

CANADA / JUDGMENT

## R. v. J.H.C.

2026 ONCA 285

### COURT

Court of Appeal for Ontario

### DECIDED

21 April 2026

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R. v. J.H.C.

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COA-24-CR-1024

Judges

Fairburn, J. Michal; Monahan, Patrick J.; Osborne, Peter J.

Subject

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. J.H.C., 2026 ONCA 285[1]

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Fairburn A.C.J.O., Monahan and Osborne JJ.A.

BETWEEN

His Majesty the King

Appellant

and

J.H.C.

Respondent

Hannah Freeman, for the appellant

Anthony Wong, for the respondent

Heard: April 13, 2026

On appeal from the acquittals entered by Justice David Rose of the Ontario Court of Justice on September 4, 2024.

Fairburn A.C.J.O.:

I. overview [1] This is a Crown appeal from acquittals on counts of assault, choking and sexual assault. The allegations covered different dates, with the assault and choking said to have occurred on February 9, 2019, and the sexual assault said to have occurred between March and June 2019.

[2] The appellant submits that the trial judge's reasons for judgment reveal two errors of law. First, the trial judge is said to have operated under the erroneous understanding that the law does not require separate consent to each step in a sexual encounter. Second, the trial judge is said to have drawn an adverse inference against the Crown for their failure to call a particular witness who, if present during the alleged assault and choking, could have provided corroboratory evidence. Based on these errors, the Crown asks this court to set aside the acquittals and return the matter to a new trial.

[3] For the reasons that follow, I would dismiss the appeal. As I will explain, it is important to read the trial judge's impugned comments in context.

II. factual background A. Evidence at trial [4] There were two witnesses at trial: the complainant and the respondent. At the time of the alleged offences, they were living together with two roommates.

[5] The complainant testified that during the morning of February 9, 2019, she and the respondent had an argument. According to the complainant, the respondent pushed and kicked her multiple times, after which he dragged her to the bedroom, put her onto the mattress and choked her. She said that eventually one of the roommates intervened.

[6] A few months following this alleged assault, the complainant and the respondent got married. The complainant testified that he "became a different person" after that. She said he started manipulating and blackmailing her.

- [7] As to the sexual assault, the complainant testified that on one occasion in the spring of 2019, the respondent anally penetrated her without her consent, while she was saying “no”. According to the complainant, he told her that she had no choice and, despite her protest, she “got into position and he start[ed] penetrating [her].” She was crying, said it was painful, and repeatedly said “no”, but he did not stop.
- [8] The respondent denied any wrongdoing. As for the assault and choking, he testified that the complainant started the physical contact and he simply put his body on top of her to calm her down. As for the sexual assault, he agreed that they had engaged in anal intercourse after an act of vaginal sex. He maintained that there was consent to both acts of penetration.

B. Closing submissions and reasons for judgment [9] Consistent with the respondent’s evidence, it was his position at trial that the assault and choking did not happen – the complainant should be disbelieved on those counts. While he did touch the complainant, he was simply and justifiably defending himself with the least amount of force necessary.

- [10] The respondent argued that the complainant’s evidence should also be disbelieved in relation to the alleged sexual assault. While the act of anal intercourse took place, she communicated her consent to the act through actions and gestures.
- [11] In contrast, it was the trial Crown’s position that the complainant’s evidence should be accepted and the respondent’s disbelieved. When the trial judge remarked on the absence of confirmatory evidence from the roommate who would have witnessed the assault and choking, the Crown explained that the witness could not be located, as had already been made clear earlier during the trial.
- [12] The trial Crown further argued that there was no communicated consent to the act of anal intercourse, even on the respondent’s own evidence. The trial judge appears to have understood the Crown’s submission to be rooted in the concept of verbal communicated consent. An exchange on this point then took place between the trial judge and Crown counsel, which the appellant now leans on in support of the first ground of appeal. I will return to this exchange shortly.
- [13] This was a short trial, two days in total. The complainant testified on the first day set for trial. The respondent testified the following morning. Submissions started at 2:00 p.m. Oral reasons for judgment came after 4:00 p.m. It was a model of efficiency.
- [14] In delivering his reasons, the trial judge briefly recounted the evidence from the complainant and the respondent. He was alive to the factual disparity between their two accounts on the sexual assault allegation. As the trial judge said:

[The complainant] also testified that in the spring of 2019 she was anally raped by [the respondent]. He had asked her to do anal sex but she said no, she did not like that. He told her you have no choice. In her evidence, they were in bed, she got into the position and he penetrated her anally. She told him it was painful, she did not like that and did not want to do that. She was crying but he did not care and kept going.

...

[The respondent] denied ever sexually assaulting [the complainant]. He never forced himself on her. He said that she took her own clothes off and put herself in position on the bed. As he testified, "sex happens". They started with vaginal sex and switched to anal sex. She made no complaint and he never threatened her in any way. He said he replied to her physical movements and it was never forced. When it was suggested to him that she never consented, he answered that if she replies to a romantic touch then that is consent and that is what she did. There was no spoken words but communication by romantic touching.

[15] Next, the trial judge remarked that if he believed the respondent's evidence as to the assault and choking, the respondent's physical response (putting his body on top of the complainant) would be a reasonable way to stop the complainant's assault against him, thereby amounting to self-defence under s. 34 of the Criminal Code.

[16] The trial judge then explained the respondent's position concerning the sexual assault as being that the complainant consented to the sexual activity that took place. As the trial judge said: "It is a matter of whether the actus reus of non-consent is established beyond a reasonable doubt." Therefore, the trial judge understood the issue to be whether the Crown had proven beyond a reasonable doubt that the complainant did not consent to the anal intercourse.

[17] The trial judge commented upon what the law of sexual assault requires when it comes to consent. The appellant maintains that the trial judge's first error in law is revealed in the underlined sentence:

If accepted, his evidence is that by touching romantically, she indicated consent. There is no question in this case that the complainant was in a position to provide consent. Capacity does not arise. I disagree that the law requires the accused to obtain separate consent to each step of the sexual encounter. The question is whether the Crown has proven lack of consent at any point in the physical encounter. [Emphasis added.]

[18] The trial judge then correctly noted that he had to analyze reasonable doubt under the framework set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

- [19] He started with the respondent's evidence. He concluded that he believed "enough of [the respondent's] evidence" that he could not reject it entirely "on either incident". He therefore had a reasonable doubt about whether the assault and choking happened. In the trial judge's view, the respondent's evidence also raised a "doubt about whether the sexual encounter was non-consensual." Therefore, the respondent had to be acquitted on all counts.
- [20] After reaching that conclusion, the trial judge went on to explain why he had reservations about the complainant's credibility. While he would not find she was "untruthful", her evidence had "frailties". One such frailty was the "lack of confirmatory evidence" coming from one of the roommates who was in the home when the assault and choking were said to have occurred. The appellant contends that this finding constitutes the trial judge's second error.
- [21] The trial judge ultimately found that, although the complainant's evidence was "mostly believable", it did not "come without reservations by the court."
- [22] In conclusion, he found as follows:

The question in this case is not whose evidence I prefer more. It is not a matter of who is more believable. The question is whether the Crown has proven each charge to the standard of beyond a reasonable doubt. In this case, and despite [Crown counsel's] efforts, the Crown has not met that burden.

III. analysis A. Overview [23] The appellant argues that the trial judge made two errors of law that had a material bearing on the acquittals, such that this court can safely conclude to a reasonable degree of certainty that the verdicts would not necessarily have been the same had the errors not been made: *R. v. Hodgson*, 2024 SCC 25, 438 C.C.C. (3d) 315, at para. 36; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at paras. 14-16.

[24] In the appellant's submission, the trial judge erred in:

- (a) finding that the respondent did not need the complainant's communicated consent to each sexual act; and
- (b) drawing an adverse inference against the Crown for failing to call a witness.

[25] Despite the appellant's capable submissions, I would accede to neither ground.

1. The trial judge understood consent [26] The appellant argues that the trial judge's reasons make clear his erroneous belief that the respondent did not need to obtain consent to each sexual act. In advancing this submission, the appellant points to the following sentence in the trial judge's reasons for judgment: "I disagree that the law requires the accused to obtain separate consent to each step of the sexual encounter."

[27] There is no dispute in the law and there is no dispute between the parties that consent is required for separate sexual acts. This is, of course, consistent with s. 273.1(1) of the Criminal Code, which defines consent as the "voluntary agreement of the complainant to

engage in the sexual activity in question” (emphasis added). It is also consistent with the evolution of the law, which requires the “conscious agreement of the complainant to engage in every sexual act in a particular encounter”: *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 31.

- [28] The parties agree that the sexual activity in question was anal intercourse. The dispute is whether the trial judge misunderstood that there had to be consent to that specific sexual activity, as opposed to consent to sexual activity more generally. The appellant maintains that the trial judge was under a serious misapprehension as to the law of communicated consent, which is apparent not only in his reasons for judgment but also in a colloquy with Crown counsel in closing submissions.
- [29] Recall that the complainant and respondent had fundamentally different versions of the sexual activity in question. The complainant testified that the respondent wanted to have anal sex, and that he told her that was going to happen and that she had “no choice” in the matter; it was painful, she cried and repeatedly said “no”. In contrast, the respondent testified that the sexual activity started with vaginal intercourse and eventually moved to anal intercourse. On his version, the complainant communicated her consent to both sexual activities through romantic touching.
- [30] During closing submissions, the trial Crown submitted that “there was not communicated consent” and that there was an “absence of discussion regarding anal sex before or after.” To support that position, the trial Crown leaned on the respondent’s own evidence and said that the respondent agreed there was no discussion between the vaginal and anal sex. As the respondent said, “sex happened”, he started to penetrate her vagina and then switched to anal sex. The Crown argued that this reflected an absence of communicated consent.
- [31] The trial judge, perhaps understandably, understood the trial Crown to be suggesting that there was no verbal “discussion regarding anal sex” before it happened. With that apparent understanding in mind, he interjected that consent can get “very tricky” when sexual activity takes place on a continuum and that “presumably the law doesn’t require partners to obtain consent at each and every stage.” He then went on to make what was an inadvisable comment in the context of a sexual assault trial: the Crown was “too young to remember” the phrase about “singing and dancing” being forbidden because “singing leads to dancing, which leads to kissing, which leads to all sorts of things.” He added that the Crown may have been “applying an unnecessarily high standard in saying at every step of the way, consent must be verbally obtained and so forth” (emphasis added). The Crown maintained the reasonable position that vaginal and anal sex are “different acts”, and the trial judge seemed to agree: “Okay.”

- [32] The Crown went on to clarify that the complainant's evidence was that she said "no", she told the respondent it "hurt", and she was fearful, "believing she had no choice." But even if the trial judge rejected the complainant's evidence, the sexual assault would still be proven because, as the Crown contended, the respondent's evidence disclosed an absence of communicated consent.
- [33] In my view, the trial judge's impugned comments must be considered against that factual context. His comments, both in the colloquy and his reasons for judgment delivered almost immediately after closing submissions, are a direct response to the Crown's suggestion that the trial judge could reject the complainant's evidence and yet still convict on the basis of the respondent's evidence alone.
- [34] I accept that the trial judge should not have used the expression he uttered during the colloquy. Given the seriousness of criminal trials, and especially sexual assault trials, it is advisable not to resort to colloquial expressions that might be perceived as making light of a serious issue. With that said, this was an experienced trial judge doing his level best to reach a just conclusion to this matter in a timely and effective way.
- [35] I also accept that the trial judge's reasons are less than perfect when it comes to describing what the law requires as it relates to consent: "I disagree that the law requires the accused to obtain separate consent to each step of the sexual encounter."
- [36] I do not accept, though, that the trial judge erred.
- [37] The only reason why the trial judge addressed "separate consent" in his reasons is because the trial Crown shifted gears in his closing, as he was permitted to do, by arguing that the respondent's own evidence made out a sexual assault because, as the trial judge understood the submission, there was no verbal consent to the anal intercourse. In making this submission, the trial Crown stressed that there was no "discussion" between the vaginal and anal sex. But, as the trial judge noted in his reasons, the respondent testified that the complainant communicated consent through gestures rather than words. In light of this context, I read the impugned passage in the reasons as missing one word, which I insert in brackets: "I disagree that the law requires the accused to obtain [verbal] separate consent to each step of the sexual encounter."
- [38] I am confident in this conclusion because, not even a couple of hours before he delivered his judgment, the trial judge specifically expressed his concern that the trial Crown was "applying an unnecessarily high standard in saying at every step of the way, consent must be verbally obtained and so forth" (emphasis added). I am also confident in this conclusion, that the impugned passage was directed only at separate verbal consent, based on the sentence that immediately follows it: "The question is whether the Crown has proven lack of consent at any point in the physical encounter" (emphasis added). The trial judge clearly and correctly stated that the onus rested on the Crown to prove a lack of consent "at any point" in the sexual activity.

- [39] In my view, this issue really comes down to the fact that the oral reasons for judgment, delivered shortly after closing submissions were completed, reflect a slip in language. The trial judge made credibility findings to which we owe deference. He did not accept key aspects of the complainant's version of events. While he did not adopt the respondent's version of events wholesale, that version was believable enough to raise a reasonable doubt about the complainant's lack of consent.
- [40] I would not accede to this ground of appeal.
2. The trial judge did not draw an adverse inference against the Crown [41] The appellant maintains that the trial judge erred by drawing an adverse inference against the Crown for failing to call one of the roommates that the complainant said was present when the assault and choking took place.
- [42] There is no dispute that an adverse inference from a failure to call a witness should be drawn only with great caution: *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at paras. 25-27; *R. v. Lapensee*, 2009 ONCA 646, 99 O.R. (3d) 501, at para. 42. There can be many reasons for not calling a witness. Generally, an adverse inference can only be drawn if there is no plausible reason for nonproduction: *R. v. Ellis*, 2013 ONCA 9, 113 O.R. (3d) 641, at paras. 48-49; *Jolivet*, at para. 26. In this case, the reason was given during the trial: the Crown was simply unable to find the roommate to serve a subpoena.
- [43] There does not appear to be any dispute about the law on this point. Rather, the dispute is whether the trial judge drew an adverse inference. The Crown says "yes", and the respondent says "no".
- [44] As I have explained, the trial judge's reasons identified "frailties" in the complainant's evidence. In reviewing these frailties, the trial judge observed that there was a "lack of confirmatory evidence" of the alleged assault. The trial judge found this to be a "weakness in the Crown's case" because there was a witness to the assault who was not present in court.
- [45] This was not a negative comment about how the Crown conducted the prosecution. Rather, the trial judge simply observed that the Crown did not call evidence that might have confirmed the complainant's otherwise frail evidence. Remarking on a "gap in the Crown's case" left by the failure to call a witness should not be confused with drawing an adverse inference: *R. v. Rudge*, 2011 ONCA 791, 108 O.R. (3d) 161, at para. 82, leave to appeal refused, [2012] S.C.C.A. No. 64. The trial judge said nothing about what the roommate's evidence would have been had the roommate testified. There was no adverse inference.

IV. conclusion [46] I would dismiss the appeal.

Released: "April 21, 2026 JMF"

*"Fairburn A.C.J.O."*

*"I agree. P.J. Monahan J.A."*

*“I agree. P.J. Osborne 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.
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