a defence to a jury is a question of law, reviewable on a correctness standard: Cinous, at para. 55; Othman, at para. 43.

The evidence regarding the sexual assault

- [12] The alleged sexual assault took place on December 16, 2019, at the appellant's apartment. Two witnesses to the event testified: the complainant, K.P., and the appellant's girlfriend, A.C.[3] The appellant did not testify.
- [13] K.P. and the appellant had been friends for a year or two, and she went to his home regularly to buy or smoke marijuana. She testified that A.C. was already at the apartment when she arrived there on December 16.[4] K.P. and A.C. sat on the couch in the living room while the appellant cooked in the adjacent kitchen. All three were drinking. According to A.C., they were also smoking marijuana.
- [14] K.P. and A.C. had met before, in July 2019, at a party. They each testified that they were attracted to each other. While sitting on the couch, they began to kiss and touch each other. They both removed their tops and bras. K.P. also removed her pants.
- [15] The appellant then walked over to them. It was at this point that K.P. and A.C.'s accounts diverged significantly.

K.P.'s account

- [16] K.P. did not recall whether the appellant asked to join in the sexual activity, but she testified that she let the appellant know that "this was not going to happen." She said that A.C. caressed the appellant's penis and then performed oral sex on him while she sat beside A.C. K.P. admitted that she surreptitiously took a picture of the appellant's penis when A.C. removed it from his pants and that she was giggling. She denied that she also performed oral sex on the appellant.
- [17] K.P. testified that she and A.C. continued to kiss and fondle each other. A.C. then grabbed K.P. by the arms and lifted her up so that she was standing, bent over and facing A.C., who remained sitting on the couch. Both women were naked at this point. K.P. testified that the appellant was standing behind her and he tried to put his penis in her vagina. She grabbed it, sat back down on the couch, and said to the appellant: "I don't care what you and [A.C.] do together, but I am not having sex with you." She did not recall if the appellant responded.

- [18] K.P. recalled that, after this happened, she was again sitting on the couch, “turned off”. She and A.C. then resumed kissing and touching each other. According to K.P., A.C. again grabbed her by the upper arms and positioned her so that she was standing, bent over and facing A.C. on the couch. As they continued to kiss, the appellant penetrated K.P. vaginally with his penis for less than two minutes. According to K.P., the appellant said nothing to her before doing this.
- [19] K.P. testified that she was surprised that the appellant penetrated her when she had told him that she did not want to have sex with him. She pushed him off and sat down. On her account, this was the end of all sexual activity between her, A.C. and the appellant.
- [20] K.P. stayed the night at the appellant’s apartment because she had been drinking and did not want to drive.

A.C.’s account

- [21] According to A.C., when the appellant first approached the couch where she and K.P. were kissing and touching each other, he asked if he could join them. A.C. testified that both she and K.P. said “sure”. She denied hearing K.P. tell the appellant that she did not want to have sex with him.
- [22] A.C. testified that she then pulled the appellant’s penis out and began performing oral sex on him. She said that K.P. asked her if she could do it as well and also began performing oral sex on the appellant.
- [23] A.C. recalled that, at one point, K.P. was standing over her, facing her, while she remained seated on the couch. While A.C. and K.P. continued to touch and kiss each other, the appellant penetrated K.P. vaginally with his penis. A.C. recalled that, at one point, he complimented K.P.’s vagina and she thanked him. A.C. again denied hearing K.P. say that she did not want to have sex with the appellant.
- [24] According to A.C., she asked to move their activity to the bedroom because her neck was sore. On the bed, the appellant again had sexual intercourse with K.P., then the appellant had sexual intercourse with A.C.
- [25] Both K.P. and A.C. stayed at the apartment overnight.

The trial judge’s instructions with respect to the mens rea requirement

- [26] The trial judge instructed the jury that, to secure a conviction for sexual assault, the Crown must prove beyond a reasonable doubt both that K.P. did not consent to the sexual activity in question and that the appellant knew that K.P. did not consent. This required the Crown to prove that the appellant knew that K.P. did not consent; or that he proceeded in the face of a risk that she did not; or that the appellant was aware of indications that K.P. did not consent but chose to ignore them because he did not want to know the truth. In her concluding instructions on the mens rea element, the trial judge told the jury that:

If you accept [K.P.'s] evidence that she told [the appellant] that she did not want to have sexual intercourse with him, you should have little difficulty concluding that [the appellant] knew that [K.P.] was not consenting to engaging in sexual activity with him. Nothing about the circumstances, as she described them, could have possibly left [the appellant] with any other impression.

[27] The trial judge did not instruct the jury to determine whether the appellant had an honest but mistaken belief that K.P. had consented.

The trial judge did not err in her instruction on mens rea

[28] In closing argument, the defence took the position that K.P. affirmatively consented to sex with the appellant. Trial counsel did not raise a defence of honest but mistaken belief nor suggest that an instruction should be included in the jury charge. This does not preclude the appellant from arguing on appeal that the jury should nonetheless have been instructed on this defence: *R. v. A.D.H.*, 2015 ONCA 690; J.B. The question is whether there was an air of reality to such a defence.

[29] In our view, there was not. The competing accounts by K.P. and A.C. were so diametrically opposed that there was no way to cobble together a version of events consistent with a lack of consent on the part of K.P. but an honest but mistaken belief in her consent on the part of the appellant.

[30] A.C. testified that K.P. enthusiastically consented to a threesome with the appellant. On her account, K.P. responded “sure” when the appellant asked if he could join them, sought A.C.’s permission to perform oral sex on the appellant, thanked the appellant for complimenting her vagina while he penetrated her vaginally as she was bent over A.C. on the couch, and later engaged again in sexual intercourse with the appellant in his bedroom. A.C. denied that K.P. did or said anything that would indicate that she did not consent.

[31] If the jury accepted A.C.’s evidence, they would have concluded that K.P. consented to the sexual intercourse with the appellant and found him not guilty.

[32] K.P. testified that she twice told the appellant that she did not want to have sex with him. She denied that she performed oral sex on the appellant or had intercourse with him in his bedroom. Perhaps most significantly, she said that she physically resisted his first attempt to penetrate her vaginally by grabbing the appellant’s penis and sitting back down on the couch next to A.C. Despite this, the appellant penetrated her vaginally after A.C. again moved her so that K.P. was facing the couch, bent over A.C. K.P. pushed him off and sat down again, and ceased any further sexual activity.

[33] If the jury accepted K.P.’s evidence, and they rejected A.C.’s evidence or found it did not raise a reasonable doubt, they were bound to find the appellant guilty of sexual assault.

- [34] There is no middle ground here. Although it was open to the jury to accept some but not all of A.C.'s evidence, and to accept some but not all of K.P.'s evidence, their versions of events could not be spliced together to give the defence of honest but mistaken belief in consent any air of reality. If the jury accepted K.P.'s evidence that she did not affirmatively consent, it necessarily rejected A.C.'s evidence to the contrary. A.C.'s evidence otherwise did not provide an evidentiary basis on which the jury could find that the appellant reasonably believed that K.P. agreed to sexual intercourse with him. Nothing that A.C. testified that K.P. did, including her willingness to engage in sexual activity with A.C. and her positioning over the couch, could be the basis for such a belief.
- [35] This case resembles *Othman*. In *Othman*, the complainant and Othman's version of events, while consistent to a point, were diametrically opposed regarding their sexual encounter. On the complainant's version, all the sexual activity occurred despite her communicated non-consent. According to Othman, the complainant initiated their sexual interaction, she was an active and willing participant throughout, and he sought and obtained her consent to every specific act they engaged in. The trial judge declined to instruct the jury to consider whether Othman had an honest but mistaken belief in the complainant's consent, on the basis that acceptance of the complainant's account necessarily precluded accepting Othman's evidence. This court dismissed Othman's appeal. Given the mutual exclusivity of the two accounts of the alleged sexual assault, this court agreed that the defence of honest but mistaken belief in consent had no air of reality and was properly kept from the jury.
- [36] We conclude likewise here. Given the lack of evidence to support the defence of honest but mistaken belief, the trial judge did not err in her instructions on mens rea. She cautioned the jury that the Crown had the onus to prove both that K.P. did not consent and that the appellant knew she did not consent. She did not need to instruct the jury on honest but mistaken belief in consent because, assuming it accepted K.P.'s evidence that she did not consent, there was no air of reality to the defence.
- [37] We therefore conclude that this ground of appeal cannot succeed.

Second ground: The trial judge's charge on motive to fabricate was confusing

- [38] At trial, the defence argued that K.P. had a motive to fabricate the allegation that the appellant sexually assaulted her on December 16, 2019. A.C. testified that, on December 26, 2019, she witnessed an argument between K.P. and the appellant about K.P. spilling a drink and some cannabis in his home, at the end of which K.P. told the appellant that he could explain himself to a judge. K.P. denied that she saw the appellant on December 26, 2019, but admitted that she argued with him when she next encountered him on February 15, 2020, the same day she reported the sexual assault.
- [39] On appeal, the appellant contends that the trial judge did not adequately instruct the jury on the implications of rejecting A.C.'s evidence on this issue, as required by this court in *R. v. Ignacio*, 2021 ONCA 69, 400 C.C.C. (3d) 343, leave to appeal refused, [2021] S.C.C.A. No. 127.

The appellant argues that the trial judge should have told the jurors that, even if they disbelieved A.C.'s account of the events of December 26, this did not mean that K.P. had no other motive to fabricate or that she must be telling the truth about the alleged sexual assault.

- [40] Reading the charge in the context of the parties' closing submissions, we are not persuaded that there was a risk that the jury would conclude that, if it rejected A.C.'s evidence about the events of December 26, it followed that K.P. had no motive to fabricate.
- [41] In his closing argument, Crown counsel addressed the defence submission that K.P. had invented the sexual assault allegation. Crown counsel pointed out that, prior to December 16, 2019, K.P. and the appellant were friends. The only evidence of a motive to fabricate was A.C.'s account of the December 26 argument. Crown counsel urged the jury to reject this evidence. He acknowledged, however, that the appellant did not have to prove that K.P. had a reason to fabricate the sexual assault allegation:

Now, let me clearly say, [the appellant] does not have to prove that [K.P.] had a reason to make it up. Having a reason to lie about something, having no apparent reason to lie is only one factor for you to consider when you're deciding whether or not you believe [K.P.] but the fact that there is no obvious reason for her to make this up is one of the things that you can consider in deciding whether or not she is telling the truth.

- [42] The Crown later reiterated that the appellant did "not have any onus to demonstrate that [K.P.] fabricated the allegations."
- [43] The Crown did not invite the jury to improperly infer that K.P. had no motive to fabricate based on a rejection of A.C.'s evidence. On the contrary, Crown counsel explicitly acknowledged that the appellant had no onus to prove that K.P. had a motive to lie. It was open to him to suggest, as he did, that the absence of any apparent motive to fabricate was a factor that the jury could consider in assessing K.P.'s credibility: Ignacio, at para. 59.
- [44] In her charge, the trial judge specifically cautioned the jury on the implications of rejecting A.C.'s evidence about the events of December 26, 2019. The trial judge referred to the defence theory about K.P.'s motive to fabricate and instructed as follows:

It is not the accused's onus to prove that [K.P.] had a motive to fabricate the allegations or did in fact fabricate the allegations. The onus remains on the Crown to prove the offence beyond a reasonable doubt.

If you determine that [K.P.] did not have an apparent motive to fabricate, the absence of a demonstrated motive to fabricate does not necessarily mean that there was no motive nor does the absence of a motive to fabricate conclusively establish that a witness is telling the truth. A person's true motive can sometimes be hidden. Even when a witness has no apparent motive to fabricate, people may accuse others of crimes for reasons that may never be known or even for no reason at all. There is a difference between the absence of an apparent motive and proven absence of motive.

...

Again, [the appellant] does not have any onus to demonstrate that [K.P.] fabricated the allegations. [Emphasis added.]

[45] As already noted, Crown counsel did not invite the jury to make an impermissible inference. Even if he had, the instruction equipped the jury to avoid inferring an absence of a motive to fabricate based on a rejection of the evidence of the specific motive argued by the defence, as Ignacio requires. The trial judge cautioned the jury not to conclude that K.P. had no motive to fabricate, even if it concluded that she had no apparent motive to do so. She correctly pointed out that a complainant might fabricate for hidden reasons or for no reason at all.

[46] This ground of appeal therefore fails.

Third ground: The trial judge failed to adequately instruct the jury on the use of the complainant's prior consistent statement

[47] The trial judge instructed the jury that it could rely on the evidence that K.P. told her best friend, B.F., about the sexual assault, but only for the limited purpose of rebutting the defence argument that K.P. had a motive to fabricate.

[48] The appellant concedes that the trial judge's instruction on the limited use of a prior consistent statement was legally correct. However, he contends that, because the evidence about the timing of the prior consistent statement was ambiguous, the trial judge should have instructed the jurors that they must determine exactly when K.P.'s statement to B.F. was made. The trial judge should have further instructed the jury that, if it determined that K.P.'s prior consistent statement to B.F. was made after a motive to fabricate arose, the statement could not be used for any purpose.

[49] We do not accept this argument.

[50] The defence argued that K.P. had a motive to fabricate based solely on A.C.'s evidence about the argument that she said she witnessed between K.P. and the appellant on December 26, 2019. As the trial judge noted in her charge, K.P. testified that she told B.F. about the sexual assault on December 17, 2019. B.F. testified that he could not recall the date of the conversation but said that it was "before Christmas in mid to late December 2019."

[51] In these circumstances, the jury did not need to determine exactly when the prior statement was made. B.F. and K.P. both testified that the statement was made prior to December 26, 2019, before any apparent motive to fabricate arose. The trial judge instructed the jury that the prior consistent statement could only be used for the purpose of rebutting A.C.'s evidence about the events of December 26.

[52] We conclude that the trial judge did not err in her instructions on this point, and that this ground of appeal also fails.

Disposition

[53] Notwithstanding the able submissions of duty counsel, the conviction appeal is dismissed. Leave to appeal the sentence is granted but the sentence appeal is also dismissed.

“K. van Rensburg J.A.”

“Thorburn J.A.”

“S. Gomery 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] Per L’Heureux-Dubé J., whose reasoning on this point and others cited was endorsed by a majority on the court.

[3] We rely on the trial judge’s summary of the evidence in her jury charge, as the transcripts of the evidence at trial were not filed as part of the appeal record. The trial judge ultimately made findings about what occurred during the sexual assault in her sentencing decision, but we have not considered these findings for the purpose of this analysis.

[4] A.C. testified that she arrived after K.P. Nothing turns on this.

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