

CANADA / JUDGMENT

## R. v. John

2022 BCSC 413

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 413 R. v. John

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. John,

2022 BCSC 413

Date: 20220314

Docket: 73270

Registry: Prince George

Regina

v.

Edward John

**Corrected Judgment: The text of the judgment was corrected on the front page on August 5, 2022**

Restriction on Publication: A publication ban has been imposed under s. 486.4(1) of the Criminal Code, restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainant, who is referred to by the initial A.S. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Schultes

Ruling on Jury Instructions

Counsel for the Crown:

M.P. Klein, Q.C.

Counsel for the Accused:

T.C. Paisana

G. Arnet-Zargarian

Place and Dates of Trial:

Prince George, B.C.

October 5 and 6, 2021

Place and Date of Judgment:

Prince George, B.C.

March 14, 2022

## Introduction

- [1] Mr. John is charged with three counts of committing the rape of A.S., contrary to s. 144 of the Criminal Code, as it then was. These offences are alleged to have been committed between March 1 and September 15, 1974, at Prince George and Cluculz Lake.
- [2] His trial before a jury is set to begin on July 25 of this year, and the Crown and defence have prudently applied well in advance for directions with respect to the instructions to the jury in three areas: consent, including the effect on it of the exercise of authority by an accused; the requirement for corroboration, and recent complaint. As it turns out, their only dispute is the extent to which the developments in the law of consent that have occurred since 1974 should be applicable in this trial.

## Relevant Legislative and Common Law History

- [3] During the time period covered by the indictment, s. 143 of the Code defined the offence of rape as a male person having sexual intercourse with a female person who is not his wife, without her consent.
- [4] Sub-section (b) defined certain situations in which the offence was committed even with the consent of the complainant - extorting it by threats of rear of bodily harm, obtaining it by personating the husband, or making "false and fraudulent representations as to the nature and quality of the act". It did not include obtaining consent by the exercise of authority.
- [5] The mental element required for the offence at that time was the "intent by the accused to have intercourse without the woman's consent": *R. v. Vandervoort*, [1961] 130 C.C.C. 158 (Ont. C.A.). The negation of this mental element formed the basis of the common law defence of honest but mistaken belief in consent.

- [6] It was subsequently clarified that the intent to have intercourse and to do so without consent are distinct elements, and that in relation to the latter intent, recklessness or wilful blindness as to the lack of consent was also sufficient: *R. v. Pappajohn*, [1980] 2 S.C.R. 120 at p. 140; and *R. v. Sansregret*, [1985] 1 S.C.R. 570 at paras. 22-23.
- [7] With respect to corroboration, where the evidence of the complainant was not corroborated "in a material particular by evidence that implicates the accused" s.142 of the Code required an instruction to the jury that it was unsafe to find him guilty, although they could do so if they were satisfied beyond a reasonable doubt that her evidence was "true". This requirement was repealed in 1976.
- [8] Also during the time period covered by the indictment, the common-law rule addressing the concept of "recent complaint" permitted the prosecution to adduce evidence that a complaint had been made at the first reasonable opportunity following the alleged offence, to rebut the adverse inference about the complainant's credibility that would otherwise have arisen from her silence: *R. v. Timm*, [1981] 2 S.C.R. 315 at paras. 13-16.
- [9] In 1983, the offence of rape was repealed, as part of a comprehensive group of amendments that created the new offence of sexual assault, and a new overall regime for dealing with offences against the person.
- [10] Under that regime, sexual assault was situated within the category of assaults generally, with the core definition of the application of force to another person without their consent. Section 244(3) (now s. 265(3)) provided that no consent was obtained when the complainant "submits or does not resist" because of the application of force, the threats or fear of it being applied, fraud or the exercise of authority.
- [11] Section 244(4) (now s. 265(4)) of the new provisions addressed the defence of honest but mistaken belief in consent. If the judge was satisfied that if there was "sufficient evidence" and that if it was "believed by the jury it would constitute a defence", then the judge was to direct the jury, when reviewing the evidence relating to the honesty of the belief "to consider the presence or absence of reasonable grounds" for it.
- [12] Among their other changes, the amendments abrogated the rules relating to recent complaint "in sexual assault cases" (s. 246.5).
- [13] The amendments also contained a transitional provision, which is significant for our purposes:
33. An offence committed prior to the coming into force of this Act against any provision of law affected by the Act shall be dealt with in all respects as if this Act had not come into force.
- [14] The consent provisions were refined further by legislation in 1992. The newly-created s. 273.1 defined consent, specifically in relation to sexual assault, as "the voluntary agreement of the complainant to engage in the sexual activity in question" (ss. (1)). The section also provided additional circumstances in which no consent would be given, including when "the

accused induces the complainant to engage in the activity by abusing a position of trust, power or authority" (ss. (2)(c). Consent was also not obtained if the complainant "by words or conduct" expresses a lack of agreement to engage or continue to engage in the activity (ss. 2(d)-(e)).

- [15] Section 273.1 was amended in 2018 to add, among other things, the requirement that consent be given at the time the sexual activity was taking place (ss. (1.1)).
- [16] The new s. 273.2 clarified it was not a defence that the accused believed that the complainant had consented where it arose from the accused's recklessness or wilful blindness, or the accused "did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."
- [17] The 2018 amendment to s. 273.2 added a further limitation to this defence, making it unavailable in circumstances where "there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct" (ss. (c)).
- [18] In a series of decisions, the Supreme Court of Canada has elaborated on the Code provisions, including with respect to consent and the defence honest but mistaken belief in it. For our purposes, the most developments have been the Court's clarifications (1) of the entirely subjective nature of consent - the relevant question being whether the complainant in their mind wanted sexual contact to occur - and (2) that any honest but mistaken belief in consent on the part of the accused must be a belief in the complainant's "communicated consent", there being no permissible implied or assumed consent in our law: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 26, 31; *R. v. Barton*, 2019 SCC 33 at para. 92.

## Positions

### Crown

- [19] Crown counsel's essential point is that the changes in the law of consent since 1974 are common-law changes (or judge-made law, as they are sometimes described). Such changes have always been considered to be retrospective - that is, applying to events that occurred before the decisions were made.
- [20] The principle was succinctly expressed by Justice Doherty in *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada*, 2009 ONCA 258:

54 [W]hile new legislation is presumptively prospective only, judge-made law is by its very nature inherently retrospective in that it attributes legal consequences as announced in the particular case to the prior events that are at issue in the litigation: see, for example, *Cusson v. Quan* (2007), 87 O.R. (3d) 241 (Ont. C.A.), at paras. 145-49, leave to appeal to S.C.C. granted, [2008] S.C.C.A. No. 11 (S.C.C.); *National Westminster Bank plc v. Spectrum Plus Ltd. (In Liquidation)*, Re, [2005] UKHL 41 (U.K. H.L.), per Lord Nicholls, at paras. 4-7.

- [21] Although it used the term "retroactive" to describe it (which Doherty J.A. defined, as distinct from retrospective rulings, as those decisions that undo decided cases or change the law as of a date prior to their release (para. 53)), the Supreme Court of Canada nonetheless affirmed the same principle in *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 84 and *R. v. Jordan*, 2016 SCC 27 at para. 27.
- [22] The principle is part of the "declaratory theory of law and precedent", which goes back to Blackstone, in which judges are said to "discover" the law, rather than amend it, and previous decisions are held not to have accurately stated the law. In other words, the new decision "defines what the law always has been": *Edward v. Edward Estate*, (1987) 39 D.L.R. (4th) 654 (Sask. C.A.), at para. 18; *R. v. Dunn* (1977), 21 N.S.R. (2d) 334 at 341; *R. v. Polay*, 2021 BCSC 1872 at para. 48.
- [23] The Crown notes that there has been relatively little discussion of the underpinnings of this principle, likely because, as explained in *Edward*:
- 25 It may be taken that, in keeping with the attitude of the English and Canadian courts generally, the courts in these cases assumed that the retrospective principle is so basic and inherent in the law that it may be applied without mention or acknowledgment.
- [24] The Crown refers to several cases involving historical sexual offences in addition to rape (indecent assault, and gross indecency, the latter of which was not repealed until 1988) in which courts applied the law on consent and/or honest but mistaken belief as it has developed since they were committed: *R. v. Rozon*, 2021 QCCQ 8498 at pars.13, 32; *R. v. P.S.*, 2021 ONSC 1388 at para. 189; *R. v. Golightly*, [2007] OJ No. 2007 (S.C.); *R. v. LePage*, 2013 ONCJ 257 at paras. 7-10, 23.
- [25] The Crown's last point on the issue of consent is that even before the 1983 amendments, the exercise of authority by the accused was a relevant consideration on the question of whether consent was actually given, although it could not render the consent invalid, as the 1983 amendments provided: *R. v. O'Connor*, (1998) 105 B.C.A.C. 56 at para. 65; *R. v. Shearing*, 2000 BCCA 83 at para. 99, rev'd on other grounds [2002] 3 S.C.R. 33. Thus, the pre-1983 analysis should apply here.
- [26] With respect to the requirement for the instruction on corroboration imposed by the former s. 142, Crown counsel points out that its repeal in 1976 has been held to apply retrospectively, so that there is no requirement for the instruction in relation to offences under s. 143 that are alleged to have been committed before the repeal: *R. v. Firkins*, (1977) 37 CCC (2d) 227 (B.C.C.A.) at para. 14; *R. v. Threlfall*, 2006 BCSC 1620 at para. 16.
- [27] In contrast, the Crown concedes that the express transitional provision in the amendments that offences committed before the legislation came into force are to be dealt with "in all respects" as though it had not come into force, ousts the retrospectivity that might otherwise have attached to the amendments' abrogation of recent complaint. Thus, it remains an applicable evidentiary rule in this case.

## Defence

- [28] In overview, the defence's opposition to the applicability of the law relating to consent as it has evolved since 1974 is grounded in "fundamental fairness", which they argue requires that he be judged by the law that was in place at the time of his conduct, and of which he had notice, rather than according to the vastly altered regime that has developed in the ensuing years.
- [29] The flaws in the Crown's argument, they submit, are that: (1) most of the so-called common law modifications to the law that the Crown relies on were actually based on legislative amendments and (2) in any case, common law changes are equally subject to the presumption against retrospectivity if they affect substantive rights, as these changes clearly do.
- [30] First of all, counsel point out that s. 143 had its own stand-alone consent provision, which was not part of the consent provisions that then applied to physical assaults (before sexual assault was created). There was no statutory or common-law requirement for affirmative consent on the part of a complainant, and the focus in rape trials tended to focus on the degree to which she had resisted the accused. In addition, the honest but mistaken belief in consent that could negate the mens rea did not have to be reasonable.
- [31] Counsel then highlighted the distinction between the extensive legislative changes that followed and the aspects of the law in this area that it modified or replaced. The point was to show how legislatively-based the modern law of consent is, and how greatly it has diverged from the pre-1983 situation. This is in contrast to the kinds of legislative provisions that only codify pre-existing common law.
- [32] As I have summarized, the 1983 amendments revised the section dealing with consent to assaults (s. 244) to include sexual assaults. The use of the words "submits or does not resist" in the consent section is said by the defence to represent a clear attempt by Parliament to include the law that applied to rape within this new all-inclusive definition. It is also said to be a strong indicator that submission or failing to resist were previously equated with consent.
- [33] Abrogating the recent complaint rule was also part of Parliament's effort to eliminate certain rules relating to rape offences, the defence submits.
- [34] Within this context of Parliament's creation of an entirely new regime, s. 33 the transitional provision can be seen as a signal by it "that any development in the law arising from the 1983 amendments was to apply prospectively only." For our purposes this means that we cannot superimpose the new consent provisions on pre-1983 conduct. In addition, the defence submits that the requirement in s. 33 that pre-amendment offences be "dealt with in all respects" as though the amendments had not come into force must include the common law changes that arise from them.

- [35] The 1992 amendments creating specific consent provisions for sexual assault and requiring reasonable steps to maintain a mistaken belief in consent are characterized as a response to the continuing difficulties of applying these concepts in sexual assault trials.
- [36] One difficulty was that recklessness as to the presence of consent, which could defeat the defence of honest but mistaken belief in it, was treated as virtually amounting to knowledge of the lack of consent. For example, in *R. v. Moreau*, (1986) 26 C.C.C. (3d) 359 (Ont. C.A.) at para. 43, a trial judge's failure to give an instruction on recklessness as to consent in his instructions on honest but mistaken belief was found not to amount to reversible error in the circumstances. Another difficulty was the degree of ambiguity that judges were prepared to find in communications by complainants about their willingness to engage in sexual activity, such as in *R. v. Letendre*, (1991) 5 C.R. (4th) 159 (B.C.S.C.).
- [37] According to the defence, decisions of the Supreme Court of Canada after the 1992 amendments show the importance of this legislation to the development of the law:
- *R. v. Park*, [1995] 2 SCR 836, which dealt with the circumstances under which honest but mistaken belief should be left with a jury as a defence, involved conduct that occurred before the amendments. The Court cited the pre-1992 consent definitions and did not refer to the amended version or the added requirement of reasonable steps in support of the accused's honest but mistaken belief;
  - *R. v. Esau*, [1997] 2 S.C.R. 777, which dealt with honest but mistaken belief in relation to an intoxicated complainant, involved conduct that occurred after the amendments. The Court declined to consider the effect of the provision requiring the accused to take "reasonable steps" to determine the existence of consent only because it had not previously been raised at trial or on appeal; and
  - The majority judgment in *Ewanchuk*, the seminal decision on consent that I referred to previously, described consent being limited "by both the common law and the provisions of ss. 273.1(2) and 273.2 of the Code" (para. 50). The concurring judgment of Justice L'Hereux-Dube made specific reference to the legislative prohibitions on finding consent when the complainant expressed a lack of agreement pursuant to s. 273.1.2(2)(d), or when the accused had failed to take reasonable steps pursuant to s. 273.2(b).
- [38] The defence submits that once it is understood that the relevant cases arise from the amendments that have been made since 1983, it becomes clear that applying those cases retrospectively would offend s. 11(g) of the Charter, which prohibits imposing criminal liability for acts that were not criminal at the time they were committed. Safeguarding against the retrospective imposition of criminal liability in turn safeguards the rule of law, they argue, by ensuring that citizens have fair notice that their conduct may be characterized as criminal. It is also a matter of fundamental fairness: *R. v. K.R.J.*, 2016 SCC 31 at paras. 22-24.

- [39] This important value gives rise to the presumption, to be displaced only in exceptional circumstances that legislation affecting substantive rights applies only prospectively: *R. v. Dinely*, [2012] 3 S.C.R. 272 at paras. 10-11. Counsel emphasize that when identifying legislation that is subject to the presumption it is the impact of the change that matters, not the label that is ascribed to it: *Sullivan & Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at p. 584.
- [40] Thus, we are dealing with a vastly different regime for assessing the nature and presence of consent, and the accused's belief about it, than he could possibly have contemplated in 1974. This could result in the fundamental unfairness of convicting him on the basis of standards that did not exist when the actions in question were carried out.
- [41] Further, by characterizing the changes in these areas of law as solely the product of judicial decision-making, the Crown is seeking to do through the back door what it could not do directly - to impose the post-1983 law of consent retrospectively. In fact, as the defence has sought to demonstrate, the pivotal cases in this area were simply interpreting and applying the legislative changes, and are equally subject to the presumption against retrospectivity.
- [42] In this regard, the defence submits that the cases relied on by the Crown to support the retrospectivity of the common law do not apply here, because they were either made in a civil context, which has its own concept of retrospectivity, or do not address the effect of s. 11(g). In fact, one of the academic authorities relied on by the Crown actually left open the possibility that s. 11(g) could apply to "judge-made law removing a defence that existed at the time of the accused's act": *Stuart, Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 37.
- [43] In particular, sentencing cases in which retrospectivity of common law decisions is discussed, such as *Polay*, do not assist in the present situation, because the issue of fair notice and a change to substantive rights is not engaged in a sentencing context. There is also contrary authority, which found it unfair to increase sentences for offences that were committed before the harmfulness of that activity was widely known: *R. v. Smith*, 2017 BCCA 112 at paras. 50, 54-65. One must also consider the violation of the liberty interest protected by s. 7 that is caused by "after the fact condemnation" of their actions, the defence points out: *R. v. Mabior*, [2012] 2 S.C.R. 584 at para. 14.
- [44] That concern about fair notice also did not arise in *Jordan*, because it was dealt with extending a protection to accused persons pursuant to another Charter right - the one guaranteed by s. 11(b).
- [45] As to the decisions relied on by the Crown in which courts purported to analyze historical sexual offences under the present consent regime, counsel submit that they contain flawed analysis (*Rozon* held that the applicable regime was the one in place at the time of the complaint to the police[1], and reached conclusions on the applicability of the corroboration instruction and the inapplicability of recent complaint that are the opposite of the Crown's position in the present case); do not address the impact of s. 11(g) (P.S.); or deal with the

offence of indecent assault, which was subject to the consent provisions for assaults in general, as distinct from the stand-alone one for rape (J.G., at para. 28, LePage).

- [46] Significantly from the defence point of view, the Court in J.G. appeared to apply the law of consent and honest but mistaken belief that would have been in effect at the time of the offence, concluding that ambiguous conduct by the complainant raised a reasonable doubt about whether he had consented as well as, in conjunction with the testimony of the accused, whether the accused had an honest belief in the complaint's consent: para. 314. There was no requirement imposed in that decision that the accused take reasonable steps to obtain affirmative consent.
- [47] Of greatest significance to the defence under this heading is the decision in O'Connor, which the Crown relied on the use of authority issue. Addressing offences committed in the 1960's, including a count of rape, the Court of Appeal considered the analysis of the consent issues by the Supreme Court of Canada in Pappajohn:
- [58] [W]hen discussing whether the defence of honest but mistaken belief should be one which is objectively or subjectively held Dickson J. said this (at p. 155):

[I]f the woman in her own mind withholds consent, but her conduct and other circumstances lend credence to belief on the part of the accused that she was consenting, it may be that it is unjust to convict. I do not think it will do to say that in those circumstances she, in fact, consented. In fact, she did not, and it would be open to a jury to so find. [Emphasis added.]

- [59] This passage, and for that matter the rationale for the defence of honest but mistaken belief, demonstrates that the Criminal Code did not require an active actual dissent or resistance on the part of the woman to constitute the offence of rape. To fulfill the element of "without consent" it was sufficient for the Crown to show a subjective absence of consent. The failure to resist was a circumstance to consider in determining whether the complainant ought to be believed when she testified she did not consent to sexual intercourse, and if the jury accepted her evidence, whether the accused was honestly mistaken about her consent on the basis of the complainant's passivity.
- [48] After considering two of its pre-amendment decisions on consent (R. v. Firkins (1977), 37 C.C.C. (2d) 227 at p. 230, and R. v. Stinson (1934), 61 C.C.C. (2d) 227 at p. 229, the Court concluded:

65 It follows from these cases that the meaning of "consent" in the rape and indecent assault provisions of the pre-1983 Criminal Code was the same for both offences; that submission was not equated with consent, but was a factor to be considered in resolving the question of consent; and, that if a complainant submitted to a person who was in a position of authority it was taken into account in determining the factual issue of consent.

- [49] The Court also set out the correct approach to these issues on the facts before it:

[74] There were a number of courses open to the trial judge. If he accepted the evidence of the complainant as she told it in chief he could have convicted the appellant of rape. If he found that the complainant did not consent but failed to communicate non-consent he could have convicted the appellant of rape if the Crown negated the defence of honest belief. If the trial judge found that the complainant consented or if he had a doubt that she did, then he should have acquitted the appellant. It was incumbent on the trial judge to resolve the question of consent. He did not have the benefit of the extensive arguments that were made in this Court. He did not resolve the issue of consent. There must be a new trial on this count.

[emphasis added]

[50] Finally, the defence accepts the Crown's reliance on O'Connor as correctly stating the effect of the exercise of authority on consent (although they emphasize that it applies only to the complainant's subjective consent), as well as the Crown's positions that an instruction on corroboration is not required, but the rule dealing with recent complaint must be applied.

## Discussion

- [51] I think the Crown is correct that common law developments apply to actions that took place before those developments were "discovered" by the new decisions. The cases referred to by the Crown provide general and unqualified statements of this principle, and such statements cannot be distinguished on the basis of whether they were made in a civil or a criminal context, or of the specific subject matter that was before the courts in them, as the defence suggests. Further, despite the possibility referred to by Professor Stuart in his treatise, no actual decisions have been cited in which the retrospective operation of a common law development of this kind has in itself amounted to a violation of s. 11(g).
- [52] In contrast, quite aside from the presumption against retrospectivity that applies to statutorily-based changes, s. 33 of the 1983 amendments prohibits reliance on that legislation in relation to any acts committed before it came into force. It seems clear that any judicial decisions that rely on or interpret those amendments are similarly restricted in their application.
- [53] However, I do not agree with the defence that s. 33 also prevents the common law to as it may have developed after the amendments from applying to acts that were carried out before them. To deal with a pre-amendment offence "in all respects as if [the amendments] had not come into force" can only mean a restriction on the effects of those amendments.
- [54] O'Connor offers support for the defence position - when the Court of Appeal was interpreting the law of consent and mistaken belief that applied to rape, it referred only to case authorities that pre-dated the amendments.

[55] However, the decision of the Supreme Court of Canada in *R. v. Sazant*, [2004] 3 SCR 635, which was also referred to during submissions, offers an example of a common law principle that has been judicially elaborated on after 1983 that was nonetheless applied to a pre-amendment offence.

[56] In *Sazant*, the Court was dealing with a situation in which a judge at a preliminary inquiry had declined to commit the accused for trial on charges of indecent assault committed in 1981 and 1982, on the basis that there was no evidence of a lack of consent by the complainant. In finding that the judge had erred in this conclusion, the majority applied the completely subjective definition of consent that it had set out in *Ewanchuk*:

19 There is no dispute that Moore J. erroneously concluded that there was "absolutely no evidence of non consent". The absence of consent is subjective and "the actual state of mind of the complainant is determinative": see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.), at paras. 26-27. (The *Ewanchuk* decision was handed down February 25, 1999. The preliminary inquiry judge pronounced his decision in this case on May 1, 2001). As the Court of Appeal pointed out, at para. 21, the fact that the complainant testified that he did not want to take part in the sexual activity with the respondent constitutes direct evidence of lack of consent.

[57] In my opinion, the Court was able to apply its post-1983 decision in *Ewanchuk* to an offence that predated the amendments (and that had been repealed by them) because it was dealing with the inherently subjective nature of consent - a common-law principle that had not been altered by any of the amendments. In other words, this judicial restatement did not retrospectively alter the pre-amendment definition of consent. As *Ewanchuk* itself explains:

26 The absence of consent is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38; *aff'd* [1997] 1 S.C.R. 304 (S.C.C.), *R. v. Park*, [1995] 2 S.C.R. 836 (S.C.C.), at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

27 Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour: see, for example, N. Brett, "Sexual Offenses and Consent" (1998), 11 *Can. J. Law & Jur.* 69, at p. 73. While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.

[58] This is consistent with the statements of the pre-amendment law of consent in the passages from *Pappajohn* and *O'Connor* that I have previously referred to.

[59] Other appellate decisions dealing with the offence of rape make the same point. In *R. v. Hindle*, (1978) 39 C.C.C. (2d) 529 (B.C.C.A.) at para. 9, the Court, in the context of submission due to threats or fear of violence, referred to the need for "genuine consent, freely and voluntarily given by the complainant as a free agent". Similarly in *Firkins*, the Court dealt with the argument that because the complainant submitted to the acts involved because of threats, the indictment should have referred to the subsection of s. 143 that dealt with the effect of threats on consent:

6 The evidence does not support this argument. The complainant swore, "No, I didn't consent to it." The evidence also establishes that because of the threats she submitted, but this is not the same as saying that she consented. See *Rex v. Stinson*, [1934] 1 W.W.R. 593 at 594-95, 48 B.C.R. 96, 61 C.C.C. 227, [1934] 2 D.L.R. 544 (C.A.), where Martin J.A. quotes *Regina v. Day* (1841), 9 Car. & P. 722, 173 E.R. 1026, where Coleridge J. said: There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent.

Accordingly, in the present case, there was ample evidence to support a conviction on the charge of rape as it was framed.

[60] As to the assessment of the credibility of a claim of subjective non-consent, *Ewanchuk* further explains:

29 While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

30 The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The 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.

[Emphasis added]

[61] There is no meaningful difference between this weighing the complainant's denial of consent against the totality of her actions when assessing her credibility, and the analysis that is described in *O'Connor and Pappajohn*. In particular, submission, which was frequently considered in rape cases, is just an example of conduct that has to be weighed against the complainant's denial of consent, and was taken into account when assessing that denial in the older cases, in the same manner that *Ewanchuk* describes for any "ambiguous"

conduct.

[62] The Court in *Ewanchuk* also made it clear that, leaving aside the additional limitations that have been imposed on it by statute, the basic contours of the defence of honest but mistaken belief originate in the common law and continue following the amendments:

42 However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3. As such, the mens rea of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See *Park*, supra, at para. 39.

43 The accused may challenge the Crown's evidence of mens rea by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC), [1980] 2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):

Mistake is a defence...where it prevents an accused from having the mens rea which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the actus reus of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

44 The defence of mistake is simply a denial of mens rea. It does not impose any burden of proof upon the accused (see *R. v. Robertson*, 1987 CanLII 61 (SCC), [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

[63] The reference to *Pappajohn*, a pre-amendments rape case, is noteworthy in this regard. As in the case of subjective consent, I do not see any meaningful difference between *Ewanchuk*'s statement of the law on this point and the pre-amendment common law.

[64] So far, I do not think the application of *Ewanchuk* raises any issue of the retrospective application of the common law because, as I have attempted to explain, there is essential continuity in the definition of consent and honest but mistaken belief in it from before and after the amendments.

[65] The more difficult question is the applicability of *Ewanchuk*'s further conclusion about what an accused must mistakenly believe in order to sustain the defence.

[66] In reference to the pre-amendment law, the Court of Appeal explained at para. 74 of O'Connor that if the complainant "failed to communicate non-consent" then the Crown would have to negative honest but mistaken belief in consent. In contrast, Ewanchuk concludes that the defence requires a mistake as to "communicated consent", a conclusion that is grounded in the very definition of consent:

46 In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

47 For the purposes of the mens rea analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the Code by Parliament in 1992 is consistent with the common law:

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

49 In the context of mens rea - specifically for the purposes of the honest but mistaken belief in consent - "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused

[Emphasis added]

[67] If s. 273.1(1) was found to have merely stated the common law, then that common law principle should in theory be available in the present case, despite the fact that it was also captured in a statutory provision that would not apply.

[68] The difficulty is of course that this would be a substantive change in the law of consent from its pre-amendment application, in contrast to the continuity on the issues of its subjective nature and mistake concerning it. The Court was addressing the post-amendment offence of sexual assault, and I conclude that it would be too much of a stretch to infer that it (1) also intended to refer to the common law as it existed before the amendments; and (2) would have made a substantive change in the pre-amendment common law without such a fact situation being before it, and without even referring to the change having been made.

[69] There is some circumstantial support for the conclusion that the Court in Ewanchuk was restricting its view of the common law with respect to communicated consent to that of sexual assault. Justice L'Hereux-Dube, who first championed the concept of communicated consent in that Court, unsuccessfully sought to include it in the test for honest but mistaken belief in Park (the other members of the Court did not adopt her reasoning on that issue). Her suggestion that the common law needed to evolve "to reflect contemporary social mores and realities" (para. 49) was explicitly offered in the context of the law of sexual assault. This

is also true of her dissent in Esau, in which she offered the same suggestion. Ewanchuk's eventual adoption of this definition of consent was the culmination of a process that seems clearly to have focused on the existing regime of sexual assault, and not to have encompassed the previous one of rape.

- [70] To be clear, this is not a situation of declining to apply the common law retrospectively -as I have found, it is certainly permissible in appropriate circumstances. It is rather an inability to be satisfied that the common law development being referred to by the Court was actually intended to pre-date the amendments and the new offence of sexual assault that they created. While courts, especially the Supreme Court of Canada, can make substantive changes to the common law in response to societal changes, which can affect subsequent trials of offences committed before the changes were made, they still need to be clear about the extent of the changes they are making.
- [71] I do not think the examples cited by the Crown support any different result. The approach followed in Rozon - applying all of the legislative changes since the offence of rape was alleged to have been committed in 1979-80 to the date of trial in 2020, without addressing the presumption against retrospectivity or that fact that the offence to which the post-1983 amendments apply is a different one - cannot be correct. The usefulness of P.S. is limited because the offences in that case, though dated, were sexual assaults, so no issue of retrospectivity involving the pre-amendment regime arose. The Court in Golightly declined to apply ss. 271.1 and 271.2 because they were not in force when the offences were alleged to have occurred. It did adopt the passage in Ewanchuk requiring communicated consent without distinguishing the pre-amendment offences, but did so without addressing the difficulty I have identified. Lastly, LePage cited the same portions of Ewanchuk on principles of subjective consent and honest but mistaken belief that I have found continued from the pre-amendment common law, without referring to communicated consent.

## Conclusion

- [72] It is not necessary to finalize the precise wording of the jury instructions with respect to consent which will be arrived at following further submissions. What can be said at this point is that the basic elements of consent and honest but mistaken belief in it will be as set out in the passages from Ewanchuk that I have cited, which I am satisfied describe the common law with respect to those elements that applied at the time of the offence.
- [73] In accordance with Pappajohn and Sansregret the additional mental states sufficient to meet the mens rea requirement will be recklessness and wilful blindness.
- [74] None of the post-amendment statutory definitions of consent, including s. 273.1(1), and none of the statutory restrictions on the defence of honest but mistaken belief, will form part of the instructions.

[75] The instruction on the effect of the exercise of authority on consent will follow the language in O'Connor

[76] Finally, as is common ground among counsel, there will be no instruction with respect to the requirement for corroboration, and the rule relating to reasonable complaint will continue to apply.

"Schultes J."

[1] Another decision of the same Court expressly held that applying the limits on consent defences in ss. 273.1 and 2 would offend s. 11(g): R. c H.H., 2007 QCCQ 4738, at para. 10.

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