
CANADA / JUDGMENT

R. v. Kirkpatrick

2020 BCCA 136

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 136 R. v. Kirkpatrick

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kirkpatrick,

2020 BCCA 136

Date: 20200513

Docket: CA45759

Between:

Regina

Appellant

And

Ross McKenzie Kirkpatrick

Respondent

Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code prohibiting the publication, broadcasting or transmission in any way of evidence that could identify the complainant.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Bennett

On appeal from: An order of the Provincial Court of British Columbia, dated November 6, 2018 (R. v. Kirkpatrick, Surrey Docket No. 223696-1).

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Place and Date of Hearing:

Vancouver, British Columbia

December 12, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 13, 2020

Written Reasons Concurring in Part by:

The Honourable Mr. Justice Groberman

Reasons Concurring in Part by:

The Honourable Madam Justice Bennett (p. 15, para. 45)

Concurring Reasons by:

The Honourable Madam Justice Saunders (p. 31, para. 123)

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Summary:

The complainant consented to sexual intercourse on condition that the accused wear a condom. The two engaged in intercourse on two occasions, on the second of which, unbeknownst to the complainant, the accused did not wear a condom. He was charged with sexual assault. The Crown contended that the activity went beyond what was consented to, or, in the alternative, that consent was vitiated by fraud. The judge granted the accused's no evidence motion at the conclusion of the Crown's case. On the Crown appeal, held: Appeal allowed, new trial ordered.

- (1) On the issue of the scope of consent: Majority (per Groberman J.A.; Saunders J.A. concurring): while a passage in *R. v. Hutchinson*, 2014 SCC 19 can be read to support the proposition that a person who consents to intercourse cannot limit the consent by specifying that their partner must use a condom, such a reading is a misinterpretation of the judgment. Sexual intercourse with a condom is not the same physical activity as sexual intercourse without a condom. A person may validly limit their consent to sexual intercourse with a condition that their partner wear a condom. Dissent (per Bennett J.A.): *Hutchinson* states that measures to prevent disease or pregnancy, such as effective condom use, do not change the nature of a sexual act agreed to under s. 273.1 of the Criminal Code. The trial judge did not err in following this binding precedent and concluding there was no evidence the complainant did not agree to the basic physical act engaged in.
- (2) On the issue of fraud: Majority (per Bennett J.A.; Saunders J.A. concurring): the judge erred in requiring evidence of active rather than passive deception to establish fraud under s. 265(3)(c). There was evidence the complainant would not have consented to sexual activity with the accused if she had known the accused was not wearing a condom, which would constitute fraud. This should have been sufficient to overcome a no-evidence motion, and requires a new trial to be ordered. Dissent (per Groberman J.A.): the trial judge was correct in holding that there was no evidence capable of founding an inference that the accused engaged in either active or passive deception.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] The question on this appeal is a simple one: where a person consents to engage in sexual intercourse on condition that their sexual partner wear a condom, can that partner ignore the condition without being subject to criminal liability?
- [2] Those who lack a comprehensive knowledge of recent Supreme Court of Canada jurisprudence would almost certainly answer the question with a simple and resounding "No". Those who have read the judgment of the majority of the Supreme Court of Canada in *R. v. Hutchinson*, 2014 SCC 19, however, may be less definitive in their answers. In the case before us, the trial judge, relying on *Hutchinson*, held that the accused could not be found guilty of sexual assault for engaging in sexual intercourse without wearing a condom, even though the complainant's consent was conditional upon his doing so.
- [3] While there is a passage in *Hutchinson* that can be read as supporting that proposition, it is my view that such a reading is a misinterpretation of the judgment. Properly interpreted, *Hutchinson* allows a person to validly limit their consent to sexual intercourse by insisting that a condom be used. The trial judge's interpretation of *Hutchinson* would leave the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.

Events Giving Rise to the Charge

- [4] It is important to begin by recognizing that the trial in this matter ended after the Crown had led its evidence. The accused succeeded in his no-evidence motion, so was not called upon to present a defence. The background facts I am summarizing, therefore, reflect the complainant's account of events and not any final judicial determination.
- [5] The complainant and the accused met online, and the two texted each other. Up until March 16, 2017 they had met in person on only a single occasion, for about two hours. On that occasion, they discussed sexual practices. The complainant told the accused that she insisted on the use of condoms during sexual intercourse. The accused agreed that such a practice was safest for all concerned.
- [6] A few days later, the two decided to meet again. Just after midnight on March 16, the accused picked her up and took her to his house. There, they went into his bedroom and undressed. The complainant performed fellatio on him, without requiring that he put on a condom. After that, they kissed, and the accused asked her to "hop on" top of him. She asked if he had a condom, and added that if he did not, she did. He replied that he did, and reached onto a side table to get one, which he put on. The two then engaged in vaginal intercourse.
- [7] When they were finished, the complainant asked to see the condom, to satisfy herself that he had worn it during intercourse. He showed her the condom, which he had, indeed, worn.

- [8] The two then went to sleep. Sometime in the night, the complainant awoke, noting that the accused was sexually aroused. She pushed him away, and he turned briefly toward the side table from which he had previously retrieved a condom. Although the complainant believed that he was getting a condom, he was not doing so. She did not hear him open a condom package or see him put on a condom, nor did he do or say anything to make her think that he had put one on. The two then engaged in sexual intercourse.
- [9] After he ejaculated in her vagina, the complainant realized that the accused was not wearing a condom. She had not consented to intercourse without a condom, and her evidence is that she would not have done so if asked.
- [10] There was a confrontation between the complainant and the accused. Ultimately he told her that he had been "too excited to wear a condom".
- [11] As I have indicated, the accused was not called upon to present a defence. His statement to police was, however, in evidence. It confirmed much of what the complainant alleged, but denied that the complainant had ever told him that she would only engage in intercourse if he wore a condom.
- [12] The judge found that there was no evidence to support the contention that the complainant did not consent to the sexual activity:
- [28] I find no merit to Crown counsel's position that there was no consent since no condom was used. The majority of the court in Hutchinson specifically disagreed with that analytical approach that was adopted only by the minority of the court.
- [13] The judge also found that there was no evidence to support the Crown's secondary theory, which was that the accused engaged in fraud, deceiving the complainant into thinking that he was using a condom:
- [31] The accused did nothing to hide or deceive the complainant that he did put on a condom. Within a minute of the commencement of [the second incident of] intercourse, the accused asked her if it felt better this way. She unfortunately mistook the inference that the accused was making, and said yes.
- [32] Also, he asked her to guide his penis into her vagina at one point, which strongly suggests that he was not hiding the fact that he was not wearing a condom.
- [33] Accordingly, I am unable to find any evidence of dishonesty on the part of the accused that could result in a conviction.

Analysis

- [14] Section 273.1 of the Criminal Code, R.S.C. 1985, c. C-46 sets out the meaning of "consent" in cases involving sexual activity:

273.1 (1) Subject to subsection (2) and s. 265(3), consent means the voluntary agreement of the complainant to engage in the sexual activity in question.

(1.1) Consent must be present at the time the sexual activity in question takes place.

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

(2) For the purpose of subsection (1), no consent is obtained if

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[15] Subsection 265(3)(c) provides that "no consent is obtained where the complainant submits or does not resist by reason of fraud".

[16] The questions on this appeal are whether there was evidence that:

- a) the complainant had not agreed to engage in "the sexual activity in question" (s. 273.1); and
- b) the complainant submitted or did not resist by reason of fraud (s. 265(3)(c)).

Did the Complainant Consent to the Sexual Activity in Question?

[17] The question of whether the complainant consented to the "sexual activity in question" is, on the face of it, a straightforward one. But for confusion arising from some of the language used in Hutchinson, it seems obvious that a person who consents to sexual intercourse on condition that their partner use a condom does not thereby consent to sexual intercourse where no condom is used.

[18] It is necessary to consider Hutchinson in some detail. The facts of the case are unusual, but straightforward. The complainant consented to engage in sexual intercourse with the accused, but only if he wore a condom. Although he did so, he had, unbeknownst to her, poked pin holes in it, rendering it entirely ineffective. She became pregnant, and he was charged with aggravated sexual assault.

[19] At trial, the accused was convicted. The judge found that the complainant did not consent to having unprotected sex. The majority of the Nova Scotia Court of Appeal upheld the conviction, finding that condom protection was an essential feature of the consented-to activity, and that its absence meant that the complainant had not consented to the sexual activity in question. A dissenting judge found that the complainant had consented to the sexual activity, but would have ordered a new trial to determine whether the consent was vitiated by fraud.

- [20] The Supreme Court of Canada upheld the accused's conviction, but split on the analysis. The majority (McLachlin C.J. and Cromwell J.; Rothstein and Wagner JJ. concurring) found that the complainant had consented to the "sexual activity in question", but found that her consent was vitiated by the accused's fraud. The minority (Abella and Moldaver JJ.; Karakatsanis J. concurring), on the other hand, found that she had not consented to the sexual activity in question.
- [21] The majority outlined two approaches to defining "the sexual activity in question" for the purposes of s. 273.1:
- [21] The first approach, which has many variants, defines the "sexual activity in question" as extending beyond the basic sexual activity the complainant thought she was consenting to at the time to conditions and qualities of the act or risks and consequences flowing from it, provided these conditions are "essential features" of the sexual activity (reasons of the majority of the Court of Appeal, at paras. 71 and 81) or go to "how" the physical touching was carried out (reasons of Abella and Moldaver JJ.). Under this approach, whether a complainant's mistake prevents voluntary agreement to the sexual activity under s. 273.1(1) depends on the nature of the mistake. The difficulty with this approach, as we shall see, is that it provides no clear line between mistakes that result in no consent under s. 273.1(1), and mistakes that do not. The result of this lack of clarity may be inappropriate criminalization and uncertainty in the law.
- [22] The second approach defines the "sexual activity in question" more narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner. If the complainant subjectively agreed to the partner's touching and its sexual nature, voluntary agreement is established under s. 273.1(1) of the Criminal Code. That voluntary agreement, however, may not be legally effective. The Code also sets out a number of situations in which, notwithstanding apparent agreement, no consent is obtained. In particular, deceptions may negate consent if they meet the requirements for fraud under s. 265(3)(c).
- [22] The majority favoured the second approach for three reasons. First, it considered that because deception is specifically dealt with by s. 265(3)(c), it cannot have been intended to form part of the analysis under s. 273.1(1):
- [26] The "essential features" approach of the Court of Appeal and the "how the physical act is carried out" approach of Abella and Moldaver JJ. do not conform to this two-part scheme. The fraud provision in s. 265(3)(c) deals with situations where consent to the sexual activity has been given because of a deception by the accused. But under these approaches, all deceptions about "essential features" of the sexual activity or about "how" the sexual activity was carried out would result in a finding of no consent to the "sexual activity in question" under s. 273.1(1). Many deceptions would be dealt with at the first step under s. 273.1(1), rather than where the scheme of the Criminal Code suggests they should be dealt with, under s. 265(3)(c). Section 273.1(1) would do most of the work that the fraud provision was intended to do, rendering the fraud provision in s. 265(3)(c) redundant in many cases,

contrary to the principle that every word and provision in a statute has a meaning and a function.

[23] Second, the majority noted the legislative history, commenting that:

[27] There was no suggestion that Parliament intended to expand the notion of "sexual activity" by including not only the sexual act for which consent is required, but also potentially infinite collateral conditions, such as the state of the condom.

[Emphasis added.]

[24] Third, the majority was critical of the approach of the minority and of the Nova Scotia Court of Appeal, stating that by adopting an expansive definition of "the sexual activity in question", they would, in effect, be watering down the elements necessary to establish fraud. They were concerned that consent would be vitiated without the Crown demonstrating both that the accused deceived the complainant and that the complainant suffered a deprivation. Indeed, even innocent mistakes (for example, with respect to the quality of a condom) might result in convictions.

[25] The majority considered that two essential qualities of criminal law -- restraint and certainty -- militated against an expansive definition of "the sexual activity in question". It adopted a narrower definition:

[54] We conclude that Farrar J.A. was correct to interpret the "sexual activity in question" in s. 273.1(1) to refer simply to the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys). The complainant must agree to the specific physical sex act. For example, as our colleagues correctly note, agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching.

[55] The "sexual activity in question" does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Thus, at the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act. Deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the Criminal Code, if the elements for fraud are met.

[Emphasis in original.]

[26] Did the majority, in describing "conditions or qualities of the physical act" as including such matters as "birth control measures or the presence of sexually transmitted diseases" mean to exclude important physical aspects of the sexual activity (such as the wearing of a condom) from the definition of the "sexual activity in question"?

[27] In my view, it did not. While para. 55, read in isolation, could be interpreted as doing that, such an interpretation would ignore, entirely, the majority's rationale for differentiating between the "physical act itself" and other "conditions or qualities". The focus of the majority

judgment was to ensure that issues of deception were dealt with in accordance with the established criminal law framework, and separately from the issue of what physical activities the parties agreed to engage in. The Court wished to ensure that an expansive definition of "the sexual activity in question" did not have the effect of criminalizing activity that did not fall appropriately within the compass of criminal law. It spoke of the need for "restraint and certainty". It also wished to ensure that the analytical approach of the Criminal Code provisions was not distorted. Nothing in the judgment suggests that there was an intention on the part of the majority to specifically exclude from the definition of "the sexual activity in question" physical aspects of sexual activity adopted for birth control or disease prevention purposes.

- [28] Such a limitation on the definition of "the sexual activity in question" would be perverse, as it would, without any rationale, prevent a person from limiting their consent in a manner that is intimately related to their personal autonomy and the public interest. It would also lead to obnoxious and irrelevant inquiries. For example, if a person agreed to perform fellatio on their partner, on condition that the partner not ejaculate in the person's mouth, the condition would be valid, unless one of the reasons for the limitation was that the person wished to protect themselves from disease transmission.
- [29] In my view, when the majority speaks of "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" in para. 55, it is referring to matters that are not physically part of the sexual act, and that are properly the subject of a deception analysis. They include such matters as whether a partner has undergone a vasectomy or tubal ligation, uses contraceptive drugs, has an intrauterine device implanted, or is otherwise sterile. It also includes information as to whether a partner is infected with a sexually transmissible disease.
- [30] I do not take the majority of the Supreme Court of Canada in *Hutchinson* to be adopting a position that ignores important physical differences that can exist within broad categories of sexual activity. The judgment itself appears to acknowledge that vaginal penetration does not constitute a single, generic sexual activity. The majority expressly differentiates between penetration with a "toy", by way of oral sex, and by way of penile-vaginal intercourse. Equally, it seems obvious that within these various categories of sexual activity, important physical variations cannot be ignored. Consent to penetration with one "toy" for example, cannot be taken to be consent to penetration with any object, regardless of size, shape, or lubrication. Similarly, consent to sexual touching over top of clothing cannot be taken to be consent to sexual touching beneath clothing. The two are different sexual activities.
- [31] Just as sexual touching over top of clothing is obviously a different physical act from sexual touching beneath clothing, it seems to me that penile-vaginal penetration with a condom is a different physical act from such penetration without one.

- [32] As I read it, there is nothing in the majority judgment that expressly disagrees with the common-sense proposition that sexual intercourse with a condom is a different sexual activity from sexual intercourse without a condom.
- [33] In saying this, I acknowledge that the minority judgment in Hutchinson suggests that the majority did exclude condom use from the definition of "the sexual activity in question". It says:
- [97] The heart of our disagreement with McLachlin C.J. and Cromwell J. turns on whether the use of a condom is included in the manner in which the sexual activity is carried out. According to our colleagues, the use of a condom during sexual intercourse does not change the "specific physical sex act" which occurs, but rather is merely a "collateral conditio[n]" to the sexual activity. In their view, so long as there is consent to "sexual intercourse", this general consent is not vitiated by a deception about condom use unless it exposes the individual to a deprivation within the meaning of s. 265(3) (c), which they conclude in this case means depriving a woman of the choice to become pregnant by "making her pregnant, or exposing her to an increased risk of becoming pregnant".
- [Emphasis in original.]
- [34] The minority took the view that the use of a sabotaged condom was, for legal purposes, the same as the failure to use a condom at all. That approach carried with it certain problems; to the extent that it suggested that the use of any defective condom meant that consent was vitiated, it risked imposing a criminal sanction on a person who had done nothing wrong. To the extent that it relied on the fact that the accused had deliberately damaged the condom, it failed to ensure that the fraud analysis was conducted methodically and separately from other considerations in the case. In any event, it was the minority's insistence on the idea that the use of an ineffective condom was the same as the use of no condom at all that caused it to mischaracterize the effect of the majority judgment.
- [35] The concerns expressed by the majority in Hutchinson do not require "the sexual activity in question" to be defined so broadly and generically as to treat sexual intercourse with and without a condom as the same activity. Treating them as different sexual activities is completely consistent with the majority judgment. Further, such treatment is much more consistent with fundamental aspects of the law of sexual assault, including protecting the sexual autonomy of persons in the position of the complainant. The majority's demand that "the sexual activity in question" be defined by observable aspects of physical activity is not threatened by recognizing the difference between intercourse with a condom and intercourse without one.
- [36] This is not a case, like Hutchinson, where the physical act (sexual intercourse with a condom) was consented to, and the only issue was the state of the condom, something that would have been imperceptible, except on close examination using an instrument such as a magnifying glass or microscope. Nor is this a case where the relevant condition is unconnected with the physical acts (for example, the question of whether a party has a

sexually transmissible infection, is sterile, or has a particular social standing). Rather, this is a case about the sexual activity that the complainant consented to. On her evidence, she did not consent to the accused penetrating her with his unsheathed penis.

- [37] Given my conclusion that sexual intercourse with a condom is not the same sexual activity as sexual intercourse without a condom, it follows that the judge was wrong in giving effect to the no-evidence motion. There was a considerable body of evidence that the complainant did not consent to the sexual activity that took place.

Did the Trial Judge Err in Finding That There was No Evidence of Fraud?

- [38] The trial judge found that there was no evidence of fraud. He examined the evidence for any indication that the accused took steps to deceive the complainant into believing that he was wearing a condom during the second instance of intercourse. He found that there was no evidence of active deception.
- [39] As my colleague points out in her concurring judgment, fraud may be carried out through passive, as well as through active deception. A person can be guilty of fraud where the person deliberately remains silent or takes no action. The key is that the person committing the fraud must, whether actively or passively, engage in deceptive behaviour for the purpose of ensuring that another person has a mistaken view of a situation.
- [40] On the complainant's evidence, the accused was aware that she did not wish to engage in sex unless he wore a condom. He did so the first time they had sex. There is no evidence, however, that he intended (either through active or passive behaviour) to deceive her the second time. The evidence indicates, on the contrary, either that he simply failed to exercise self-control (was "too excited to wear a condom" as the complainant said he told her) or that he simply felt he could ignore the limitation on consent that she had specified.
- [41] The fact that he had, at an earlier time, agreed to use a condom is not evidence of fraud. A failure to keep a promise is not, in and of itself, fraudulent -- if it were, every breach of contract would amount to a fraud.
- [42] I conclude that the judge made no error in finding that there was no evidence of fraud on the part of the accused in this case.
- [43] The absence of evidence of fraud in this case should serve as a caution against an expansive reading of para. 55 of Hutchinson. While the fraud provisions of the Code are adequate to deal with situations in which a person deceives a sexual partner by providing them with false information, they offer no protection to a person who sets limits on the conditions of sexual activity if their partner simply chooses to ignore those limits. This concern is further heightened if the expansive interpretation of Hutchinson is applied in civil claims, as well as criminal prosecutions, as one judicial decision suggests in obiter (PP v. DD, 2017 ONCA 180).

Conclusion

[44] As there was evidence indicating that the accused engaged in sexual intercourse without a condom, knowing that the complainant required him to wear one, the judge erred in granting the no-evidence motion. In the result, I would set aside the acquittal and remit the matter to the Provincial Court for a new trial.

"The Honourable Mr. Justice Groberman"

Reasons for Judgment of the Honourable Madam Justice Bennett:

Overview

- [45] I have had the opportunity to review the draft reasons of Mr. Justice Groberman. While I agree that there must be a new trial in this case, my colleague's analysis, in my respectful view, fails to apply binding Supreme Court of Canada authority. In my view, it is abundantly clear that Canadian law permits a person to limit their consent to intercourse by insisting a condom be used. The question at issue in this appeal is which provision of the Criminal Code operates to criminalize deception with respect to condom use. The majority of the Supreme Court of Canada in *Hutchinson* concluded this deception should be analyzed under the fraud provision of s. 265(3)(c), and it is this judgment that we are obliged to follow.
- [46] The Criminal Code requires a two-step analysis of consent to sexual activity: first, consideration of whether the complainant voluntarily agreed to the "sexual activity in question"; and second, whether this agreement was obtained in circumstances vitiating consent, such as fraud. My colleague proposes an interpretation of the majority reasons in *Hutchinson* where condom use forms part of the definition of "sexual activity" at the first step. Respectfully, this proposed interpretation ought not to be accepted, for three reasons.
- [47] First, the majority in *Hutchinson* expressly rejected this proposed reading. *Hutchinson* and this case both involve persons agreeing to intercourse on the condition a condom be used: in *Hutchinson*, the question was whether a badly damaged condom altered the "sexual activity" consented to, whereas this case asks the same of condom non-use. On the highly similar facts in *Hutchinson*, the Court held the "sexual activity in question" did not include the damaged condom, stating at para. 64 that "[o]n the approach we propose, the 'sexual activity in question' was the sexual intercourse that took place in this case. Effective condom use is a method of contraception and protection against sexually transmitted disease; it is not a sex act" (emphasis added). In the face of that express holding, it is not open to this Court to hold that condom use is indeed part of the definition of a sexual activity.
- [48] Second, the minority in *Hutchinson* premised its dissent on a differing approach to condom use. It stated that the "heart" of its disagreement with the majority was "whether the use of a condom is included in the manner in which the sexual activity is carried out": at para. 97.

- [49] Accepting my colleague's proposed reading of Hutchinson thus depends on two improbable assumptions: that the majority of the Court did not consider condom use to be a "method of contraception", or protection from infection; and that the dissenting judges fundamentally misunderstood the majority judgment. I cannot accept a reading of Hutchinson that depends on either of these propositions.
- [50] Third and finally, the proposed reading of Hutchinson is at odds with the majority's unequivocal rejection of what was termed the "essential features" approach to defining the "sexual activity in question". As explained by the majority in Hutchinson, that approach has not only proven to be a source of confusion and uncertainty in the past, but is also inconsistent with a line of Supreme Court of Canada decisions that includes *R. v. Cuerrier*, [1998] 2 S.C.R. 371 and *R. v. Mabior*, 2012 SCC 47.
- [51] It follows, in my view, that the trial judge was correct in holding there was no evidence the complainant did not voluntarily agree to the sexual activity in question here. There is, in my opinion, no other plausible reading of Hutchinson.
- [52] I part company with the trial judge at the second step of the consent analysis. In my view, there was evidence that the complainant's agreement to sexual activity was obtained by fraud and the trial judge erred in holding otherwise. In finding no evidence of "dishonesty" on the accused's part, he misapplied the test from *Mabior* and failed to consider that a failure to disclose a condom's absence could, given the complainant's evidence that she explicitly communicated its importance, amount to dishonesty.
- [53] In concluding that there was no evidence of agreement to the sexual activity or fraud that vitiated consent, the trial judge made findings of fact in relation to the element of dishonesty. Therefore, in my view, there must be a new trial before a different judge. I would allow the appeal and order a new trial.

Background

- [54] The evidence in this case is critical to my conclusion that there was evidence of fraud sufficient to overcome a no-evidence motion. Justice Groberman has set out the facts in some detail, which I adopt, in addition to what I set out below.
- [55] Prior to the alleged assault, the complainant, who I will refer to as AB, and Mr. Kirkpatrick had met in person once. They had met online and AB's evidence was that she saw him as a potential sexual partner. She communicated with him about her sexual boundaries, including her firm insistence on condom use; AB said she had made it clear she would only have sex with a condom.

- [56] Three days later, they met up, went to Mr. Kirkpatrick's place, and ended up engaging in sexual intercourse. Before having penetrative sex, AB asked if the accused had any condoms, offering that she had some if he did not. They were in bed, and her evidence was that he turned to his bedside table and grabbed a condom. She heard the wrapper tear, and saw what she took to be motions indicating that he was putting it on.
- [57] She told him not to ejaculate in her vagina, so he withdrew, took the condom off, and ejaculated on her stomach. Afterwards, they went to the bathroom to clean up, and she asked to see the condom, as she had not seen him remove it and wanted to ensure one had been used. He showed her the used condom.
- [58] She testified that she asked to see it because it was important to her that he be wearing a condom, and reassuring that he was respecting her wishes.
- [59] They returned to bed, and fell asleep. She awoke feeling his erect penis pushing up against her buttocks. She pushed him away.
- [60] He rolled over to the same bedside table he had rolled to in order to put on a condom. She thought he once again was putting on a condom. The lights were off and she could not see him. She turned onto her stomach and he lifted her up and entered her vagina with his penis from behind her. He asked her if it felt better, to which she replied "yes" as she thought he was talking about the position. He turned her over in a position where her legs were over her head. At one point his penis fell out and she directed it back into her vagina on his request.
- [61] He then ejaculated in her vagina. She realized that he was not wearing a condom. She became very upset, and wanted to go home. She confronted Mr. Kirkpatrick with the fact that he had not used protection. He expressed no surprise at how upset she was, and admitted he had not used a condom. He told her if she got pregnant, she could have an abortion. He was very casual about her concerns about getting infected with a sexually transmitted disease. He eventually drove her to her friend's house, arriving at around 5:45 a.m.
- [62] She testified that she would never have consented to having sexual intercourse if she had known he was not wearing a condom.
- [63] She texted Mr. Kirkpatrick and asked why he didn't wear a condom, and he replied that he was too excited to put one on. He sent her a porn link titled "OMG Daddy came inside me". He sent her other abusive texts.
- [64] She attended the hospital and, on its recommendation, underwent preventative HIV treatment for 28 days, from which she suffered serious side effects.

[65] She testified that she trusted him to wear a condom the second time they had sexual intercourse. When he rolled over, she thought he was putting on a condom. She did not ask a second time because, based on their discussions and that he had used a condom the first time, she trusted that he would use one the second time.

[66] In cross-examination she said the following:

Q You -- you agree with me that there is a difference between telling someone I only have sex with condoms, and then telling someone when you and I have sex, you have to wear a condom?

A I don't think there's a difference. If you say that you're only gonna have sex with condoms and that person, like, tries to engage with -- like, you guys have sex, you're gonna have sex with condoms. Like, other than that, it's, like, freaking rape, like, because -- like, I said I only have sex with condoms. Like, if he tries to force the fact that he doesn't have sex with condoms while we're having sex, like, that's - that's, like, trickery. Like, I do not believe that you have to, like, have multiple statements in order for, like, safe sex to occur.

[67] In Mr. Kirkpatrick's statement, he said there was no discussion about condoms at their first meeting.

Reasons for Judgment on the No-Evidence Motion

[68] In brief reasons for judgment, the trial judge concluded AB had agreed to the sexual activity in question, and that there was therefore no evidence an assault had occurred under the first step set out in Hutchinson. He concluded that based on the decision in Hutchinson, Mr. Kirkpatrick's failure to use a condom was not relevant to determining consent at the first step.

[69] He said that the only real issue was whether there was fraud, which requires evidence of both dishonesty and deprivation or risk of deprivation. He concluded that there was no evidence of dishonesty, as Mr. Kirkpatrick did not hide the fact that he was not wearing a condom. He concluded, consequently, that there was no evidence of fraud that would vitiate the complainant's consent.

Position of the Parties

[70] The Crown submits that the trial judge erred in both concluding that there was no evidence that AB did not agree to the sexual activity in question, and that there was no evidence of fraud.

[71] Mr. Kirkpatrick relies on Hutchinson to sustain the trial judge's finding that there was agreement to the sexual activity in question. On the issue of fraud, he submits that failure to disclose the non-use of a condom was not dishonest, and submitted that there was no agreement with AB that he would wear a condom. Furthermore, he submits that the complainant did not suffer any deprivation or risk of deprivation as a result of the failure to use a condom. Consequently, there was no fraud, and the complainant validly consented to

the sexual activity.

Issues on Appeal

[72] As discussed at the outset of my reasons, the issues are whether there was some evidence that the complainant did not consent to the sexual activity in question, and if not, whether there was some evidence that consent was vitiated by fraud.

Test on a No-Evidence Motion

[73] This decision under appeal concerns a no-evidence motion by Mr. Kirkpatrick.

[74] In order to overcome a no-evidence motion, the Crown need only show that there is some evidence on each essential element of the offence. It differs from an insufficient evidence motion, in which the defence waives its right to call evidence and the Crown's evidence must therefore satisfy the burden of proof on each essential element beyond a reasonable doubt: see e.g., the discussion in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242.

[75] The test on a no-evidence motion is the same as for a directed verdict in a jury trial, or a committal at a preliminary inquiry. The question is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty": *R. v. Arcuri*, 2001 SCC 54 at para. 21, citing *United States of America v. Shephard*, [1977] 2 S.C.R. 1067 at 1080; see also *R. v. Monteleone*, [1987] 2 S.C.R. 154 at 160-61.

[76] If the Crown presents direct evidence on every essential element of the offence, then the accused is committed for trial, and concomitantly there is no directed verdict.

Applicable Legislative Scheme

[77] The general offence of assault is found in s. 265 of the Criminal Code, R.S.C. 1985, c. C-46:

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; . . .
- (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[78] Sexual assault is criminalized in s. 271 of the Code:

271 Everyone who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

[79] The definition of consent is found in s. 273.1(1):

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.

[80] I note this provision has been amended since the time of the offence, but reproduce it in the form that applies to this case.

[81] Section 273.1(1) is subject to ss. 265(3) and 273.1(2), which set out circumstances where, regardless of the complainant's voluntary agreement to the act in question, no consent is obtained. Relevant to this appeal is s. 265(3)(c):

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(c) fraud;

[82] In other words, there are circumstances where a complainant may have given "voluntary agreement" to "the sexual activity in question", but "no consent [was] obtained" by virtue of the circumstances of the agreement.

The Two-Step Analysis of Consent

[83] Sexual activity without consent is an offence. The Supreme Court of Canada has repeatedly identified sexual autonomy, which includes being able to decide whether and with whom one wishes to engage in sexual acts, as at the core of human dignity. As the majority stated in Hutchinson:

[1] Control over the sexual activity one engages in lies at the core of human dignity and autonomy: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28. This principle underlies the offences of assault and sexual assault. Sexual activity without consent is a crime under the Criminal Code, R.S.C. 1985, c. C-46.

[84] In Hutchinson, the Court set out a two-step analytical framework to be applied to the question of whether valid consent existed at the time of the sexual activity. The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant voluntarily agreed to the sexual activity within the meaning of s. 273.1 (or a reasonable doubt was raised), the court should then turn to the second step to consider whether there are any circumstances under ss. 265(3) or 273.1(2) such that this voluntary agreement did not constitute legal consent. As discussed above, s. 265(3) defines circumstances under which the law recognizes the complainant did not consent, notwithstanding their apparent agreement to participate in sexual activity: *Ewanchuk* at para. 36.

The First Step: Consent to the Sexual Activity in Question

- [85] The first step of the analysis engages the question of whether there is a voluntary agreement to the sexual activity in question within the meaning of s. 273.1(1).
- [86] The Hutchinson decision indicates that condom use is not analyzed under s. 273.1(1) as it is not part of the sexual activity in question. As I will set out, this is made apparent by the reasons of the majority, the reasons of the minority, and the rationales underlying their disagreement.
- (i) The Reasons of the Hutchinson Majority
- [87] The Court in Hutchinson at para. 5 held that the activity in question includes "the touching, its sexual nature, or the identity of the partner". These are the only aspects of the act relevant to the first step of the consent analysis. As the majority stated:
- [5] Mistakes on the complainant's part (however caused) in relation to other matters, such as whether the partner is using effective birth control or has a sexually transmitted disease, are not relevant at this stage. However, mistakes resulting from deceptions in relation to other matters may negate consent at the second stage of the analysis, under the fraud provision in s. 265(3)(c) of the Criminal Code.

[Emphasis added.]

- [88] The Court determined at para. 55 that at the first stage of the analysis, "the Crown must prove a lack of subjective voluntary agreement to the specific physical sexual act". Any deception by the accused is to be analyzed at the second step under s. 265(3)(c). The majority specifically excluded condom use from the nature of the act, stating "[e]ffective condom use is a method of contraception and protection against sexually transmitted disease; it is not a sex act": at para. 64. In other words, the Court decided that effective condom use was a method of contraception and protection against a sexually transmitted disease--and not an aspect of the "sexual act in question".
- [89] The reasoning of the majority was affirmed in *R. v. Barton*, 2019 SCC 33 at para. 88:
- [88] "Consent" is defined in s. 273.1(1) of the Code as "the voluntary agreement of the complainant to engage in the sexual activity in question". It is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (J.A., at para. 31), and it must be freely given (see *Ewanchuk*, at para. 36). This consent must exist at the time the sexual activity in question occurs (J.A., at para. 34, citing *Ewanchuk*, at para. 26), and it can be revoked at any time (see Code, s. 273.1(2)(e); J.A., at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55

and 57 (emphasis deleted)).

[Emphasis added.]

- [90] The case at bar does not greatly differ from the factual scenario in *Hutchinson* on this issue. The complainant in that case agreed to engage in sexual activity with Mr. Hutchinson on the condition he was wearing a condom. Mr. Hutchinson used a condom in which he had poked holes. The Court found that the complainant voluntarily agreed to the sexual act--the specific form of intercourse in which she and the accused engaged. However, she had not legally consented as her agreement was obtained by fraud.
- [91] Similarly, in this case, AB agreed to intercourse with Mr. Kirkpatrick on the condition he was wearing a condom. She voluntarily agreed to engage in the sexual activity in question--the form of intercourse. Any issue as to whether that agreement constituted valid consent due to Mr. Kirkpatrick's failure to use a condom must be addressed at the second step of the analysis.
- [92] In my view, the trial judge was correct in his application of *Hutchinson* in concluding that AB voluntarily agreed to the sexual activity in question within the meaning of s. 273.1(1).
- [93] Justice Groberman concludes intercourse without a condom and intercourse with a condom full of holes are different physical acts within the meaning of s. 273.1(1). In his view, "[n]othing in the judgment suggests that there was an intention on the part of the majority to specifically exclude from the definition of 'the sexual activity in question' physical aspects of sexual activity adopted for birth control or disease prevention purposes": Reasons of Justice Groberman at para. 27.
- [94] I cannot agree. To the contrary, in my reading, this is precisely what the majority intended: to exclude from the definition in s. 273.1(1) everything except the "basic physical act", along with its sexual nature and the partner's identity. After all, holes in a condom certainly constitute a physical aspect of sexual contact. Both the failure to use a condom and condom sabotage remove a barrier against skin-to-skin contact, fluids, disease, or, for some sexual partners, the possibility of pregnancy; both impact physical aspects of the act engaged in. There is no basis on which to say the majority was addressing "matters that are not physically part of the sexual act", given the facts of that case: Reasons of Justice Groberman at para. 29.
- [95] My colleague concludes that using a condom filled with holes does not alter the "sexual activity" agreed to, but failing to use a condom does. *Hutchinson* does not allow this distinction to be drawn. The majority judgment is clear: protections against pregnancy and infection, such as physical barriers, are "conditions or qualities of the physical act", and do not change the activity consented to under s. 273.1(1).

(ii) The Reasons of the *Hutchinson* Minority

[96] The fact that the use of a condom was not part of the "sexual activity in question" was at the root of the minority's disagreement in Hutchinson. As it stated:

[97] The heart of our disagreement with McLachlin C.J. and Cromwell J. turns on whether the use of a condom is included in the manner in which the sexual activity is carried out. According to our colleagues, the use of a condom during sexual intercourse does not change the "specific physical sex act" which occurs, but rather is merely a "collateral conditio[n]" to the sexual activity. In their view, so long as there is consent to "sexual intercourse", this general consent is not vitiated by a deception about condom use unless it exposes the individual to a deprivation within the meaning of s. 265(3)(c)

[Emphasis added.]

[97] Indeed, the minority went on to describe its disagreement with the fact that the majority approach excludes the exact situation in this case from affecting the nature of the activity under s. 273.1:

[98] [I]ndividuals who engage in sexual activity that has no risk of pregnancy, either because of age, fertility, or gender, for example, would have no legal right to insist upon the use of a condom. If one of those individuals has insisted upon the use of a condom, and their partner has deliberately and knowingly ignored those wishes -- whether by not using a condom at all, removing it partway through the sexual activity, or sabotaging it -- that individual will nonetheless be presumed to have consented under the approach suggested by our colleagues.

[Emphasis added.]

[98] My colleague suggests that the minority judgment "mischaracterize[d]" the majority in these paragraphs, because of an "insistence on the idea that the use of an ineffective condom was the same as the use of no condom at all": at para. 34. In my view, this insistence stems from a correct reading of the majority judgment, which very much treats a broken condom the same as an absent one. I find the suggestion improbable that two judges of the Supreme Court of Canada would have so fundamentally misunderstood reasons for judgment on which they were dissenting.

[99] Respectfully, I cannot agree that the majority judgment in Hutchinson leaves open the possibility that condom use should be analyzed as part of the nature of the act under s. 273.1.

(iii) The Principled Basis for the Hutchinson Majority Decision

[100] The rationales animating the majority judgment in Hutchinson once again support the conclusion that condom use does not change the sexual activity under s. 273.1(1).

- [101] In concluding use of a sabotaged condom, along with deception with respect to other birth control measures and protection from diseases, does not change a sexual act, the majority considered an approach set out by the Nova Scotia Court of Appeal decision in *Hutchinson* (see 2013 NSCA 1). This approach suggested a person agrees to "essential features" of a sexual activity under s. 273.1(1), and that other, nonessential features can vitiate consent via provisions such as s. 265(3)(c).
- [102] The *Hutchinson* majority rejected the "essential features" approach as unnecessary and unclear. The majority concluded that treating circumstances vitiating consent--such as deception around condom use--under s. 273.1(1) would be duplicative. As it stated, this would have s. 273.1(1) "do most of the work that the fraud provision was intended to do" (at para. 26), as dishonest conduct leading to a risk of deprivation is already criminalized under s. 265(3)(c). Further, it reasoned that such an analysis would bring uncertainty into the criminal law, and had the potential to cast "the net of the criminal law too broadly": at para. 53. Taking a broad approach to defining the "sexual activity" agreed to, rather than focusing on dishonesty and deprivation, would risk sanctioning an overly broad range of conduct.
- [103] In particular, the majority was concerned with sweeping criminalization of HIV nondisclosure, which the Court had endeavoured to avoid through its holdings in *Mabior* and *Cuerrier*. As McLachlin J. recognized in her concurring reasons in *Cuerrier*, such sanctions have the potential to impact most heavily on already marginalized groups, who bear the highest risk of contracting HIV: at para. 55. The majority determined there was no principled reason to treat dishonesty as to condom use differently than dishonesty as to HIV status, as both are concerned with voluntary agreement obtained through deceit: at para. 38.
- [104] The majority reasons were firmly animated by a view that the definition of "sexual activity" under s. 273.1(1) should be kept narrow and predictable. Respectfully, my colleague's approach does not reflect this view. Criminalizing a sabotaged condom differently than a failure to use a condom does not provide a "principled and clear line" (*Hutchinson* at para. 49) between what is and is not part of the nature of a sexual act--the very issue the Court has endeavored to avoid by its approach to consent in *Ewanchuk*, *Hutchinson*, *Mabior*, and *Barton*.

The Second Step: Was There Some Evidence of Fraud?

- [105] The next issue to consider is whether there was some evidence that there was no consent to the sexual activity in question by reason of fraud. Fraud has two elements and the Crown must establish both. First, there must be dishonesty, and second, deprivation or risk of deprivation flowing from that dishonesty.

- [106] The trial judge concluded, and my colleague accepts, that there was no evidence of dishonesty on the accused's part that would engage s. 265(3) here. However, in my view the trial judge erred in law in his characterization of what is required in law to show dishonesty.
- [107] In *Mabior*, the Court examined the nature of fraud in the context of consent to sexual activity, building on the principles established in *Guerrier*. The Court reviewed the old law (now archaic), developed during Victorian times, that limited fraud to the "nature and quality of the act" and to the identity of the sexual partner. Thus, fraud was seldom successfully invoked as a manner of vitiating consent.
- [108] The Court rejected limiting dishonesty to active deception, or "a clear misrepresentation or a lie in response to a clear question" at para. 61. The Court concluded that, in the context of disclosing whether one was HIV-positive, a partner may reasonably infer absence of infection from prior conversations or circumstances. Significantly, the Court emphasized there is no principled distinction in law between active deception and passive deception. "Fraud is fraud, whether induced by blatant lies or sly deceit": *Mabior* at para. 65. This understanding of fraud is consistent with the importance of consent to sexual relations to the integrity of one's person, liberty to choose how to engage in sexual relations, and human dignity, all Charter values that are to be taken into account when interpreting the meaning of fraud under s. 265(3)(c): *Mabior* at para. 43.
- [109] In *Mabior*, the Court concluded at para. 104 that "failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive."
- [110] As for the second element of fraud--deprivation--it is established in circumstances in which the sexual contact poses a significant risk of or causes actual bodily harm to the complainant.
- [111] The Court applied this analysis in *Hutchinson*:
- [67] As we have seen, "fraud" for the purposes of consent has two elements: (1) dishonesty, which can include the non-disclosure of important facts; and (2) deprivation or risk of deprivation in the form of serious bodily harm which results from the dishonesty (*Guerrier*).
- [112] In *Hutchinson*, the dishonesty was admitted.
- [113] In this case, the trial judge concluded there was "nothing particularly dishonest about [Mr. Kirkpatrick] not putting on a condom prior to sexual intercourse with the complainant" because he "did nothing to hide or deceive the complainant that he did not put on a condom": at paras. 30-31.

- [114] In this case, the trial judge concluded that there was no evidence of overt dishonesty, and thus Mr. Kirkpatrick's motion must succeed. However, in requiring overt dishonesty, he applied the wrong test. On the evidence before him, there was some evidence of fraud: Mr. Kirkpatrick admitted he was not wearing a condom, did not tell AB that he was not wearing a condom, and there was evidence he knew this was a condition of the complainant's consent.
- [115] AB testified to a protracted discussion regarding condom use, and how her consent turned on the use of a condom, which occurred on the day of their first in-person meeting. When they first had intercourse, she insisted on condom use, to the point of inspecting the condom after the sexual act occurred. There was ample evidence that she would not consent to sexual intercourse without a condom and, on her evidence, Mr. Kirkpatrick was well aware of this, yet he failed to disclose that he was not wearing one.
- [116] In my view, this is sufficient evidence of dishonesty under s. 265(3) to overcome a no-evidence motion on this issue. Recalling that for the purpose of a no-evidence motion, the direct evidence of the Crown is accepted as true, the only question on this motion was whether there was some evidence of dishonesty on the part of Mr. Kirkpatrick.
- [117] In looking for "clear misrepresentation or a lie" on the accused's part, the trial judge followed the approach expressly rejected in Mabior.
- [118] Having concluded there was no evidence of dishonesty, the trial judge did not address whether there was some evidence of deprivation or risk of deprivation. Mr. Kirkpatrick argues that, in any event, there was no evidence of deprivation or risk of deprivation, and the no-evidence motion should have succeeded on this basis.
- [119] There was, however, evidence that AB underwent preventative treatment for HIV infection, which caused serious side effects. That physical harm is some evidence of deprivation. In addition, in Hutchinson, the majority concluded that the risk of pregnancy could amount to a risk of deprivation (at para. 71). In my view, there is some evidence to be considered on the question of deprivation or risk of deprivation.

Conclusion

- [120] Applying the above-noted principles, in my opinion, there was no evidence that the complainant did not voluntarily agree to the "sexual activity in question".
- [121] However, there was evidence that her agreement was obtained by fraud, and she consequently did not consent. In my view, the trial judge erred in law in failing to apply the correct test for fraud, and failing to consider evidence of passive dishonesty.
- [122] I would therefore allow the appeal and order a new trial.

"The Honorable Madam Justice Bennett"

Reasons for Judgment of the Honourable Madam Justice Saunders:

[123] I have had the benefit of reading in draft form the reasons for judgment of my colleagues. I agree with Mr. Justice Groberman that the majority view in Hutchinson allows for conviction of sexual assault in the circumstances described in the evidence adduced by the Crown, and that the case should be remitted to the Provincial Court for a new trial. The physicality of the condition the complainant placed on her participation in sexual intercourse was plain, and in my view well within her right to determine as a matter of consent.

[124] In the event the understanding of Mr. Justice Groberman of Hutchinson, with which I agree, is mistaken, I agree with the reasons of Madam Justice Bennett on the issue of fraud. In my view, there was some evidence of fraud which obviated a no-evidence motion. For this reason, also, I consider the appeal should be allowed and the matter remitted to the Provincial Court for a new trial.

"The Honourable Madam Justice Saunders"

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