

CANADA / JUDGMENT

R. v. Razavi Zadeh

2020 BCCA 93

COURT

British Columbia Court of Appeal

DECIDED

19 February 2020

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2020 BCCA 93 R. v. Razavi Zadeh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Razavi Zadeh,

2020 BCCA 93

Date: 20200219

Docket: CA45873

Between:

Regina

Respondent

And

Seyed Nima Razavi Zadeh

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.4(2) of the Criminal Code restricting publication, broadcasting or transmission in any way of any information that could identify the complainant.

Restriction on publication: Pursuant to s. 16(4) of the Sex Offender Information and Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated
October 5, 2018 (conviction) (R. v. Razavi Zadeh, Vancouver Docket 232534-C-5).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia

February 11, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 19, 2020

Summary:

The appellant challenges his conviction for sexual assault on grounds that: (1) the trial judge misapprehended the complainant's evidence regarding the timing of the alcohol she consumed; (2) the verdict is unreasonable as it rests on an irrational conclusion that the complainant was so intoxicated at the relevant time as to be incapable in law of consenting to the sexual activity in issue; and (3) the reasons are insufficient to explain why the judge found a lack of capacity to consent. Held: Appeal dismissed. The appellant failed to show a clear misapprehension of evidence, let alone one that played an essential role in the judge's reasoning process. It was open to the judge to conclude that the complainant's intoxication had progressed to the point that she lacked the capacity to consent. It follows that the verdict is not unreasonable in the Beaudry sense (R. v. Beaudry, 2007 SCC 5). Further, the reasons explain why the appellant was convicted and permit effective appellate review.

FITCH J.A.:

I. Introduction

- [1] The appellant was tried before a provincial court judge on a two-count information alleging that he, on or about the 11th day of July, 2014, sexually assaulted a female complainant (Count 1) and administered to her a stupefying drug (GHB) with intent to enable the commission of the indictable offence of sexual assault (Count 2), contrary to ss. 271 and 246(b), respectively, of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] It was not in dispute at trial that the appellant engaged in sexual activity with the complainant in his apartment after she had consumed a considerable quantity of alcohol over a short period of time. At issue was whether the complainant in fact consented to the sexual activity, whether she was capable in law of doing so, and whether the appellant surreptitiously administered GHB to the complainant by spiking one of her drinks.
- [3] This was the second trial of this matter. The appellant was convicted of both counts in 2015. A new trial was ordered by this Court in 2016. Reasons for judgment are indexed as 2016 BCCA 474.
- [4] On October 5, 2018, following the retrial, the appellant was convicted of sexual assault. The judge concluded that the appellant engaged in oral sex and vaginal intercourse with the complainant when she was severely intoxicated and lapsing in and out of consciousness. While the judge entertained a reasonable doubt about the complainant's evidence that she did not consent to sexual activity with the appellant, he found that she was incapable of consenting to that activity. At the time the offence was committed, s. 273.1(2) of the Code provided that no "consent" -- defined to mean the voluntary agreement of the complainant to engage in the sexual activity in question -- is obtained where the complainant is incapable of consenting to the activity. In addressing the test for capacity to consent, the judge referred to *R. v. J.A.*, 2011 SCC 28 at para. 44, and *R. v. Siddiqui*, 2004 BCSC 1717 at para. 55. The appellant does not take issue with the judge's articulation or application of the test for capacity to consent.
- [5] The judge was unable to conclude beyond a reasonable doubt that the appellant administered GHB to the complainant. Accordingly, the appellant was acquitted on Count 2.
- [6] The appellant appeals his conviction for sexual assault on three grounds. First, he argues that the judge misapprehended the complainant's evidence concerning her drinking pattern in ways that were material to his conclusion that she was incapable of giving consent to the sexual activity in question. Second, relying on *R. v. Beaudry*, 2007 SCC 5, the appellant submits that the verdict is unreasonable as it rests on a finding of fact (degree of intoxication) that is irrational given the complainant's drinking pattern and the judge's conclusion that she had the legal capacity to consent earlier in the evening. Third, the appellant submits that the judge's reasons are insufficient to explain why he found that the complainant lacked capacity to consent. In the result, the appellant seeks a new trial.

[7] For the reasons that follow, I am unable to give effect to the appellant's grounds of appeal.

II. Background

[8] I will set out only so much of the background as is necessary to put in context the grounds of appeal.

[9] The complainant agreed to accompany the appellant on a first date. He picked her up in downtown Vancouver and asked her to accompany him to his apartment so he could change his clothes before they went out. They arrived at the apartment at about 9:15 p.m.

[10] Between about 9:15 and 9:40 p.m., the complainant consumed two double gin and tonics plus three shots of tequila. She said that the second or third shot of tequila had a salty taste, which she said was consistent with the taste of GHB, a drug she had tried on a recreational basis in the past.

[11] There was no evidence as to the amount of alcohol in the mixed drinks or "shots", but assuming that the mixed drinks contained two ounces of alcohol each and the shots of tequila contained 1½ ounces of alcohol each, the complainant consumed about 8½ ounces of alcohol in less than 30 minutes.

[12] The complainant testified that over the course of the evening she consumed two or three additional shots of tequila -- or five or six in total. She was not challenged on this point. She was not asked, specifically, when these additional shots of tequila were consumed. She said that all of her alcohol consumption, with the exception of the last shot of tequila discussed below, occurred over a period of about 1½ to two hours.

[13] The complainant and appellant moved from the kitchen to the living room at about 9:35-9:40 p.m. and engaged briefly in some consensual kissing. Thereafter, the complainant moved out to the balcony and began consuming her third double gin and tonic. She did not finish this drink. She testified that while she was standing on the balcony, the appellant put his hands between her legs and began rubbing her vaginal area on top of her jeans. The complainant testified she did not consent to this touching and moved her body away from the appellant.

[14] The complainant went back inside to the living room. She testified that she was "definitely intoxicated" at this point and starting to feel "heavy" in her body.

[15] The complainant said the appellant tried to get her to go with him into his bedroom saying, "Try me, try me, I'm not going to do anything." The complainant eventually agreed to do so and briefly straddled the appellant on the bed while she was fully clothed. She said she did this to appease him, not to arouse him. She did not mention this in her initial statement to the police because she thought doing so might "ruin" her case.

[16] The complainant left the bedroom and returned to the kitchen where she poured herself another shot of tequila.

- [17] She testified that she was "definitely not in a sober state" and feeling "slow motion effects." She testified that her body felt "very heavy" and she just wanted to sit down.
- [18] When the appellant came out of the bedroom, the complainant testified that she was sitting on the kitchen floor. She said the appellant tried to pull her up by her arms. She testified that she fought against it because she wanted to remain sitting on the floor, but that he grabbed her hand and "lugged" or "guided" her back into the bedroom. The complainant testified that she just wanted to sleep.
- [19] She said the appellant pulled down her pants, removed her underwear and performed oral sex on her. At some point thereafter, the complainant protested by saying, "no" and "stop" and by trying to pull her pants back on. The appellant did not stop or respond. The complainant testified that she was extremely weak at this point and "couldn't get up even if I wanted to." As she put it, "I was definitely intoxicated from alcohol, and I was not able to pick myself up, or move myself in any way."
- [20] Finally, the complainant testified that she mustered enough energy to pull her knees up to her chest and wrap her arms around her legs. She testified that she said to the appellant, "I don't want to do this."
- [21] When asked what happened next, the complainant testified that she lost consciousness and woke up to find the appellant on top of her engaging in vaginal intercourse with her. The complainant testified that she was lapsing in and out of consciousness during the act of intercourse. She recalled touching the appellant's penis and saying to him "you're not even hard". In cross-examination, the complainant denied that she touched the appellant's penis to give him an erection. Her evidence on this point was inconsistent with a statement she had given to the police and with her evidence at the first trial.
- [22] The complainant testified that her next memory was waking up to hear the shower running. She fell back asleep. She woke up to discover the appellant attempting to put her underwear and pants back on. She went to sleep again and woke up at 5:30 a.m. She gathered her belongings and left the appellant's apartment.
- [23] On July 16, 2014, the police searched the appellant's apartment pursuant to a search warrant. GHB in an unknown concentration was found in an energy drink in the refrigerator and in a bottle of Jose Cuervo tequila on the kitchen counter. In cross-examination, the complainant testified that she believed that she helped herself to the final shot of tequila from the Jose Cuervo bottle. She also agreed that prior to testifying at the first trial, her mother told her that the police seized a bottle of Jose Cuervo tequila from the appellant's apartment that tested positive for GHB.

- [24] Kimberly Young, a forensic toxicologist, testified that the onset of the effects from GHB can generally be expected within 10 minutes of consumption. The effects will peak after 45 minutes then decline and disappear between three to six hours. She also agreed that ingesting GHB and consuming alcohol in large quantities can produce some of the same effects.
- [25] With respect to the effects of alcohol on the human body, Ms. Young testified that a number of case-dependent variables must be taken into account, including an individual's tolerance to alcohol, size, and food consumption prior to drinking alcohol. She testified that the fast ingestion of a substantial amount of alcohol can cause the rapid onset of central nervous system depressant effects after about 30 minutes as the bolus quantity of alcohol gets absorbed in the bloodstream and reaches the brain.
- [26] Assuming that the complainant consumed five ounces of gin and nine ounces of tequila (six 1½ ounce shots), and further assuming a 70% absorption rate, the complainant's blood alcohol level 1½ hours after the start of consumption was estimated to be between 216 and 226 milligrams percent. Two hours after the start of consumption, the complainant's blood alcohol concentration was estimated to be between 209 and 216 milligrams percent.
- [27] Ms. Young testified that a blood alcohol concentration of about 150 milligrams percent would have a significant impact on an individual's motor control. Symptoms would include stumbling when walking, swaying when standing, and the inability to carry out fine motor coordination tasks. Cognitive effects such as mental confusion and mood swings are symptomatic at levels of 200 milligrams percent and above. Blood alcohol concentrations beginning at 250 milligrams percent can be expected to be associated with unconsciousness, although an individual at that level might still be arousable.
- [28] The complainant was cross-examined on evidence she gave during the first trial relating to the timing of her alcohol consumption. It was put to her that she consumed 2½ double gin and tonics plus three shots of tequila before coming in from the balcony. The complainant agreed that, aside from the last shot of tequila she drank before sitting on the kitchen floor, she had consumed all of the drinks that had been put to her in cross-examination before coming in from the balcony. I would note that the cross-examination left unaccounted for the complainant's evidence that, at some point in the evening, she consumed one or two additional shots of tequila. I will return to this point later.
- [29] The complainant's credibility and the reliability of her account were challenged at trial. First, it was asserted that the complainant's symptoms were inconsistent with the administration of GHB, as the effects of ingesting GHB come on quickly and do not occur 1½ hours after consumption. The appellant noted that the complainant consumed a large quantity of alcohol over a relatively short period of time and that this would produce effects similar to the ingestion of GHB. In addition, the appellant relied on the extent to which the complainant's evidence was malleable and evolved over time. With respect to the complainant's capacity to consent, the appellant highlighted that the complainant knew the

difference between losing consciousness and blacking out. Specifically, she knew that blacking out meant being conscious and present in the moment but having no memory of events after the fact. When telling the police about her condition at the time of the sexual activity in the bedroom, the complainant used the language of "black out", rather than unconsciousness. She also told the police that there was nothing important to tell that she could not remember because she "didn't really black out that badly." The defence argued that the evidence fell short of proving that the complainant was incapacitated when the acts of oral sex and vaginal penetration occurred. It was submitted that her evidence was more consistent with fragmented memory than unconsciousness.

III. Reasons for Judgment

- [30] As noted earlier, the trial judge entertained a reasonable doubt about whether the appellant administered GHB to the complainant. He noted that the symptoms the complainant described experiencing by approximately 11:00 p.m. were unlikely to have been caused by GHB ingested at approximately 9:30 p.m. He noted that the complainant's symptoms were not inconsistent with the consumption of alcohol alone. In addition, the judge found the complainant's suspicion that she had been given GHB in the second or third shot of tequila to have been shaped by information that came to her attention after the fact. He did not find her to be a dishonest witness who deliberately set out to deceive, but concluded that her memory of events was shaped by information that rendered her suspicion unreliable. In the result, the judge acquitted the appellant on Count 2. He made no factual finding about whether the complainant inadvertently ingested GHB by taking her final shot of tequila from the Jose Cuervo bottle.
- [31] With respect to the sexual assault allegations, I will focus on the judge's factual findings as they relate to the acts of oral sex and vaginal intercourse.
- [32] The judge had a reasonable doubt about whether the complainant consented to the touching that occurred on the balcony. I regard aspects of the judge's analysis of the sexual assault alleged to have occurred on the balcony as problematic, but I need not address them to dispose of this appeal. Suffice it to say that the judge made a finding that when the touching occurred on the balcony, the complainant was legally capable of giving consent.
- [33] In addition, various inconsistencies in the complainant's testimony led the trial judge to entertain a reasonable doubt about whether the complainant in fact consented to the acts of oral sex and vaginal intercourse. As the judge put it, "[i]t is very likely the case that [the complainant] does not know whether she consented."
- [34] The judge then considered whether the complainant had the legal capacity to consent to the acts of oral sex and vaginal intercourse. He concluded that she did not:
- [106] That being said, I am satisfied beyond a reasonable doubt that [the complainant] did not have the legal capacity to consent.

- [107] [The complainant's] memory from the point she and [the appellant] went into the bedroom the second time is significantly impaired. Except for the terminology she used at the first trial [blacking out], there is no evidence that she was actually awake and functioning the entire time and that her fragmented memory is the result of a black out. I accept her evidence as to how she felt and that she drifted in and out of sleep from roughly the time she and [the appellant] went into the bedroom.
- [108] Notwithstanding the difficulties with [the complainant's] evidence that I have referred to, I accept her evidence that her physical and mental processes were severely impaired from intoxication and that her symptoms of impairment were much more pronounced and debilitating than they had been when [the appellant] rubbed her vaginal area. [The complainant] had reached a level of intoxication sufficient to make her incapable of making informed decisions about what she was involved in and which caused her to fall in and out of sleep or consciousness during both the oral sex and the sexual intercourse. This would have been more obvious to [the appellant] than it was to [the complainant]. [The complainant] could not consent to any sexual contact when she was unconscious or asleep.
- [109] Her fragmented memory prevents her from relating everything that happened, including whether she consented but the inconsistencies and lack of candour in her evidence are, in my view, the result of trying to account for what she does not remember rather than a deliberate attempt to mislead.
- [110] I am not satisfied that during the oral sex and sexual intercourse [the complainant] had "a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act". There was no consent at law.

[Emphasis added.]

IV. Analysis of the Grounds of Appeal

(a) The Alleged Misapprehension of Evidence

- [35] The essence of the appellant's position on this point is that the judge mistakenly inferred that the complainant consumed more alcohol after leaving the balcony but before entering the appellant's bedroom the first time. He submits that there was no evidence capable of grounding such an inference. In fact, he submits that the inference is contrary to the complainant's testimony. The appellant says that the misapprehension is material and could have played an essential role in the reasoning process that led the judge to conclude that the complainant lacked capacity to consent to the acts of oral sex and vaginal intercourse.
- [36] The appellant's reasoning follows this path. The judge found that the complainant had capacity to consent while she was on the balcony. His mistaken conclusion that she consumed more alcohol before going into the bedroom the first time could have impacted his finding on the central issue of whether she lacked capacity to consent to the sexual activity that occurred later in the bedroom. Put differently, the appellant argues that the judge may not have accepted the complainant's evidence that she was severely intoxicated

and lapsing in and out of consciousness when the sexual activity occurred in the bedroom had he understood that she had not consumed any alcohol between leaving the balcony and drinking the final shot of tequila in the kitchen.

[37] In support of this ground of appeal, the appellant places particular emphasis on the following two paragraphs from the reasons for judgment:

[31] She finished her cigarette and she and [the appellant] went back inside the living room. She said that over a long period of time he was trying to get her to go into the bedroom and that she resisted, accusing him of wanting to take advantage of her. She said that [the appellant] kept saying "try me, try me, I'm not going to do anything" and that eventually she agreed and they went into the bedroom.

[32] [The complainant] did not specifically testify as to when she consumed the further shots of tequila, but it is reasonable to infer that there was some consumption of alcohol during the long period of time before going into the bedroom.

[Emphasis added.]

[38] The standard an appellant must meet to obtain relief on misapprehension of evidence grounds is high: *R. v. Lohrer*, 2004 SCC 80 at para. 2; *R. v. Webber*, 2019 BCCA 208 at para. 27. The error must be plainly identified. As Justice Lebel explained in *R. v. Sinclair*, 2011 SCC 40 at para. 53, "[t]he plain language or the thrust of the reasons must disclose an actual mistake." In addition, the misapprehension must go to a question of substance, must be material, and must play an essential role in the reasoning process that led to the conviction: *R. v. Swales*, 2014 BCCA 350 at para. 48. One way of determining whether the misapprehension played an essential role in the reasoning process is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on unsteady ground: *Lohrer* at paras. 6-9; *Sinclair* at paras. 53, 56.

[39] It is not enough for the appellant to merely suggest a different interpretation of the evidence. Mere differences of interpretation on factual matters are not misapprehensions of evidence but simple disagreement with the factual findings made below: *Swales* at para. 49. A factual finding not shown to rest on a misapprehension of evidence is, of course, subject to a palpable and overriding error standard of review.

[40] I am unable to give effect to this ground of appeal. In my view, the appellant has not shown that the reasons for judgment disclose an actual mistake as to the complainant's pattern of alcohol consumption, let alone one that played an essential role in the reasoning process leading to the conviction.

[41] In cross-examination, the complainant agreed that all of the drinks put to her by defence counsel were consumed before she left the balcony. Importantly, however, not all of the complainant's alcohol consumption was itemized in this portion of the cross-examination. As noted earlier, it was not contested that the complainant consumed five or six shots of tequila over the course of the evening. Two and a half double gin and tonics and three shots

of tequila were identified in the cross-examination relied on by the appellant. It was common ground that the complainant consumed the final shot of tequila in the kitchen just before the oral sex and vaginal intercourse took place in the appellant's bedroom. This left unresolved when the complainant consumed the additional one or two shots of tequila. As the complainant confirmed in cross-examination (with the exception of the last shot in the kitchen) she had consumed all but the remaining one or two shots of tequila before leaving the balcony, it was open to the judge to infer that the complainant consumed additional alcohol after leaving the balcony but before going into the bedroom the first time. I see no misapprehension of the evidence here.

- [42] While my conclusion on this point is dispositive of this ground of appeal, I am also of the view that any error made by the judge with respect to when the complainant consumed her drinks did not play an essential role in the reasoning process that led to a conviction. By any measure, the complainant consumed an enormous quantity of alcohol over a very short period of time. She described being intoxicated when she was on the balcony. She described pouring herself the last shot of tequila and then sitting down on the kitchen floor. In my view, it was open to the judge to conclude, as he did, that the complainant's intoxication and symptoms of impairment were "much more pronounced and debilitating than they had been when [the appellant] rubbed her vaginal area [on the balcony]."

(b) The Alleged Beaudry Error

- [43] An appellate court may find a verdict unreasonable if the trial judge has made a finding of fact essential to the verdict that is not logically supported by the evidence upon which it purports to rest, or because the reasons given in support of a verdict are fundamentally incompatible with evidence that has not been contradicted or rejected. As the Court explained in *Sinclair*:
- [19] Illogical or irrational reasoning can render verdicts unreasonable under s. 686(1)(a)(i) of the Code, in various ways. Beaudry identifies two. First, a verdict is unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict that is "plainly contradicted by the very evidence from which it was drawn" or upon which it has been made to rest (para. 105). In that case, the essential finding is illogical or unreasonable in light of the evidence relied upon in making the finding. Here, the rule of law speaks the language of logic: From accepted evidence "X", a court cannot lawfully infer "not X".
- [21] A verdict is likewise unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict if that inference or finding of fact is "demonstrably incompatible' with evidence that is neither contradicted by other evidence nor rejected by the trial judge" (Beaudry, at para. 79, per Binnie J.).

(See also *R. v. R.P.*, 2012 SCC 22 at para. 9.)

- [44] To succeed on Beaudry grounds, an appellant must do more than show that a particular factual finding or inference is the product of a flaw in the trial judge's reasoning process. It must be shown that the flaw played a central role in the reasoning process that led to a conviction: *R. v. Scuby*, 2015 BCCA 430 at para. 31; *R. v. Zadeh*, 2016 BCCA 474 at para. 27. Appellate intervention on "Beaudry grounds" will be rare: *Sinclair* at para. 22; *Zadeh* at paras. 25-27; *R. v. Ali*, 2013 BCCA 346 at para. 17. As Justice Bennett noted in *Ali*, the decisions in *Sinclair* and *Beaudry* are not an invitation to appellate dissection of reasons for judgment.
- [45] The appellant argues that it was irrational for the judge to conclude that the complainant's level of intoxication was such that she had the legal capacity to consent on the balcony but lacked that capacity after consuming a single additional shot of tequila in the kitchen.
- [46] The appellant's argument on this point hinges on his contention that the judge erred in inferring that the complainant had consumed more alcohol after coming in from the balcony in addition to the last shot of tequila she consumed in the kitchen before going into the bedroom. As I have concluded that it was open to the judge to infer that the complainant drank additional shots of tequila after coming in from the balcony (in addition to the last shot of tequila in the kitchen), the appellant must also fail on this ground.
- [47] Again, while this is sufficient to dispose of the appeal, I wish to record my view that even if the judge found that the complainant consumed all of the alcohol (save for the last shot of tequila) before coming in from the balcony, his acceptance of her evidence that she was severely intoxicated and lapsing in and out of consciousness at the time of the sexual acts was not irrational within the meaning of *Beaudry*. In my view, that finding is not plainly contradicted by the evidence from which it was drawn nor is it demonstrably incompatible with evidence the judge did not reject.
- (c) Sufficiency of the Reasons
- [48] The appellant submits that the judge's reasons do not explain why he found that the complainant lost capacity to consent. More particularly, he asserts that it is unclear why the judge accepted the complainant's evidence that she was lapsing in and out of consciousness at the relevant time despite making negative credibility and reliability findings about some other aspects of her evidence. Second, he submits that the reasons do not make clear how the complainant lost capacity to consent when she was capable of granting or withholding consent on the balcony. Third, he submits that the judge failed to reconcile significant inconsistencies about the complainant's symptoms during the sexual activity in the bedroom which related to her capacity to consent.
- [49] I see no merit in this ground of appeal. In my view, the reasons explain why the judge decided as he did. He was not required to reconcile every frailty in the evidence, nor was he required to make explicit reference to all the conflicting evidence in his reasons: *R. v. M. E-H.*, 2015 BCCA 54 at para. 68.

- [50] Even so, the judge set out in detail his concerns with respect to some aspects of the complainant's evidence. Notwithstanding those difficulties, the judge accepted the complainant's evidence that she was severely intoxicated by alcohol and unconscious for portions of the sexual acts engaged in by the appellant. As a result, he was satisfied beyond a reasonable doubt that she was incapable of consenting to sexual contact at the relevant time. He concluded that inconsistencies in the complainant's evidence were the result of her attempts to account for what she does not remember rather than a deliberate attempt to mislead.
- [51] In my view, the reasons explain why the appellant was convicted of sexual assault and permit effective appellate review: *R. v. R.E.M.*, 2008 SCC 51 at para. 11. I would not give effect to this ground of appeal.

V. Conclusion

- [52] Despite acknowledging frailties in the complainant's testimony, the judge accepted her evidence that she was severely impaired and, at times, unconscious when the acts of oral sex and vaginal intercourse occurred. In my view, this factual finding was untainted by any misapprehension of the evidence. It cannot be said that the judge's reasoning process was irrational in the sense contemplated by *Beaudry*. Nor can it be said that the reasons for conviction are insufficient to explain why the appellant was convicted of sexual assault or to permit meaningful appellate review. In short, I see no basis upon which this Court could properly interfere with the judge's conclusion that the complainant was incapable of consenting to the sexual activity in issue at the relevant time. As a consequence, I would dismiss the appeal.
- [53] BUTLER J.A.: I agree.
- [54] DEWITT-VAN OOSTEN J.A.: I agree.
- [55] FITCH J.A.: The appeal is dismissed.
- "The Honourable Mr. Justice Fitch"

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