

CANADA / JUDGMENT

R. v. Rioux

2025 SCC 34

COURT

Supreme Court of Canada

DECIDED

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R. v. Rioux

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2025 SCC 34

Case number

41362

Judges

Wagner, Richard; Karakatsanis, Andromache; Côté, Suzanne; Rowe, Malcolm; Martin, Sheilah; Kasirer, Nicholas; Jamal, Mahmud; O'Bonsawin, Michelle; Moreau, Mary

On appeal from

Quebec

Subjects

Criminal law

Notes

Case in Brief SCC Case Information

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. Rioux, 2025 SCC 34

Appeal Heard: January 22, 2025

Judgment Rendered: November 7, 2025

Docket: 41362

Between:

Frédéric Rioux

Appellant

and

His Majesty The King

Respondent

Official English Translation:

Reasons of Wagner C.J. and Côté, Rowe and Moreau JJ.

Coram: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

Reasons for Judgment:

(paras. 1 to 146)

Martin J. (Karakatsanis, Kasirer, Jamal and O'Bonsawin JJ. concurring)

Joint Dissenting Reasons:

(paras. 147 to 210)

Wagner C.J. and Côté, Rowe and Moreau JJ.

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Frédéric Rioux Appellant

v.

His Majesty The King Respondent

Indexed as: R. v. Rioux

2025 SCC 34

File No.: 41362.

2025: January 22; 2025: November 7.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

on appeal from the court of appeal for quebec

Criminal law — Sexual assault — Elements of offence — Actus reus — Consent — Capacity to consent — Evidence — Assessment — Direct evidence — Circumstantial evidence — Accused charged with sexual assault — Accused testifying that complainant consented to sexual activity — Complainant testifying that she lacked full memory of sexual activity that took place after she consumed alcohol — Trial judge acquitting accused — Court of Appeal setting aside acquittal and ordering new trial — Whether trial judge applied correct legal and evidentiary principles when determining whether Crown had established that complainant did not consent or did not have capacity to consent to sexual activity — Criminal Code, R.S.C. 1985, c. C-46, s. 273.1.

The accused was charged with sexually assaulting the complainant in respect of events that occurred after they met for a picnic in a park. Some sexual acts took place in the early evening in the park, and others took place later that night at the accused's home. At trial, the parties provided very different versions of events. The accused testified that the complainant was willing, physically able, physiologically present and capable of consenting throughout. The complainant testified that, after consuming alcohol at the park, she experienced a lack of control over her body and suffered partial amnesia regarding a significant portion of the evening's events, including most of the sexual activity, and that she believed she had been drugged.

The trial judge acquitted the accused. With respect to the sexual acts in the park, he held that the actus reus of sexual assault was not established beyond a reasonable doubt since the Crown had not established the absence of the complainant's consent for these acts. As for the sexual acts at the accused's home, the trial judge found that the complainant lacked the capacity to consent at the time of those acts and therefore concluded that the actus reus had been established. However, he accepted that the accused had an honest but mistaken belief in the complainant's consent and her capacity to consent, or at least that there was a reasonable doubt as to the accused's guilt. On appeal by the Crown, a majority of the Court of Appeal held that the trial judge had committed errors of law in how he treated the evidence, by improperly using the accused's testimony as direct evidence of the complainant's subjective consent and by failing to consider a large body of circumstantial evidence regarding the series of sexual acts in the park. It set aside the acquittal and ordered a new trial, limited to the sexual acts in the park.

Held (Wagner C.J. and Côté, Rowe and Moreau JJ. dissenting): The appeal should be dismissed.

Per Karakatsanis, Martin, Kasirer, Jamal and O'Bonsawin JJ.: To determine whether a complainant did not consent or lacked the capacity to consent at the time of a sexual act, a court must consider all the relevant evidence. If the complainant has no recall of the sexual activity in question, the trier of fact is also obliged to consider all credible and reliable circumstantial evidence. In the instant case, the trial judge committed errors in his evaluation of the evidence in relation to consent and capacity to consent. These errors led the trial judge to fail to consider all the evidence and had a material bearing on the acquittal. The verdict should have been based on

the totality of the evidence, including the complainant's evidence about her state of mind and physical state before, during and after any sexual activity, as well as any other relevant circumstantial evidence. The Court of Appeal was justified in ordering a new trial.

To establish sexual assault, the Crown must establish both the accused's *mens rea* and the *actus reus* beyond a reasonable doubt. The *actus reus* of sexual assault includes the absence of consent. Pursuant to s. 273.1(1) of the Criminal Code, consent requires the voluntary agreement of the complainant to engage in the sexual activity in question. Individuals may choose whether or not to engage in sexual activity, which activities are allowed and when and under what conditions they may occur; consent may be revoked at any time. At the *actus reus* stage, the question is whether the complainant, in their mind, subjectively and voluntarily agreed to the sexual activity in question. If there was no such agreement, non-consent in fact will be established.

Individuals must have the mental capacity to give meaningful consent. Pursuant to s. 273.1(2)(b) of the Criminal Code, no consent is obtained if the complainant is incapable of consenting to the sexual activity. Incapacity deprives the complainant of the ability to formulate a subjective agreement. The complainant must be capable of understanding: (1) the physical act; (2) that the act is sexual in nature; (3) the specific identity of the complainant's partner or partners; and (4) that the complainant has the choice to refuse to participate. All four factors must be satisfied for a complainant to have capacity to consent. If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of consent. Consent and capacity are inextricably joined; subjective consent requires both that the complainant is capable of consent, and does in fact, consent. The Crown may establish the absence of subjective consent by proving either that the complainant was incapable of consenting or that she did not agree to the sexual activity. Where both consent and capacity are at issue, the trial judge must consider each or both, as circumstances require. Section 273.1(1.2) provides that whether the complainant's subjective consent is prevented or vitiated is a question of law.

Where the complainant cannot give direct evidence of her subjective consent, because of memory loss or blackout, the inability to articulate her state of mind, or because she was drugged, intoxicated, ill or had certain physical or mental conditions, proof of the *actus reus* will rest almost exclusively on circumstantial evidence. This evidence can come from the complainant, witnesses, or documentary proof. An accused's testimony should not be treated as direct evidence of the complainant's state of mind. Only the complainant can provide direct evidence of her subjective consent. For the purpose of the *actus reus*, the accused's perception is irrelevant. The accused is legally unable to provide direct evidence on the complainant's consent.

Complainants who experience memory loss can still provide evidence relevant to capacity and consent. A complainant's circumstantial evidence may include her emotional state before and after the sexual act; her attitude towards the accused; any of her actions inconsistent with consent; her beliefs and assumptions about how she would have acted in the circumstances; physical evidence inconsistent with consent; and any relevant actions of the accused. The complainant's evidence as to what occurred before and after the sexual act is also admissible as

circumstantial evidence of her capacity at the time of the sexual act. In addition, courts must consider evidence of outward signs of impairment, including loss of gross motor skills, vomiting, loss of bladder control, and significantly impaired speech. Finally, although lack of memory alone cannot by itself establish a lack of capacity, memory loss or a blackout can be considered circumstantial evidence that, when considered with the whole of the evidence, may permit an inference to be drawn about whether a complainant was capable of consent.

An appellate court's jurisdiction to hear a Crown appeal from an acquittal is limited to errors on questions of law alone. In the instant case, the trial judge erred in law when he failed to apply relevant legal principles and cases to the available evidence, and failed to consider all the relevant evidence. First, the trial judge treated direct evidence from the complainant about her state of mind as a requirement for determining her incapacity and absence of subjective consent, and then mistook the complainant's lack of direct evidence as a lack of any evidence relating to her state of mind. Regarding the sexual acts in the park, the trial judge focused only on direct evidence at the exact period of time of these activities, and not the totality of the relevant evidence. Because the complainant had no memory of the specific sexual acts that occurred, the trial judge did not consider the evidence about what she could remember. The trial judge used the same erroneous analytical approach in relation to the sexual acts at the accused's home. He only found that the complainant lacked capacity to consent there because she managed to provide some direct evidence about her state at the time of those sexual acts; only then did he factor in other circumstantial evidence. This suggests that the trial judge would have accepted nothing short of direct evidence regarding the sexual acts in the park. As a result of this insistence, he did not consider the complainant's capacity to consent to the acts in the park.

Second, the trial judge failed to understand that the complainant's circumstantial evidence was legally relevant, independent of any direct evidence. All pertinent evidence should have been considered, including the complainant's considerable evidence relating to her physical and mental state throughout the events. This evidence ought to have informed the analysis of whether she was capable of consent, and her lack of memory did not cause the evidence to lose its relevance or probative force. It is circumstantial evidence from which the trier of fact could draw inferences regarding capacity, especially given that the trial judge found her to be credible and reliable. While the trial judge could prefer some pieces of evidence over others, he was required to consider all credible, reliable, and relevant evidence. The complainant's evidence also calls into question the trial judge's doubt about her incapacity in the park. Her circumstantial evidence — such as the fact that she never intended to have sexual relations with the accused and deplored the fact that they occurred, her emotional state and actions before and after the sexual acts, her negative attitude towards the accused, and any of her actions that were inconsistent with consent — should have been seen as relevant.

The trial judge's narrow focus on direct evidence, and the failure to consider all relevant circumstantial evidence, meant that he did not consider the totality of the evidence. Doing so is an error of law, as the Crown may meet its burden through direct or circumstantial evidence, or both; both forms of evidence are equally admissible and potentially probative, and the law does

not distinguish between them in terms of weight or importance. The trial judge's errors reflected an erroneous understanding of the law about categories of evidence that should have been considered but were not. All the complainant's evidence of what took place in the park and at the accused's home was potentially relevant. The trial judge's consideration of the evidence resulted in the apparently inconsistent finding that the complainant was capable of consent at the park, but lacked capacity at the accused's home a few hours later. The complainant testified that her loss of memory and lack of control over her body began after she consumed a mixed gin drink in the park, and continued until early the next morning. Given the facts, the finding of incapacity at the time of the sexual acts at the accused's home was relevant circumstantial evidence as to capacity at the time of the acts in the park. The trial judge incorrectly proceeded on the basis that the only evidence available about the complainant's state of mind was the uncontradicted testimony of the accused. Had all relevant circumstantial evidence been considered, the trial judge would have been required to reconcile important contradictory testimony.

The trial judge's errors of law had a material bearing on the verdict. Acquittals are not overturned lightly; the Crown must convince the appellate court, to a reasonable degree of certainty, that the verdict would not necessarily have been the same had the error not occurred. In the instant case, the trial judge's failure to consider circumstantial evidence on capacity and consent goes directly to the ultimate question of guilt or innocence; his reliance on the accused's testimony as evidence of the complainant's state of mind is an error that goes to the core of the consent analysis; and the trial judge's failure to consider all admissible evidence undermined his credibility assessment.

These errors also call into question the trial judge's treatment of the accused's assertion of an honest but mistaken belief in consent at the mens rea stage. Before an accused may assert such a belief, the defence must have an air of reality — a bare assertion by the accused will not suffice. In the instant case, had the complainant's evidence been considered, there would have been a serious issue as to whether the accused could have even asserted this defence. There is a clear conflict of testimony on whether the accused drugged the complainant. While the trial judge may not have needed to reconcile this conflict to find the complainant lacked capacity, a finding on this question was crucial to accept the accused's assertion that he had an honest but reasonable belief in her consent. Anyone who administers a stupefying substance to facilitate sexual activity cannot have such a belief and may otherwise be legally disentitled from relying on this defence.

Per Wagner C.J. and Côté, Rowe and Moreau JJ. (dissenting): The appeal should be allowed and the verdict of acquittal restored. On the whole, the evidence accepted by the trial judge — coupled with the deficiencies in the Crown's case — left a reasonable doubt as to the events that occurred.

Crown appeals from acquittals are limited to questions of law alone. The Crown may not appeal what it regards as an unreasonable verdict of acquittal, given that, as a matter of law, this concept is incompatible with the presumption of innocence, with the burden resting on the prosecution to prove its case beyond a reasonable doubt and with the protection against double jeopardy. The Crown may not appeal on questions of fact, such as the weight given to various pieces of evidence and the assessment of the credibility and reliability of witnesses. There is also no error of law

arising from a disagreement over factual inferences to be drawn from the evidence. Expanding the concept of error of law and, by extension, the Crown's right of appeal from an acquittal could have a profound impact on the interests of accused persons, would go against the clear intention of Parliament and would undermine the integrity of the justice system.

Shortcomings in the assessment of the facts may sometimes actually constitute errors of law, such as a failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence. However, for it to be found that a trial judge made this error, the judge's reasons must actually demonstrate this. Unless the contrary is demonstrated, it must be assumed that the judge considered all of the evidence. An appellate court must read the trial judgment functionally and contextually in light of the record as a whole, including the evidence, the issues raised and the parties' arguments. It is not appropriate to read part of a decision in isolation and to infer therefrom, as a result of this unduly narrow reading, a failure to consider a significant portion of the evidence; the reasons cannot be divorced from their overall context.

In this case, the trial judge neither erred in applying the legal principles relating to sexual assault nor failed to consider all of the evidence. First, nothing in the trial judge's reasons suggests that he thought the complainant's testimony was of no assistance. Contrary to what the majority assert, the trial judge did not say that the accused's testimony was the only evidence concerning the sexual activity; rather, it was the only testimony. The judge was justified in relying on the accused's testimony as circumstantial evidence of the complainant's state. On the basis of a contextual and functional reading of the reasons, it can be said that the trial judge did not fail to consider all of the evidence. The pieces of circumstantial evidence were all dealt with. When read in context and as a whole, in light of the live issues, the reasons contain no error of law that justifies intervention. The reasons do not demonstrate a failure to consider all of the evidence in relation to the ultimate issue of the accused's guilt or innocence. The majority arrive at the opposite conclusion by favouring a decontextualized reading of the reasons. This is always to be avoided, particularly in the case of an appeal from an acquittal.

Second, the trial judge's reasons in no way indicate that he used the accused's testimony as direct evidence of the complainant's subjective state of mind. The trial judge used the word "probative", which does not mean "direct", in referring to the accused's evidence on the complainant's consent. In the context in which the word was used, the meaning of "probative" is plain: the accused's testimony clearly raised a doubt in the trial judge's mind as regards the absence of consent, a finding that is owed deference. The judge himself noted the absence of direct evidence and stated that he had to rely solely on the circumstantial evidence. He was aware that no direct evidence concerning the complainant's state of mind was available, and he knew full well that he could not use the accused's testimony for such purposes; he was thus properly instructed on the applicable law. At most, he used this testimony only as circumstantial evidence.

Third, the trial judge's finding that the accused's testimony was credible and reliable cannot be disturbed on appeal. The trial judge analyzed the accused's testimony generally and found it to be trustworthy, both for the period in the park and at the accused's home. It is clear that the accused's testimony raised a reasonable doubt for the trial judge. In the circumstances, the judge had no choice but to acquit him.

Finally, the majority are presuming to interfere with the trial judge's findings of fact. The judge could validly find that he had a reasonable doubt as to the complainant's lack of consent in the park, but not entertain such a doubt with regard to her incapacity at the accused's home. His finding that the complainant was in a state of incapacity at the accused's home did not oblige him to find that the only reasonable inference was that the same was true in the park. However, the majority criticize the trial judge for not reconciling these two findings. Under the pretext of an error of law, the majority thus express their disagreement with the trial judge's assessment of the evidence and indicate their conclusion that the acquittal was unreasonable.

The majority also resurrect a theory regarding the complainant's memory gaps despite it having been rejected, noting that the complainant testified that she believed the accused had drugged her. The majority state that the trial judge had to make a finding of fact on this theory. However, although the complainant was found to be credible, this does not mean that the judge accepted all the details of her testimony or that he was required to address each of her allegations. The trial judge did not err by not addressing this question. The majority are intruding into questions of fact in respect of which an appellate court is required to show deference.

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By Martin J.

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By Wagner C.J. and Côté, Rowe and Moreau JJ. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Mainville, Hamilton and Bachand JJ.A.), 2024 QCCA 657, [2024] AZ-52029982, [2024] J.Q. no 4049 (Lexis), 2024 CarswellQue 4951 (WL), setting aside a decision of Gagnon J.C.Q., 2022 QCCQ 63, [2022] AZ-51821827, [2022] J.Q. no 116 (Lexis), 2022 CarswellQue 1222 (WL), and ordering a new trial. Appeal dismissed, Wagner C.J. and Côté, Rowe and Moreau JJ. dissenting.

Sophie Beauvais and Benoit Demchuck, for the appellant.

Maxime Hébrard, for the respondent.

The judgment of Karakatsanis, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

Martin J. —

I. Overview

- [1] The appellant, Frédéric Rioux, was charged with one count of sexual assault in relation to sexual activities during the evening and morning of August 1 and 2, 2019. The complainant testified that, after consuming two drinks containing alcohol, she experienced a lack of control over her body and suffered partial amnesia regarding a significant portion of the evening's events, including most of the sexual activity that took place. The appellant was acquitted. The Crown appealed and a majority of the Court of Appeal of Quebec held that the trial judge had committed errors of law sufficient to overturn the acquittal and order a new trial. The dissent found no error and the matter is before this Court as of right. The main issue is whether the trial judge applied the correct legal and evidentiary principles when determining whether the Crown had established that the complainant did not consent or did not have the capacity to consent to the sexual activity in question.
- [2] I agree with the majority of the Court of Appeal that there were errors of law of sufficient gravity to set aside the acquittal and order a new trial. A trial judge must assess and weigh all admissible and relevant evidence to determine whether the complainant consented or had the capacity to consent to the sexual activity in question. In addition, though I need not decide the point, if the trial judge relied on the testimony of the appellant as direct evidence of a complainant's state of mind, it would have been an error to do so. This is so even where the complainant does not have full memory of the sexual activity in question. For the reasons that follow, I would dismiss the appeal.

II. Factual Background

- [3] On August 5, 2020, the appellant was charged with sexual assault contrary to s. 271(a) of the Criminal Code, R.S.C. 1985, c. C-46, arising from events on August 1 and 2, 2019. The trial judge accepted that the sexual activity described by the appellant took place. The legal issue was whether, considering the gaps in the complainant's memory, the Crown had established either her non-consent or her incapacity to consent beyond a reasonable doubt. Four witnesses testified at this judge-alone trial: the complainant, her mother, a friend of the

complainant, and the appellant. What follows is a summary of relevant portions of their testimony. The trial was conducted in French and certain parts of the complainant's testimony are better presented in the language she employed. So, in these reasons, I have left certain quotations in their original French.

- [4] The complainant and the appellant met online in May 2019, dated a few times, and saw each other exclusively for a period. The complainant then ended that relationship, but wanted to remain friends. The appellant was unsure about her proposal to remain friends. However, after that time and before the events of August 2019, the appellant and the complainant saw each other twice. On both occasions, the appellant asked the complainant if she wanted to spend the night at his home and she refused each time.
- [5] On August 1, the appellant suggested they meet for a picnic in a park bordering Lake Memphrémagog, in the city of Magog. The complainant was to bring the alcohol and the appellant was to bring the food. They both arrived in their own cars. According to the appellant, they opened the complainant's bottle of wine at approximately 5:00 p.m. While drinking the wine, the complainant recalled thinking that the bottle of wine was empty before she had even finished her first glass. The appellant recalled drinking more of the wine than the complainant did.
- [6] The appellant brought a bottle of gin, even though the parties had agreed that the complainant would bring the alcohol. Although the precise timing of events is unclear, the parties were in the park from approximately 5:00 p.m. to 10:00 p.m. According to the appellant, he poured the complainant a mixed gin drink around the midpoint of their time there. The complainant testified that, after consuming the gin drink, she had no full or clear recall, or sequential memories of the night's events, other than brief flashes of memory. She spoke of being in a state of "blackout" and believed she had been drugged.
- [7] The complainant testified that her total alcohol consumption for the entire evening was one glass of wine, and that one gin drink. The appellant initially testified that the complainant had consumed a second mixed gin drink after the first series of sexual acts in the park, but later testified that he could not remember if she had consumed more than one mixed gin drink that evening.
- [8] The appellant also stated that, combined, they only had drunk four to six ounces of gin and a bottle of wine in the park, and that they drank only water later when at his home. While the trial judge made no express findings of fact on how much each had consumed, the trial judge seems to have accepted the appellant's evidence when he concluded that the appellant's level of intoxication did not preclude him from claiming an honest but mistaken belief in her consent.
- [9] The fact that there are lapses in the complainant's memory from after she consumed a gin drink until she woke up at 5:30 a.m. in the appellant's home means that the evening's timeline and events are based primarily upon the testimony of the appellant.

- [10] The appellant testified to the nature of their sexual activity over the time span on the indictment. He stated that she had consented to everything, was a willing partner and could consent throughout.
- [11] Per the appellant, the first series of sexual acts took place between approximately 7:30 p.m. and 8:30 p.m. He testified that leading to this touching, the complainant was sharing some of her concerns about returning to work as an emergency nurse. She was on leave following a violent attack that occurred in the workplace. The appellant, who had been a soldier, offered to give her a lesson in self-defence, so she might feel better prepared should another attack take place. He testified that the physical contact during this lesson became flirtatious.
- [12] The appellant stated that they sat on the picnic table and he received verbal consent to kiss the complainant. They continued to intermittently converse and kiss. He said the complainant straddled the appellant's legs, and the appellant touched her buttocks and hair. After about 30 minutes, the appellant began to kiss the complainant's neck and touched her breasts. The appellant testified that the complainant then unbuttoned her own jeans and she put the appellant's hand on her genitals. He digitally penetrated her vagina. At some point, the complainant removed one leg from her jeans. The appellant tied his shirt around the complainant's waist to protect her from public view. He then continued to digitally penetrate her vagina. Throughout this time, the appellant stated that the [translation] "vibe was sexy", and that they were having a good time (2022 QCCQ 63, at paras. 73-74).
- [13] The complainant testified that she had a vague memory of some physical proximity, but had no recollection of digital vaginal penetration or other sexual activity while on the picnic table in the park. She described her condition as: "J'ai la tête qui tourne, je suis incapable de me tenir debout, je suis molle comme une guenille" ([translation] "My head was spinning, I was unable to remain standing, I was like a limp rag") (trial reasons, at para. 35).
- [14] Between 8:30 p.m. and 9:00 p.m., the complainant's mother received an unplanned phone call from the complainant. She testified that the complainant's voice was atypical and the content of her daughter's speech was incoherent. She recalled thinking that the complainant must have consumed at least three bottles of wine to enter this unfocussed state. The complainant's mother mentioned that it was also abnormal that the complainant called her, as they both prefer communication via text message. Worried about her daughter's condition, she recommended that the complainant and the appellant stay in a hotel and abstain from driving. The complainant also tried to call her father. The appellant contacted the complainant's mother two other times throughout the evening to reassure her of the complainant's safety.
- [15] At the park, the complainant testified that she recalled falling on the large rocks near the lake, but could not recall why or how she arrived at this location. She sustained injuries to her hip and elbows. The appellant corroborated the injuries and stated this took place slightly after 9:00 p.m.

- [16] The complainant also recalled the appellant helping her get to his car, as she had a complete lack of control over her body. He had to carry her [translation] “like a sack of potatoes”, over his shoulder (trial reasons, at para. 41, fn. 1). On their way to the car, a municipal employee saw him carrying her over his shoulder and asked them if all was well. The complainant recalled that she [translation] “was no longer there, no longer there at all” and that the appellant coached her to say that all was well, and she obliged (para. 41). The appellant testified that he was helping her because she had just hurt herself on the rocks, that he was practicing his firefighter’s dead lift, and that the complainant independently confirmed that she was well.
- [17] Upon arriving at the appellant’s car, the complainant recalled vomiting. The appellant testified that the complainant was nauseated because of the way he was carrying her to the car, but said that he did not think she vomited.
- [18] The appellant said they left the park slightly after 10:00 p.m. He drove the parties to his home in Bonsecours, Quebec, despite his alcohol consumption.
- [19] In the night, the appellant says there was a second series of sexual acts at his home. These activities included kissing, various forms of sexual touching, digital penetration of her anus, and unprotected penile penetration of her vagina. He testified that after these actions, she went downstairs to sleep, he began to watch a pornographic film, that she later came back upstairs and saw him masturbating, and in the morning seemed angry with him.
- [20] The complainant testified that she had a memory about how she felt at his home. She recalled being “molle comme une guenille” ([translation] “like a limp rag”), feeling tired, and having no judgment of the situation. She had no control over her body, she only wanted to sleep and fell asleep. She also testified that she woke up and remembered the appellant being naked on top of her. She reached out and placed her arms around his neck.
- [21] She then again lost recall until she woke up again at 5:30 a.m. in a state of panic. She found herself at his home, where she did not want to be, unclothed from the waist down, with the appellant asleep, unclothed, next to her. She was shaking like a leaf.
- [22] She believed she had been drugged and planned to record the appellant admitting that he drugged her. Between 7:00 a.m. and 8:00 a.m., the complainant woke the appellant to drive her back to her car, which was still at the park. She recorded her conversation with the appellant on her cellular device. She asked the appellant if he had “mis quelque chose dans son verre” ([translation] “put something in her drink”) to get her to relax, which he denied (trial reasons, at para. 49). He asked her about what she remembered and he recounted the evening’s sexual acts to her.

- [23] After leaving the appellant, the complainant contacted a friend, texted her mother, and attended a hospital nearby to undergo a medical evaluation. At the hospital, staff told the complainant that GHB — a common date-rape drug — cannot be detected after its effects have worn off. Upon learning this, the complainant left the hospital. A couple of days afterward she returned to the hospital for a full medical evaluation. Medical personnel noted injuries to her hips and elbows, but little else.
- [24] Later, she contacted the appellant to state she had not wanted to have any sexual relations with him. She subsequently deleted all of her text messages with him and did not contact him further. The appellant testified he was shocked by her accusations because, from his point of view, the complainant consented and was able to consent to all the sexual activities in question.
- [25] After these events and in the ensuing months, the complainant's mental health significantly deteriorated. She became depressed and expressed suicidal ideation, culminating in a two-month psychiatric hospitalization. In January 2020, the complainant reported the incident to the police.

III. Procedural History

A. Court of Québec, 2022 QCCQ 63

- [26] The Crown argued at trial that, by way of extreme intoxication, the complainant lacked the capacity to consent throughout the evening. One of the Crown's pathways to finding extreme intoxication was that the complainant had been drugged by the appellant.
- [27] The trial judge summarized the evidence, accepted that the described sexual acts occurred, and cited applicable law. He chose to divide this single charge into two separate time frames: first, the sexual activity in the park and second, the sexual activity after the appellant took her to his home. He appreciated that consent and capacity must exist simultaneously to the sexual activity, and that the legal question for the *actus reus* was whether she consented in fact and had the capacity to consent for each sexual act performed that evening.
- [28] The trial judge was alive to the difficulty faced by a trier of fact when determining the *actus reus* of a sexual assault if the complainant has little or no memory about the sexual activity in question. Regarding the sexual activity in the park, the trial judge stressed how the complainant had no memory of the sexual acts, but for a few "flashes" and spoke of her state of mind as involving: partial amnesia, a blackout, few [translation] "clear memories" and "vague impressions", and, after consuming a mixed gin drink, "the complainant's memories were blurry" (paras. 6 and 32).

[29] Despite appearing to be alive to the importance of circumstantial evidence elsewhere in his reasons (at para. 91), the trial judge repeatedly stated that in relation to the sexual activity in the park, he had only the appellant's version of events (at paras. 61-62 and 76-78) and that the appellant was the only witness about what happened at the time of the sexual activity in question:

[translation] The accused's testimony is the only testimony left available to the Court regarding the complainant's state at the time of this sexual act. While the complainant reports having no memory of these moments, the accused describes a person who was fully consenting and able to consent to sex. [para. 78; see also para. 70.]

[30] At paragraph 83, the trial judge stated that the appellant's testimony — i.e., that the complainant consented and was capable of consent — was probative on the question of her consent. He properly noted that the question of consent must be analyzed subjectively, and only by reference to the complainant's state of mind (para. 59). His conclusion that the Crown had not established the absence of her consent for these activities is encapsulated in the following reasoning (at para. 83):

[translation] Here, the evidence from the accused is probative as to the complainant's consent. This evidence is not contradicted by the complainant, as she has no memory of the situation.

[31] First, based on the appellant's evidence that the complainant did and could consent, the judge held that the actus reus of sexual assault for the sexual activities in the park was not established beyond a reasonable doubt. The mother's evidence about her concerns from the phone call and the complainant's statement that she called her father was the only other evidence the trial judge considered in relation to the sexual activities in the park. He found this evidence was not determinative because it was commensurable with the evidence of the appellant, who had explained why he believed the calls to her parents were made. The judge cited *R. v. Kishayinew*, 2020 SCC 34, [2020] 3 S.C.R. 502 ("Kishayinew SCC"). He distinguished that case because he found that the circumstantial evidence did not lead to a single logical conclusion that the complainant did not consent or could not legally consent at the park.

[32] Second, the judge turned to the sexual acts in the appellant's home a few hours later. At the outset, the trial judge, for the first time, set out the test for finding capacity to consent from *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801 ("G.F. SCC"), at paras. 57-58. The judge found that the complainant lacked the capacity to consent at the time of those acts, based on her direct evidence that she could not control her body or exercise judgment and on the fact that when she woke up, the appellant was on top of her and her arms were around his neck. The trial judge found that the complainant's circumstantial evidence was equally important, including: her panicked state after regaining consciousness, her confusion and lack of memory upon waking the next day, her belief that she had been drugged, her decision to record the appellant's response to questions regarding whether he drugged her, and her attendance at the hospital for a medical assessment.

- [33] The trial judge stated that, having found incapacity, he did not need to determine whether the appellant administered a drug to the complainant, even though their testimony conflicted on the alleged drugging.
- [34] He did not explain what may have accounted for the complainant's change in capacity between the two relevant times.
- [35] As the *actus reus* had been established, the judge turned to whether the appellant had a guilty mind. The judge invoked *R. v. W. (D.)*, [1991] 1 S.C.R. 742, and accepted that the appellant held an honest but mistaken belief in the complainant's consent and her capacity to consent — or at least had a reasonable doubt as to the appellant's guilt. He acquitted the appellant of the offence as charged.
- [36] He conducted separate credibility assessments based on his understanding of what evidence was relevant and probative. The trial judge found the testimony of the complainant to be credible and reliable, generally and without apparent reservation. He did not state that he accepted only part or parts of her evidence. He acknowledged that while the appellant was not guilty, the complainant was a victim of sexual assault, having [translation] “experienced a criminal act in that she had sex without her consent” (para. 151).
- [37] The trial judge addressed the trustworthiness of the appellant's evidence only in the context of the second sexual act, within a discussion of *W. (D.)* and the defence of honest but mistaken belief in consent. While he noted that the appellant took time answering, was cautious and did not want to take a wrong step, he found that the appellant's testimony was both credible and reliable, and that it did not conflict with the complainant's testimony.
- [38] The trial judge concluded that the Crown had not proven the *actus reus* in relation to the first series of sexual acts in the park. He found that the complainant did not have the capacity to consent later, at the time of the second series of acts at his home. He then concluded that the appellant held an honest but mistaken belief in her consent and acquitted the appellant.

B. Court of Appeal for Quebec, 2024 QCCA 657

- [39] The majority of the Court of Appeal found that the trial judge made errors of law in how he treated the evidence.
- [40] First, the Court of Appeal found that, although the trial judge's reasons [translation] “may be open to interpretation”, he nevertheless improperly used the appellant's testimony as direct evidence of the complainant's subjective consent, contrary to the principles set out in this Court's decision in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (C.A. reasons, at para. 10).
- [41] Second, and more significantly, the trial judge failed to consider a large body of circumstantial evidence in the first series of sexual acts. The evidence of the complainant of what she felt throughout the evening was material to her subjective consent because it was found to be largely credible and reliable by the trial judge, and contradicted the evidence of

the appellant. The majority also noted that other relevant circumstantial evidence was not considered by the trial judge. This included the complainant having been found to have lacked capacity later in the evening and the contents of the audio recording taken by the complainant the next morning. In the recording, the appellant confirmed they had engaged in sexual activity the night before. The complainant told him she had memory gaps from the evening and asked if the appellant had put something in her drink to help her relax, which he denied. However, he seemed interested in what she remembered. The appellant described their sexual encounter as “animal” (trial reasons, at para. 50). The majority found that the errors of law committed were material, such that they could lead to a different verdict. This justified ordering a new trial, which they limited to the first sexual act.

- [42] Justice Mainville, writing in dissent, would have found that the trial judge properly considered all the evidence bearing on the complainant’s capacity to consent to the first sexual acts, including the complainant’s circumstantial evidence. He accepted that a complainant’s lack of memory regarding sexual relations may be taken into account on the issue of consent, along with the rest of the evidence. Justice Mainville concluded that, in this case, the trial judge was entitled to consider the appellant’s testimony on the issue of consent, as [translation] “[t]his is what allows a judge to find that they are not in a situation where only circumstantial evidence of the absence of consent has been adduced at trial” (para. 78). He further concluded that any error would not be material because the acquittal was based on the judge finding the appellant’s evidence to be credible. He would have dismissed the appeal.

IV. Standard of Review

- [43] This appeal comes before this Court as of right, following the Court of Appeal’s decision to allow the Crown’s appeal from acquittal on the charge of sexual assault (Criminal Code, s. 691(2)(a)). An appellate court’s jurisdiction to hear a Crown appeal from acquittal arises under s. 676(1) of the Code and is limited to errors on questions of law alone (R. v. Hodgson, 2024 SCC 25, at para. 19). What amounts to an error of law alone is based on the character of the error, rather than on its severity (R. v. George, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17; Hodgson, at para. 33).
- [44] Sometimes, questions of law are clearly identifiable, for example, where a purely legal conclusion is drawn from the evidence, without putting the evaluation of the evidence into question (M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales* 2025 (32nd ed. 2025), at para. 51.56). They may also arise where “the trial judge finds all the facts necessary to meet the test but errs in law in its application” (R. v. Chung, 2020 SCC 8, [2020] 1 S.C.R. 405, at para. 11).
- [45] In other cases, parsing questions of law from questions of fact or mixed fact and law is more complex. Legal errors of this nature may arise where there is “an assessment of the evidence based on a wrong legal principle” (R. v. J.M.H., 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 28-30; Chung, at para. 11). To help identify questions of law alone, J.M.H. sets out four

non-exhaustive grounds where “shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal” (para. 24). In the court below in the present case, the Crown argued that the trial judge failed to consider all the evidence in relation to the ultimate issue of guilt or innocence. The dissenting judge concluded, contrary to the majority, that the trial judge properly considered all the relevant evidence [translation] “but found that the probative value of the respondent’s testimony, which he believed, nevertheless allowed him to acquit” (para. 67).

- [46] Even in the presence of one of these errors, acquittals are not to be overturned lightly (see Hodgson, at para. 36; R. v. Cowan, 2021 SCC 45, [2021] 3 S.C.R. 323, at para. 46). The Crown must “convince the appellate court, to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred” (Hodgson, at para. 36, citing R. v. Graveline, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 15). The burden on the Crown is onerous (see Hodgson, at para. 36; Graveline, at paras. 14-15 and 19, quoting R. v. Morin, [1988] 2 S.C.R. 345 (“Morin 1988”), at p. 374; R. v. Sutton, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2).
- [47] When reviewing a trial judge’s assessment of the evidence, appellate courts must also bear in mind that trial judges are not to be held to a standard of perfection (R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55(7); R. v. R.E.M., 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 45; G.F. SCC, at para. 74; Hodgson, at para. 68; see also J.M.H., at para. 32). Trial judges are generally presumed to “know the law with which they work day in and day out” (R. v. Burns, [1994] 1 S.C.R. 656, at p. 664; R.E.M., at para. 45; G.F. SCC, at para. 74; Hodgson, at para. 68). The trial judge’s reasons are entitled to a “functional and contextual reading” with this presumption in mind (G.F. SCC, at para. 74).

V. Issues

- [48] Whether there were errors of law of sufficient seriousness to overturn an acquittal is at the heart of this appeal. As will be explained, this will turn on the interplay of the substantive requirements in the Code for sexual assault offences with evidentiary rules around direct and circumstantial evidence and their allowable uses, and how they both apply where a complainant lacks memory about what occurred.

VI. Analysis

- [49] I conclude that the trial judge fell into error in his evaluation of evidence in relation to the legal issues of whether consent and capacity to consent existed. These errors of law primarily impacted his treatment of the first sexual acts in the park, but they have much wider implications for how he reached his verdict. As his reasons demonstrate, the errors led the trial judge to fail to consider all the evidence which properly should have been taken into account on the issue of the appellant’s culpability or innocence for the offence of sexual assault.

- [50] I agree with the majority in the Court of Appeal that the trial judge misapprehended and misapplied the law of evidence in the actus reus stage by requiring direct evidence from the complainant when the alleged assault occurred. He committed another error when he then also failed to consider the complainant's circumstantial evidence when addressing her subjective consent and when determining the appellant's guilt or innocence. His legal conclusions on these matters should have been based on the totality of the relevant, admissible, credible and reliable evidence over the full time, including the complainant's evidence about her state of mind and physical state before, during and after any sexual activity that took place, as well as any other relevant temporally connected circumstantial evidence.
- [51] Second, these errors lead to an impermissibly siloed approach to the evidence. Had the trial judge applied the correct principles of law, he could not have proceeded on the erroneous basis that the only evidence he had about her subjective consent at the park was the uncontradicted testimony of the appellant. Under the correct legal principles, the trial judge ought to have considered a much wider range of relevant evidence, some of which conflicted with the appellant's testimony. His partial assessment of the relevant evidence calls into such serious question the soundness of his findings on credibility that the normal deference attached to such determinations is not warranted.
- [52] Further, the trial judge needed to reconcile the contradictory evidence of the complainant and appellant about whether he drugged her. While the exact cause of her physical and mental state was not a prerequisite to finding that she lacked capacity to consent, a finding on this disputed fact was crucial to whether the court could legitimately accept the appellant's assertion that he had an honest but reasonable belief in her communicated consent.
- [53] Finally, I agree with Bachand J.A. that the trial judge would have erred if he used the appellant's perceptions of the complainant's state of mind as direct evidence probative of her subjective consent.
- [54] Before explaining each error and why they had a material effect on the acquittal, it is important to explain certain foundational principles.

A. General Legal Framework

- [55] Respectfully, the trial judge erred by confusing what must be proved to establish non-consent and incapacity to consent, with how the law permits it to be established. Here, I first provide an overview of general principles that apply to a trial judge's consideration of evidence relating to these issues. I will then turn to the trial judge's errors in this case, where I will consider in further detail methods of proof on these issues where the complainant cannot fully recall the sexual activity in question.

- (1) Constituent Elements of Sexual Assault and the Difference Between Direct and Circumstantial Evidence
- [56] To establish sexual assault, the Crown must establish both constituent elements of the offence beyond a reasonable doubt: being the *actus reus* and the accused's *mens rea*. It may meet its burden through direct or circumstantial evidence, or any combination of both (H. C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at §§ 3:5-3:7; D. Stuart, *Canadian Criminal Law: A Treatise* (8th ed. 2020), at pp. 183-86 and 645-46).
- [57] The term “direct evidence” means evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption (R. v. Greenwood, 2022 NSCA 53, 415 C.C.C. (3d) 89, at para. 163; Black's Law Dictionary (12th ed. 2024), at p. 697, sub verbo “evidence”). Direct evidence is witness testimony as to “the precise fact which is the subject of the issue on trial” (S. N. Lederman, M. K. Fuerst and H. C. Stewart, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada* (6th ed. 2022), at ¶¶2.94-2.102). The testimony, if believed, establishes the fact testified to (see S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 31:2). It is put forward to directly establish a fact which resolves a matter. When accepted, it, by itself, proves a point. It requires no inference or deduction, additional supporting information or links to other pieces of evidence (M. Gourlay et al., *Modern Criminal Evidence* (2022), at p. 152). Direct evidence is based on the witness's senses, such as personal observations about what they saw, heard, or experienced.
- [58] Circumstantial evidence tends to establish those facts which are at issue at trial, but it does so indirectly (Hill, Tanovich and Strezos, at § 31:3). It concerns the proof of facts from which inferences can be drawn about the facts relevant to the legal issue under consideration (see Gourlay et al., at pp. 152-53; B. L. Berger, “The Rule in Hodge's Case: Rumours of its Death Are Greatly Exaggerated” (2005), 84 Can. Bar Rev. 47, at p. 50; D. M. Tanovich, “Angelis: Inductive Reasoning, Post-Offence Conduct and Intimate Femicide” (2013), 99 C.R. (6th) 338, at pp. 340-41). Each piece of evidence need not alone lead to the conclusion sought to be proved, and pieces of circumstantial evidence can be combined to justify the inference that a certain fact or state of mind exists (see Lederman, Fuerst and Stewart, at ¶¶2.96 and 2.102; see, e.g., R. v. White, [1998] 2 S.C.R. 72, at para. 21; R. v. Robinson, 2017 ONCA 645, 352 C.C.C. (3d) 503, at para. 36; R. v. Candir, 2009 ONCA 915, 250 C.C.C. (3d) 139, at para. 74).
- [59] While both forms of evidence are equally admissible and potentially probative, the benefit of direct evidence is that it contains only one source of possible error: “the unreliability of human testimony” (John v. The Queen, [1971] S.C.R. 781, at pp. 788 and 789-90, per Ritchie J.; see also Hill, Tanovich and Strezos, at § 31:2). The value of circumstantial evidence also depends on the credibility and reliability of the witness, but it may also suffer “from the difficulty of drawing a correct inference” from that evidence (John, at p. 788). The rationality, logic and strength of the requested inference can fall anywhere on the continuum between nonsensical and incontrovertible.

- [60] The law does not distinguish between circumstantial evidence and direct evidence in terms of weight or importance (Lederman, Fuerst and Stewart, at ¶2.94). Either type of evidence, or a combination of both, may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact. That said, in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, this Court set out the principles to follow where the Crown's case or an element of a criminal offence turns on circumstantial evidence. The inferences to be drawn from the circumstantial evidence depend on the nature of the evidence, the live issues and the theories of the parties. If after considering that evidence, satisfaction as to the existence of the elements of the offence is the only reasonable or rational inference, the trier of fact should draw the inference that the elements of the offence, and hence guilt, have been established beyond a reasonable doubt (see para. 41).
- (2) What the Crown Must Prove To Establish the Actus Reus of Sexual Assault
- [61] The actus reus of sexual assault comprises three elements: (1) touching; (2) the sexual nature of the contact; and (3) the absence of consent (*Ewanchuk*, at para. 25; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 87; *G.F. SCC*, at para. 25). As there was no dispute that touching of a sexual nature took place at both the park in Magog and the home in Bonsecours, the only part of the actus reus of sexual assault at issue in this appeal is the absence of consent. The legal requirements for establishing non-consent have been clarified over the years, both through legislative amendment and in the jurisprudence.
- [62] Consent is accorded a broad definition in the Code at s. 273.1(1) and requires “the voluntary agreement of the complainant to engage in the sexual activity in question”. At the actus reus stage, the question is whether “the complainant, in their mind, agreed to the sexual touching taking place” (*G.F. SCC*, at para. 29; *Ewanchuk*, at para. 48; *J.A.*, at para. 23; *R. v. Park*, [1995] 2 S.C.R. 836, at para. 16; *Barton*, at para. 89; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 44). Subjective consent “relates to the factual findings of the trier of fact about whether the complainant subjectively and voluntarily agreed to the sexual activity in question” (*G.F. SCC*, at para. 31; see also *Stewart*, at § 3:5). If there was no such agreement, the actus reus of sexual assault based on non-consent in fact will be established (*G.F. SCC*, at para. 31).
- [63] Section 273.1(2) of the Code further clarifies circumstances in which, in law, consent cannot be obtained. Relevant to this appeal, it provides that “no consent is obtained” if the complainant is unconscious (s. 273.1(2)(a.1)), or if “the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1)” (s. 273.1(2)(b); see also s. 265(3) for other requirements for a valid consent). Whether the complainant's subjective consent is prevented or vitiated is a question of law (s. 273.1(1.2)).

- [64] Section 273.1(2) was amended in 2018 to stipulate that an unconscious person is incapable of consenting. In s. 273.1(2)(a.1) and (b), the Code thus now provides two distinct ways in which no consent would be obtained where a complainant does not have a memory or cannot provide direct evidence relevant to consent: unconsciousness and incapacity for any reason other than unconsciousness. Reading the text of these provisions together in context, and in light of their purpose, it is clear that incapacity under s. 273.1(2)(b) is the broader residual category; that is, a complainant may be incapable of consenting in circumstances other than unconsciousness. Section 273.1(2)(b) thus expressly contemplates a category of persons who are conscious, or may not technically be “unconscious”, but are incapable of providing voluntary agreement to the sexual activity in question.
- [65] The Code does not define either the specific state of “unconsciousness” or the separate, more general category of “incapacity”. While this Court has not delineated the content or contours of these separate states, we recognized in G.F. that “[l]ike unconsciousness, incapacity deprives the complainant of the ability to formulate a subjective agreement” (para. 44). In J.A., this Court held that individuals must have the mental capacity to give meaningful consent in law, which at a minimum means that “an individual must be conscious throughout the sexual activity in order to provide the requisite consent” (paras. 3 and 36).
- [66] This Court in G.F. examined capacity to consent more generally, clarified its role and foundational concepts, set out important principles, and provided much helpful guidance. Consent and capacity to consent are “inextricably joined” such that subjective consent requires both that the complainant is capable of consent, and does in fact, consent (para. 2). Capacity is a precondition to subjective consent (para. 55). The absence of capacity to consent does not vitiate the complainant’s voluntary agreement to the sexual activity (see paras. 42-47). Instead, capacity to consent is part of what makes the consent voluntary (see para. 56). The Crown may establish the absence of subjective consent by proving either that the complainant was incapable of consenting or that she did not agree to the sexual activity in question (para. 22).
- [67] The capacity to consent requires the complainant to understand what is required for subjective consent. To establish capacity, the complainant must have “an operating mind capable of understanding each element of the sexual activity in question” at the time of the touching (G.F. SCC, at paras. 55-56; see also Barton, at para. 88; R. v. Hutchinson, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 54-57). A complainant who cannot say no, or does not know they have that choice, cannot form subjective consent (G.F. SCC, at para. 56). In G.F., the Court explained that a higher degree of capacity is required to be able to voluntarily agree to sexual activity than it is to refuse it (para. 62). The complainant must be aware and understand she has a choice to engage or refuse the sexual activity (para. 56).
- [68] In particular, the complainant must be capable of understanding: (1) the physical act; (2) that the act is sexual in nature; (3) the specific identity of the complainant’s partner or partners; and (4) that the complainant has the choice to refuse to participate in the sexual

activity. All four factors must be satisfied for a complainant to have capacity to consent (G.F. SCC, at paras. 57-58). If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of consent and the absence of subjective consent is established at the actus reus stage (para. 58).

[69] In G.F. SCC, the definition of what consent is and when it is not obtained are mutually reinforcing, and both are highlighted as essential components of the law's insistence on the complainant's subjective consent. Thus, subjective consent has two components: consent in fact and the capacity to consent. If the Crown establishes, beyond a reasonable doubt, either no consent in fact or an incapacity to consent, the non-consent element of the actus reus of sexual assault will be established (para. 31; see also paras. 32-33).

[70] A further substantive requirement is that "[c]onsent must be present at the time the sexual activity in question takes place" (Criminal Code, s. 273.1(1.1)). The requirement of contemporaneous and continuous consent includes the concurrent capacity to consent and applies to each specific sexual act when it occurs. It has as its foundation respect for a person's dignity, physical inviolability and equal sexual autonomy. As protected by law, individuals may choose whether or not to engage in sexual activity, which activities are allowed and when and under what conditions the activities may occur; consent may be revoked at any time (s. 273.1(2)(e); see also J.A., at paras. 40 and 43-44). Our law does not recognize advance consent or implied consent (Barton, at para. 99; G.F. SCC, at paras. 44-45 and 56; R. v. Kirkpatrick, 2022 SCC 33, [2022] 2 S.C.R. 480, at para. 53; Ewanchuk, at para. 31). The entire course of sexual activity need not be blanketed with a single finding of consent, non-consent or incapacity (G.F. SCC, at para. 63).

(3) Distinguishing What the Crown Must Prove From How It Can Be Established

[71] The need for both subjective consent and a voluntary agreement contemporaneous with the sexual activity are cornerstone concepts for the offence of sexual assault. While central to what the Crown must prove, they do not prescribe or limit how they can be established. It is important not to conflate these substantive requirements with the principles of evidence governing their proof. For example, that subjective consent is personal to the complainant does not mean that only direct evidence from the complainant about her state of mind at that time can be relevant to subjective consent. Similarly, that subjective consent must exist at the time the sexual activity occurred does not mean that only evidence about that precise moment in time would be relevant to consent in fact or capacity to consent.

[72] Triers of fact should not blur the object of proof and how it may be established. As stated by Professor Lisa Dufraimont:

Subjectivity and contemporaneity are features of the absence of consent on the facts, which is the object of proof. They are not requirements limiting the evidence that goes to consent. One might, however, mistakenly conclude that if consent must be subjective and contemporaneous then the evidence that goes to consent must share those features.

(“Myth, Inference and Evidence in Sexual Assault Trials” (2019), 44 Queen’s L.J. 316, at p. 323)

- [73] These important distinctions have often been misunderstood or misapplied. While the Crown must prove a lack of subjective consent to the sexual acts when they occur, the general principle is that direct evidence from the complainant about her state of mind at that precise moment is not required and that evidence regarding periods of time other than the moment of the alleged assault may be relevant. Circumstantial evidence is permitted and evidence of non-consent in fact and/or of an incapacity to consent can also come from sources other than the complainant (Dufraimont, at p. 325; see, e.g., *R. v. I. (C.)*, 2023 ONCA 576, 168 O.R. (3d) 575, at paras. 52-57; *R. v. F.B.P.*, 2019 ONCA 157, at paras. 4-10; *R. v. Basra*, 2009 BCCA 520, 71 C.R. (6th) 306, at paras. 37-40).
- [74] Confusion about the need for subjective and contemporaneous consent, and how they may be proven, often arises in cases like this one, in which the complainant cannot give direct evidence of her subjective consent. Generally, the governing principles of law, about both the substantive requirements of the actus reus and how the Crown may establish them, remain basically the same whether or not the complainant can provide direct evidence of her subjective consent. This is subject to the limitations on direct evidence from an accused regarding the complainant’s subjective state of mind, which I address below.
- [75] Apart from this constraint, the Crown may establish non-consent in fact or the incapacity to consent by any combination of direct and circumstantial evidence from any time frame that supports an inference that the complainant did not consent or have capacity at the time of the sexual activity in question. Realistically, when complainants cannot testify, recall or communicate their state of mind at the time of the sexual activity, it can be expected that the legal issues around the actus reus will rest almost exclusively on circumstantial evidence (see I. Grant and J. Benedet, “Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions” (2017), 37 C.R. (7th) 375; Stewart, at § 3:7).
- [76] I now turn to consider the trial judge’s errors, and will expand on these principles in relation to the particular errors alleged to have been committed in the trial judgment.

B. The Trial Judge Erred in Law by Failing To Consider All the Relevant Evidence on the Complainant’s Subjective Consent

- [77] At trial, and on appeal, the Crown argued this primarily as a case of incapacity in which the complainant’s level of impairment meant she was incapable of consenting throughout the evening under s. 273.1(2)(b). I agree with the majority of the Court of Appeal that a significant error of law occurred when the trial judge failed to assess the complainant’s subjective consent and particularly her capacity to consent, according to established legal principles. The assessment of capacity to consent is a cumulative assessment (G.F. SCC, at para. 62) and the trier of fact must consider the evidence as a whole, including relevant circumstantial evidence to make factual determinations relating to the complainant’s capacity to consent at the relevant time (*R. v. G.F.*, 2019 ONCA 493, 378 C.C.C. (3d) 518 (“G.F. ONCA”), at para. 38, rev’d on other grounds G.F. SCC; *R. v. Tubongbanua*, 2022 ONCA 601, at

paras. 28 and 31-32).

[78] In this section, I first outline the legal and evidentiary principles which govern when a complainant is unable to provide direct evidence of her non-consent or incapacity. I then explain the errors of law in this case, and particularly the failure to consider all of the relevant evidence in relation to the salient legal issues. The failure to consider the complainant's testimony led the trial judge to focus unduly on what were seen as the uncontradicted statements of the appellant when the record contained significant evidence relevant to the complainant's non-consent and incapacity. The problem is not how the trial judge weighed the evidence, but instead, it centres on what he did and did not place on the scale.

(1) Proving Absence of Subjective Consent When the Complainant Cannot Provide Direct Evidence

[79] As a starting premise, all relevant evidence is admissible, subject to recognized exclusionary rules (*R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at paras. 18-19; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Corbett*, [1988] 1 S.C.R. 670). Evidence is deemed to be logically relevant where "it has any tendency to prove or disprove a fact in issue" (*Grant*, at para. 18; *Corbett*, at p. 715, per La Forest J., dissenting). Relevance does not involve considerations of sufficiency of probative value (*R. v. Watson* (1996), 30 O.R. (3d) 161 (C.A.), at p. 172, citing *Morris v. The Queen*, [1983] 2 S.C.R. 190).

[80] Where adduced and found to be reliable, a trial judge must consider a complainant's circumstantial evidence of non-consent or incapacity in cases of memory loss or blackouts. Two decisions from this Court confirm that the Crown may establish the absence of subjective consent through the use of circumstantial evidence in such situations, whether from the complainant or other witnesses, and from times other than when the sexual activity was said to have occurred. This process is really no different from when the Crown tries to meet its burden of proving criminal intent when accused exercise their rights to silence and have not provided any direct evidence of their subjective states of mind (see, e.g., *Robinson*, at para. 36).

[81] In *R. v. James*, 2014 SCC 5, [2014] 1 S.C.R. 80 ("James SCC"), this Court confirmed that a new trial was required, in part on the basis that the trial judge had erred by failing to consider all of the circumstantial evidence relating to the complainant's non-consent. The complainant had consumed a considerable amount of alcohol and smoked cocaine on the date of the offence, and as a result experienced memory blackouts and likely lost consciousness (*R. v. James*, 2013 BCCA 159, 297 C.C.C. (3d) 106 ("James BCCA"), at paras. 2-11). Although she informed the accused she did not wish to have sexual relations with him (*James BCCA*, at para. 3), she awoke to find the accused performing a sexual act on her. She pushed him off her, went to the bathroom, and then to the motel office to contact the police, who described her as crying and upset (*James BCCA*, at paras. 10-11). This Court confirmed that the trial judge incorrectly failed to consider evidence of the multiple times the complainant told the

accused she was not interested in having in sexual relations with him, and the complainant's distraught behaviour when reporting the assault to the police (James SCC, at para. 5).

- [82] In *Kishayinew*, this Court recognized that when the complainant has had a memory loss or blackout, and cannot provide direct evidence of her subjective state of mind at the time of the alleged assault, the only evidence available on subjective consent will be circumstantial evidence. It acknowledged that the main impact of memory loss or blackout on a complainant's evidence is simply that it can lead to an absence of direct evidence on issues of consent and capacity, but that circumstantial evidence was still relevant (see *R. v. Kishayinew*, 2019 SKCA 127, 382 C.C.C. (3d) 560 ("*Kishayinew SKCA*"), at para. 75, per Tholl J.A., dissenting, rev'd on other grounds *Kishayinew SCC*).
- [83] This Court, at para. 1, affirmed the reasons of Tholl J.A. at the Court of Appeal and found that the trial judge's reasons made it clear that he was satisfied, beyond a reasonable doubt, that the complainant did not subjectively consent to any sexual activity with the accused. The complainant had consumed a significant amount of alcohol on the night of the offence and experienced two periods of memory blackout, one which encompassed the entire time the sexual act in question took place. She testified at length about the events that happened outside of her memory blackouts, including about her emotional state after the sexual act, her attitude towards the accused, and her beliefs about how she would have acted in the circumstances (*Kishayinew SKCA*, at paras. 68, 72 and 77).
- [84] The Court confirmed that the trial judge correctly considered the complainant's circumstantial evidence in the context of her memory loss, which permitted an inference that she had not consented to any touching: she was crying and disoriented; she did not want to leave with the accused; she did not consent to his attempted to kiss or touch her; she repeatedly attempted to leave the house; and upon recovering from her blackout, she was frightened, wanted to escape, and felt "weird down below" (*Kishayinew*, at para. 1).
- [85] In a portion of Tholl J.A.'s reasons endorsed by this Court, he confirmed that a complainant's evidence is not to be treated as unreliable merely because of a memory loss or blackout:
- ... a witness who has suffered memory blackouts cannot testify as to what occurred during periods when he or she has no memory but that factor alone does not render his or her other evidence unreliable. It creates an absence of direct evidence from the witness for the blackout periods but an absence of memory of certain portions of the crucial events does not automatically create an absence of reliability for the witness's other testimony. [Emphasis in original; para. 75.]
- [86] This Court has stated that the circumstantial evidence potentially relevant to subjective consent may include the emotional state of the complainant before and after the sexual act (see *Kishayinew*, at para. 1); the complainant's attitude towards the accused (see *James SCC*, at para. 5; see also *Fairy v. R.*, 2024 NBCA 92, 440 C.C.C. (3d) 377, at para. 42); actions of the complainant that are inconsistent with consent (see *Kishayinew*, at para. 1); and the complainant's beliefs and assumptions about how they would have acted in the

circumstances (see *Kishayinew SKCA*, at para. 77, dissent aff'd in *Kishayinew SCC*, at para. 1; see also *R. v. Kontzamanis*, 2011 BCCA 184, at para. 31; *R. v. Capewell*, 2020 BCCA 82, 386 C.C.C. (3d) 192, at para. 49; *R. v. Olotu*, 2016 SKCA 84, 338 C.C.C. (3d) 321 ("*Olotu SKCA*"), at para. 59, aff'd 2017 SCC 11, [2017] 1 S.C.R. 168; *R. v. Tariq*, 2016 ONCJ 614, 343 C.C.C. (3d) 87, at para. 70). Other courts have also considered any physical evidence inconsistent with consent (see *R. v. D.A.*, 2018 ONCJ 307, at paras. 49 and 54; *R. v. Okemaysim*, 2021 SKCA 33, at para. 43; *R. v. Trevor*, 2006 BCCA 91, 206 C.C.C. (3d) 370, at para. 14; *R. v. Czechowski*, 2020 BCCA 277, 396 C.C.C. (3d) 435, at paras. 9-12) and any actions of the accused that may be inconsistent with consent (see *Trevor*, at para. 14; *R. v. K. (U.)*, 2023 ONCA 587, 168 O.R. (3d) 321, at paras. 72-75 and 77; *R. v. Scott*, 2024 ONCJ 230, at para. 89; see also *D.A.*, at para. 48; *R. v. Garciacruz*, 2015 ONCA 27, 320 C.C.C. (3d) 414, at paras. 69-70; *Czechowski*, at para. 8).

(2) Proving Incapacity

- [87] When the complainant's capacity has been put in issue, the Code's inter-related provisions about consent in s. 265(3) and legal capacity in s. 273.1 work together and complement each other. A complainant who was conscious and capable of giving consent under s. 273.1(1) can usually provide direct evidence of her state of mind when the sexual activity took place. In such cases, the actus reus of consent will depend upon whether the fact-finder believes her when she states she subjectively did not want the sexual activity to take place (see *Ewanchuk*).
- [88] As this Court confirmed in *G.F.*, subjective consent requires the complainant to be capable of formulating a conscious agreement and understanding each element of the sexual activity (paras. 45 and 55). The question of capacity is thus also subjective, personal to the complainant, and inherently related to the complainant's internal state of mind at the time of the touching (see paras. 29, 56 and 65; see also *Ewanchuk*, at paras. 26-27; *J.A.*, at paras. 34, 36 and 43-44). If the complainant can describe her capacity to consent during any part of the sexual activity, that direct evidence is obviously relevant to establish her state of mind and if available and accepted, it may be cogent, compelling and convincing evidence of the level of her capacity to understand all four preconditions to consent outlined in *G.F.*
- [89] More often, however, when the complainant's capacity to consent is placed in issue, the facts which give rise to an allegation of legal incapacity, including unconsciousness (s. 273.1(2) (a.1) and (b)), may very well mean she cannot testify directly about her consent or capacity to consent when the sexual activity took place (*G.F. SCC*, at para. 65). Problems with respect to understanding the many potential causes of incapacity, a lack of memory or the inability to articulate her state of mind can be expected and will commonly arise where the complainant is drugged, intoxicated, ill or has certain physical or mental conditions. The evidentiary rules around establishing a person's ability or inability to consent recognize this reality.

- [90] The Crown may meet its burden of establishing incapacity beyond a reasonable doubt by tendering circumstantial evidence. Kishayinew and James recognized that where the complainant has no memory of the sexual act, and thus there is no direct evidence from the complainant about her capacity to understand the necessary elements of the sexual activity in question at the time it occurred, circumstantial evidence may be considered (see *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237; *R. v. B.S.B.*, 2008 BCSC 917, *aff'd* 2009 BCCA 520, 71 C.R. (6th) 306; *R. v. R. (J.)* (2006), 40 C.R. (6th) 97 (Ont. S.C.J.) (“*R. (J.) ONSC*”), *aff'd* 2008 ONCA 200, 59 C.R. (6th) 158 (“*R. (J.) ONCA*”); *Kontzamanis*; *Olotu SKCA*; *Capewell*; *R. v. Way*, 2022 ABCA 1, 38 Alta. L.R. (7th) 6).
- [91] Relevant circumstantial evidence can come from the complainant, including evidence about how she felt at other points in time, the testimony of any other witness with relevant information, and any documentary proof available.
- [92] A complainant may be able to provide direct evidence of her state of mind as to her capacity to consent at other points in time — that is, she can describe how she felt before or after the sexual activity in question. Such evidence would be classified as circumstantial evidence of the complainant’s state of mind regarding her capacity to consent at the legally relevant time of the sexual activity. This is because it invites the fact-finder to draw inferences that she felt the same way and was in a similar state at a different point in time: when the sexual activity in question took place. Where the complainant has memories relating to the time before and after the sexual act, a court must evaluate the credibility and reliability of this evidence (*D.A.*, at para. 47).
- [93] Evidence adduced by the complainant relating to what occurred before and after the sexual act is admissible as circumstantial evidence of the complainant’s capacity at the time of the sexual act (see *R. (J.) ONSC*, at para. 20, *aff'd* *R. (J.) ONCA*; *J.A.*, at para. 46). Subsequent circumstantial evidence may also be relevant to the complainant’s state of mind at the time of the sexual activity (*F.B.P.*, at paras. 7-8; *I. (C.)*, at para. 53).
- [94] Complainants who experience memory loss can still provide relevant — and even determinative — evidence relevant to incapacity, as they can about consent in fact. In *G.F.*, this Court firmly rejected the accused’s argument that the complainant’s awareness and memory of the sexual activity demonstrated that she was capable of consenting, and confirmed that the complainant’s confused and intoxicated state was evidence of incapacity (paras. 63 and 65; see also *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 34, where the Court confirmed that “[t]he effect of intoxication on a witness’s testimony is not all or nothing”).

- [95] In addition, since, as stated in J.A., consent requires “a ‘capable’ or operating mind, able to evaluate each and every sexual act committed” (para. 43), courts must consider evidence of outward signs of impairment when assessing capacity, including: loss of gross motor skills, vomiting, loss of bladder control, and significantly impaired speech (see E. Craig, “Sexual Assault and Intoxication: Defining (In)Capacity to Consent” (2020), 98 Can. Bar Rev. 70, at p. 91; G.F. SCC, at para. 86; R. v. Kaczmarek, 2021 ONCA 771, 407 C.C.C. (3d) 34, at paras. 41-44).
- [96] Finally, I note that, although proof that the complainant experienced periods of lack of memory alone cannot by itself establish a lack of capacity, it is nonetheless relevant evidence on the issue (G.F. SCC, at para. 86; Kaczmarek, at para. 34; R. v. C.P., 2019 ONCA 85, 373 C.C.C. (3d) 244, at para. 65, aff’d 2021 SCC 19, [2021] 1 S.C.R. 679). Memory loss or a “blackout” itself can be considered circumstantial evidence that, when considered with the whole of the evidence, may permit an inference to be drawn about whether a complainant was capable of consent at the relevant time (R. (J.) ONSC, at para. 20, aff’d in R. (J.) ONCA).
- [97] Even in cases of complete “blackout”, where there is an absence of direct evidence, the case law supports that a conviction could be sustained based on circumstantial evidence alone (see, e.g., G.F. SCC; F.B.P.; I. (C.); R. v. Evans, 2023 ONCA 365, 88 C.R. (7th) 372; R. v. Kownirk, 2023 NUCA 2, 88 C.R. (7th) 122; Kaczmarek). In such cases of circumstantial evidence, the judge or jury must be satisfied that guilt is the only available inference on the evidence (see Kishayinew; R. v. Green, 2024 ABCA 118).
- [98] In sum, when coming to a determination, the court must consider all the relevant evidence to determine whether the complainant lacked the capacity to consent at the time the sexual act occurred (Ewanchuk, at para. 26; J.A., at para. 46; G.F. ONCA, at para. 38, rev’d on other grounds G.F. SCC; Tubongbanua, at paras. 28 and 31-32). When assessing whether the Crown has met its burden to establish incapacity, if the complainant has no recall of the sexual activity in question, the trier of fact is also obliged to consider all credible and reliable circumstantial evidence, whether from the complainant or other witnesses.

(3) Errors of Law

- [99] I agree with the appellant that the trial judge cited some of the above principles and cases; however, he erred in law when he failed to apply them to the available evidence. As I explain, reading the judgment as a whole, fairly and functionally, the trial judge did not consider all the relevant evidence to determine whether the complainant lacked the capacity to consent when the sexual acts occurred, especially those in the park.
- [100] First, the trial judge erred in law by treating direct evidence from the complainant about her state of mind as a requirement for determining her incapacity and absence of subjective consent. Second, he failed to understand that her circumstantial evidence was legally relevant evidence independently of whether or not she could provide any direct evidence and thus confused the type and timing of what evidence was admissible, relevant and probative to assess capacity to consent and consent in fact. In short, the trial judge confused what must be proven with the manner in which the law allows it to be

established. All pertinent evidence should have been considered, including her statements about her state of mind and physical condition throughout the evening.

(a) Treated Direct Evidence as a Legal Requirement

[101] I agree with the Crown and Court of Appeal that the trial judge mistook the complainant's lack of direct evidence at the moment of sexual touching as a lack of any evidence relating to her state of mind at the time of the sexual act. The trial judge erred in law by requiring direct evidence from the complainant to establish incapacity or non-consent and misapprehending a legal principle by equating the complainant's lack of direct evidence to a lack of any evidence of her capacity to consent at the time of the first series of sexual acts. This is apparent from how he approached and analyzed both series of sexual acts.

[102] Regarding the sexual activities in the park, the trial judge stated that he had only the evidence of the appellant about the complainant's state at the time of the sexual activity on the picnic table, and he concluded that the *actus reus* had not been established beyond a reasonable doubt. This statement and his conclusion demonstrate that the focus was limited to direct evidence at that exact period of time, and not the totality of the relevant evidence in the wider circumstances of the case. It is true that the complainant only had a vague recollection of some physical proximity with the appellant but no memory of the kissing, touching or digital penetration that occurred. However, the trial judge did not consider the evidence about what she could remember.

[103] Similarly, the statement that the appellant's evidence was uncontradicted concentrates on direct evidence, again limited to that exact moment. Given the multiple noteworthy inconsistencies in the evidence of the complainant and the appellant, many of which the appellant sought to explain, it cannot seriously be asserted that the appellant's evidence was "uncontradicted", unless the trial judge meant uncontradicted by direct evidence confined to that particular time frame.

[104] The trial judge used the same erroneous analytical approach, but reached a different conclusion, in relation to the second series of sexual acts at the appellant's home. The trial judge found the complainant lacked capacity to consent when she managed to provide some direct evidence about her state at the time of that sexual activity. She testified that when she awoke, she recalled that the appellant was naked and on top of her and that she placed her hands around his neck. Only then did the trial judge look to and factor in other circumstantial evidence, like her reaction to the events.

[105] The similar analytical approach taken to both series of events supports the Crown's argument that the trial judge would have accepted nothing short of direct evidence of incapacity, as the only difference between the two time frames was that the complainant provided direct evidence about the sexual activity at his home. The trial judge appears to have determined that the availability of some direct evidence from the complainant about her state of capacity and her non-consent was the key necessary to unlock his ability to consider the other circumstantial evidence. Referring to her memories of flashes of what

occurred at this home, the trial judge accepted that incapacity had been proven beyond a reasonable doubt. When the complainant could only recall a vague impression of physical proximity in the park, the trial judge did not canvass or assess her incapacity or non-consent in relation to her other evidence.

[106] As a result of this insistence on direct evidence, it appears that the trial judge did not engage in an analysis of the complainant's capacity to consent at the time of the first sexual act. Immediately after concluding that there was only evidence from the appellant that was "probative" of consent, he proceeded to assess the second series of sexual acts, and for the first time reviewed the test for capacity to consent in relation to the second series of sexual acts, set out by this Court in G.F., at paras. 57-58 (see trial reasons, at para. 88).

[107] While G.F. SCC instructs that there is no "order-of-operations" dictating whether to first consider consent or capacity (para. 52; see also para. 24), it never said it is a good idea to treat consent in fact and incapacity as a composite concept (para. 47). Where both are live issues, the trial judge needs to independently assess and determine whether the Crown has proven beyond a reasonable doubt either that the complainant did not consent in fact (i.e., subjectively she did not want the acts to take place), or that she lacked the capacity to consent under any part of s. 273.1. Even though connected, they are still two separate pathways to establish non-consent and, methodologically, it promotes clarity and transparency to keep the Code's separate legal concepts analytically distinct. A trier of fact must consider each or both, as circumstances require. When, as here, the Crown's case is firmly based on her incapacity, a reviewing court will be interested in how the discrete issue of capacity has been resolved.

(b) Failure To Consider the Complainant's Circumstantial Evidence

[108] Relatedly, the trial judge also did not engage with the complainant's evidence in the first series of sexual acts. The trial judge cited relevant authority and relied upon circumstantial evidence about the second series of sexual acts to find that the complainant had no capacity to consent at the appellant's home. That said, he did not apply those principles to the complainant's circumstantial evidence about the events in the park. The trial judge analyzed non-consent and incapacity without reference to what the complainant could remember about what happened that night.

[109] Contrary to the views of the trial judge that the appellant's version of events in the park was uncontradicted, the complainant adduced considerable evidence relating to her physical and mental state then and throughout the evening. In law, this evidence ought to have informed the analysis of whether she was capable of consent at the relevant time. She testified with clear recall about what occurred before consuming the gin drink and why she believed she had been drugged. She testified that she began experiencing memory loss after consuming the gin drink. She had sporadic but specific recollections of certain subsequent things, which constituted a significant body of evidence.

- [110] The complainant told the court how the drink made her head spin and she was unable to remain standing and was like a limp rag who could not control her body. She recalled falling on the large rocks near the lake, feeling severe pain, and being confused as to why or how she arrived at that location. She recalled a total absence of control over her body, such that the appellant carried her over his shoulder like a sack of potatoes, from the park to his car. She said she was completely absent. She recalled calling her mother and saying she would sleep in the car because she did not want to go to the appellant's home. She also recalled vomiting upon arrival at the appellant's car. She woke up in the parking lot at his residence and was very confused, as she thought she was at the lake. She was in pain at his house, had a compelling need to sleep and did in fact fall asleep.
- [111] The complainant testified that she awoke at some point to see a pornographic film playing on the television screen, and the appellant, completely naked, then, in the complainant's own words, "s'est installé sur moi" ([translation] "got up on top of me") (A.R., vol. II, at p. 135). She instinctively put her arms around his neck but described herself as "molle comme de la guenille" ([translation] "like a limp rag"), tired and without judgment of the situation (A.R., vol. II, at p. 135; see also trial reasons, at paras. 44-45, and at paras. 87, 137 and 150). She testified that: "C'était juste . . . il se passait ça, puis c'est ça" ([translation] "It was just . . . that's what was happening, and that's it") (A.R., vol. II, at p. 135). The trial judge accepted this testimony in finding that the appellant [translation] "got up on top of her" (trial reasons, at para. 44).
- [112] The complainant woke up at 5:30 the next morning, panicked and without clothing on the bottom half of her body, with the appellant naked beside her in his bed. She said she was shaking from her head to her toes, never wanted to be at his home, and was upset because she did not have her car. She believed from the damaged condition of her clothing that some had been removed by force. She testified that, after she awoke, she believed the appellant had drugged her. She taped a conversation in which she tried to get the appellant to admit he drugged her, and in which she told him she felt that she [translation] "was no longer there, no longer there at all", during the sexual activities he described, which he affirmed (trial reasons, at para. 41). She called a friend, texted her mother, and went to the hospital for a medical examination.
- [113] The complainant's lack of memory at the time of the first sexual act did not mean this extensive evidence lost its relevance or probative force. It is circumstantial evidence from which the trier of fact could draw inferences regarding the complainant's capacity at the time of the sexual activity at both the park and his home. As the trial judge found her to be credible and reliable, he ought to have considered the complainant's testimony about what happened in the park, as well as what she could remember about how she felt throughout the evening and in the morning when assessing her capacity to consent (and her consent in fact).

- [114] Had the trial judge applied the correct legal test for the principles of proof, he could not have proceeded on the basis that all he had in evidence about the sexual activity in the park was the appellant's uncontradicted testimony, and the telephone calls to the mother and father. It was open to the trial judge to prefer the evidence of the appellant over that of the mother, but it was not open for him to reach a conclusion without also considering the credible, reliable, and relevant evidence from the complainant about the facts and legal conclusions at issue. Her extensive evidence, if taken into consideration, also calls into question the trial judge's finding that the limited circumstantial evidence he considered was insufficient to satisfy him beyond a reasonable doubt.
- [115] Here, ample circumstantial evidence should have been seen as relevant to the complainant's incapacity and non-consent in fact. For example, while the trial judge recognized that the complainant never intended to have sexual relations with the appellant and deplored the fact that they occurred, he did not seem to consider this as a relevant factor when assessing her subjective consent or capacity to consent. As in *James*, the trial judge also failed to consider circumstantial evidence — such as, among other things, the complainant's attitude towards the appellant (see, e.g., *James* SCC, at para. 5). She ended the romantic relationship, twice refused invitations to sleep at his home, and she planned to sleep in her own bed on that night of the alleged sexual assault. She told her mother that she did not want to sleep at the appellant's home that night. The next morning, she recalled that she had not wanted to go to the appellant's home. A few days after the alleged assault, she texted the appellant, indicating that she had not wanted to participate in sexual relations with him that night.
- [116] As the appellant points out, the trial judge did recognize the subsequent emotional state and actions of the complainant; however, he did not consider this as a relevant factor when assessing her subjective consent or capacity to consent to the sexual activity in the park. The trial judge also erred by failing to consider the complainant's emotional state before and after the sexual activity (*Kishayinew* SCC, at para. 1; D.A., at para. 48), and the actions of the complainant that were inconsistent with consent (*Kishayinew* SCC, at para. 1; D.A., at paras. 45-46 and 48; *Kishayinew* SKCA, at para. 77; *Trevor*, at para. 14; *Czechowski*, at para. 8).
- [117] The trial judge erred by failing to consider the complainant's circumstantial evidence relevant to her capacity to consent at the time of the series of sexual acts in the park. Circumstantial evidence is not inherently untrustworthy, nor is it considered "second class" evidence (*R. v. Papasotiriou*, 2023 ONCA 358, 166 O.R. (3d) 266, at para. 45). Importantly, the Code states that the question of whether a complainant had the capacity to consent is a question of law (s. 273.1(1.2) and (2)).

C. The Trial Judge Erred in Law by Failing To Consider the Evidence as a Whole

- [118] As a result of the errors described above, the trial judge also failed to consider all of the evidence in relation to the guilt or innocence of the appellant.
- [119] The trial judge's narrow focus on the need for direct evidence of non-consent in fact or incapacity, and the separate but compounding failure to consider all relevant circumstantial evidence — both before and after the sexual activity, and in both locations — meant that the trial judge did not consider the totality of the evidence on issues central to guilt or innocence. Doing so is an error of law, as evidence must be considered as a whole (see J.M.H., at paras. 31-32; see also R. v. B. (G.), [1990] 2 S.C.R. 57, at pp. 75-77 and 79; R. v. Morin, [1992] 3 S.C.R. 286 (“Morin 1992”), at p. 296). Had the trial judge assessed all of the evidence based on correct legal principles, he would have been required to weigh all the evidence, direct and circumstantial, from all witnesses relating to the entire time the complainant and the appellant were together to determine the innocence or guilt of the appellant.
- [120] I recognize that a trial judge need not refer to every item of evidence considered, or detail every item of evidence assessed. Appellate courts must exercise caution to avoid interfering in perceived deficiencies of a trial judge's reasons and inventing a ground of “unreasonable acquittal”, which does not exist under the Code (R. v. Walker, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 2; see also J.M.H., at para. 32). Moreover, the mere failure to record the fact of considering all of the evidence is not a proper basis for recognizing an error of law (Morin 1992, at p. 296).
- [121] However, with respect, in this case, the trial judge's multiple errors reflected an erroneous understanding of the law about categories of evidence relevant to and admissible on key issues, which should have been considered, but were not (see Chung, at para. 11). To be clear, no error arises solely from analyzing the allegations based on the two time frames in which the sexual activity occurred: on the contrary, it respects the need for contemporaneous consent. However, serious ambiguities and issues arise because principles of law and the relevant evidence were often considered in silos, and not as a whole. The analysis should have proceeded on the basis that all the complainant's evidence of what took place in the park and later at the appellant's home was potentially relevant to her consent in fact and capacity to consent at both times. While the Crown bears the onus for proving an offence to the criminal standard, “the prosecution is entitled to a legally correct approach to the evidence that bears upon the determination of whether the onus has been met” (R. v. Rudge, 2011 ONCA 791, 108 O.R. (3d) 161, at para. 47).
- [122] Perhaps most significantly, the trial judge's consideration of the evidence in silos resulted in the apparently inconsistent finding that the complainant was capable of consent at the park, but lacked capacity at his home a few hours later. The evidence was that the only intoxicants ingested by the appellant and the complainant were consumed before the sexual activity in the park. The complainant testified that her loss of memory and control of

her body began after she consumed the gin drink and continued until early the next morning. Given the facts, the finding of incapacity at the time of the second sexual act is relevant circumstantial evidence to her capacity at the time of the first. To be clear, I do not suggest that the trial judge could have drawn only inferences consistent with guilt from the evidence. However, applying correct legal principles, the trial judge was required to consider all admissible evidence as a whole, which would have required him to consider any impact of his finding of incapacity later in the evening on his findings about the complainant's physical and mental state in the park, and vice versa. Instead, he incorrectly proceeded on the basis that the only evidence available about the complainant's state of mind at the time of the sexual acts was the uncontradicted testimony of the appellant.

[123] Further, had all relevant circumstantial evidence been considered, the trial judge would have been required to reconcile important contradictory testimony of the complainant and appellant in a manner that may have led to very different findings of credibility. By considering the evidence of incapacity in a fragmented way, the trial judge was unable to assess the Crown's case in light of the totality of the evidence (see Rudge, at paras. 65-66).

D. The Trial Judge Would Also Have Erred in Law by Relying on the Appellant's Testimony as Direct Evidence of the Complainant's Subjective Consent

[124] My conclusions above are sufficient to dispose of this appeal. However, the majority in the court below also addressed the trial judge's apparent reliance on the appellant's testimony as direct evidence of the complainant's subjective consent (see C.A. reasons, at para. 10). Before this Court, the Crown took the position that the appellant's evidence was treated as direct evidence of the complainant's state of mind.

[125] I agree with Bachand J.A. that the trial judgment, especially para. 83, is susceptible of divergent interpretations on whether the trial judge improperly used the appellant's evidence as direct evidence of the complainant's capacity. Given the other errors, I need not decide this point. That said, it would have been an error to treat the appellant's testimony as a direct source of evidence, probative of the complainant's state of mind during the sexual activity in the park.

[126] This Court has recognized that it is an error of law to rely on an accused's testimony as admissible, direct evidence on the issue of the complainant's subjective consent (Ewanchuk, at paras. 29-30; J.A., at paras. 44-45). This is because the absence of consent, which is a question of fact, is determined subjectively, by reference to the complainant's internal state of mind toward the touching when it occurred (Ewanchuk, at para. 26; J.A., at para. 34; Barton, at para. 88). Consent is a subjective state of mind, entirely personal to the complainant (G.F. SCC, at para. 1). At the actus reus stage, the key question is whether "the complainant, in their mind, agreed to the sexual touching taking place" (para. 29; Ewanchuk, at para. 48; J.A., at para. 23; Park, at para. 16; Barton, at para. 89; Goldfinch, at para. 44).

[127] Only the complainant can provide direct evidence of her subjective consent at the time of the sexual act (Ewanchuk, at para. 29). This Court in Ewanchuk was unequivocal that, for the purpose of the actus reus, the accused's perception of the complainant's state of mind is irrelevant (at para. 30):

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the mens rea stage of the inquiry. [Emphasis added.]

[128] This longstanding principle of consent in sexual assault law has been repeatedly affirmed by this Court (R. v. Williams, 2003 SCC 41, [2003] 2 S.C.R. 134, at para. 37; J.A., at paras. 44-48; Barton, at para. 89; G.F., at para. 29; Kirkpatrick, at para. 28). Similarly, it has also been universally adopted and affirmed by provincial and territorial appellate courts (R. v. Nauya, 2021 NUCA 1, at para. 12; R. v. Roth, 2020 BCCA 240, 66 C.R. (7th) 107, at paras. 99-100; R. v. Dippel, 2011 ABCA 129, 281 C.C.C. (3d) 33, at para. 11; R. v. Bileski, 2022 SKCA 150, at paras. 2 and 21-23; R. v. Derksen, 2023 MBCA 85, 431 C.C.C. (3d) 517, at para. 26; R. v. Othman, 2025 ONCA 449, at para. 48; Mentor v. R., 2022 QCCA 1270, 84 C.R. (7th) 355, at paras. 54-55; R. v. C.L., 2022 NLCA 53, 418 C.C.C. (3d) 305, at para. 24; Foster v. R., 2020 NBCA 7, 61 C.R. (7th) 51, at para. 36; R. v. Percy, 2020 NSCA 11, 61 C.R. (7th) 7, at para. 105; R. v. MacGillivray, 2018 PECA 29, 369 C.C.C. (3d) 454, at paras. 16-17; R. v. Saha, 2025 ONCA 488, at paras. 12-15). The accused is thus legally unable to provide direct evidence on the presence or absence of the complainant's subjective consent (see Ewanchuk, at paras. 29-30; Barton, at para. 89). Simply put, trial judges should not prefer the evidence of an accused, merely because the complainant experienced memory loss at the relevant time. At the actus reus stage for sexual assault, the appellant's testimony about what he saw or heard is not admissible as direct evidence to establish the complainant's subjective consent.

E. Did the Errors of Law Have a Material Bearing on the Acquittal?

[129] I agree with the majority of the Court of Appeal that the verdict of acquittal would not necessarily have been the same but for the errors identified (para. 28, citing Graveline, at para. 14).

[130] This Court has made clear that even where errors of law are identified on appeal, acquittals are not overturned lightly (see Hodgson, at para. 36; Cowan, at para. 46; R. v. T.J.F., 2024 SCC 38, at para. 115; see also Graveline, at para. 16, citing Sutton, at para. 2). For the acquittal to merit interference, the Crown must "convince the appellate court, to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred" (Hodgson, at para. 36, citing Graveline, at para. 15, and Sutton, at para. 2; see also T.J.F., at para. 115; and Vézeau v. The Queen, [1977] 2 S.C.R. 277, at p. 292). To do so, the standard requires more than "an abstract or purely hypothetical

possibility that the accused would have been convicted but for the error of law”, but it need not amount to a finding that “the verdict would necessarily have been different” (Graveline, at para. 14; see also George, at para. 27; Hodgson, at para. 36; T.J.F., at para. 115). The burden on the Crown is onerous (see Hodgson, at para. 36; Graveline, at paras. 14-15 and 19, quoting Morin 1988, at p. 374; see also Sutton, at para. 2; T.J.F., at para. 115).

- [131] In my view, the trial judge’s errors of law would have had a material bearing on the acquittal. Failing to consider the circumstantial evidence of the complainant on capacity and subjective consent to the first series of sexual acts goes directly to the ultimate question of the guilt or innocence of the appellant. If the relevant evidence were to be assessed and weighed under the correct evidentiary and legal principles, the outcome may not have been the same. Moreover, reliance on the appellant’s evidence as evidence of the complainant’s state of mind at the time of the sexual act is an error that goes to the core of the consent analysis.
- [132] The appellant argues that any errors are not material because — unlike other cases — he tendered evidence found to be credible and reliable under the first step of W. (D.), and a trier of fact must acquit if they believe the evidence of the accused (p. 758). He suggests that the judge’s findings on the appellant’s credibility were determinative and did not require further discussion of the complainant’s evidence.
- [133] I do not agree, though I recognize the deference normally granted to a trial judge’s assessment of credibility (R. v. N.S., 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 25; Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 24; R. v. W. (R.), [1992] 2 S.C.R. 122, at p. 131).
- [134] The Crown emphasizes that the finding that the complainant was credible supports, to a reasonable degree of certainty, that the verdict would not necessarily have been the same but for the errors. It relies on the fact that the trial judge found the complainant credible and reliable and on the fact that her evidence was corroborated by her mother. The judge preferred the complainant’s evidence over that of the appellant by finding she lacked capacity at his home. Given that the complainant’s and the appellant’s testimonies were contradictory on the question of her capacity in the park, the complainant’s version might be preferred over the appellant’s. I accept those arguments. I also agree that the judge’s assessment of the appellant’s credibility is directly affected by failing to consider the totality of the complainant’s evidence and to weigh it against the conflicting testimony of the appellant. The assessment of the appellant’s evidence may have led to a different result had the judge considered the contradictory, circumstantial evidence of the complainant.
- [135] Failing to consider all of the admissible evidence also undermined the trial judge’s credibility assessment of the appellant, as his analysis of the appellant’s evidence was tainted by his multiple compounding legal errors (see, e.g., T.J.F., at paras. 116-17). Further, given that the trial judge was required to consider the appellant’s evidence in light of all the evidence, including the complainant’s contradictory evidence, as well as her circumstantial

evidence of incapacity, it is not possible to separate the trial judge's acquittal of the appellant from his flawed reasoning. The verdict would not necessarily have been the same in the absence of the trial judge's legal errors.

- [136] Any of these errors would have been sufficiently serious to set aside the acquittal and order a new trial. If all the evidence had been considered according to law, not only would that have had a material impact on how the trial judge assessed the first series of sexual acts, it would also have consequences for other key aspects of the judgment. These errors are so material they call into serious question not only the trial judge's credibility assessment, but also his treatment of the appellant's assertion of an honest but mistaken belief at the *mens rea* stage of the analysis.
- [137] For example, if the trial judge had properly recognized that the complainant's evidence of incapacity at the park was relevant, he would have had to consider and reconcile the apparently contradictory evidence of the complainant and the appellant about that time period. They provided very different versions of events. The complainant testified that she had no control over her body, fell on the rocks and injured herself, her head was spinning, she physically could not walk to the car, she felt that she [translation] "was no longer there, no longer there at all", she was carried like a sack of potatoes to his vehicle and she vomited at the car. The appellant stated she was willing, physically able, physiologically present and capable of consenting throughout. Based on the full consideration of the relevant evidence, it would have been open for a trier of fact to come to a different conclusion about consent, capacity and credibility.
- [138] The complainant's full evidence would have also related to the appellant's ability to claim an honest but mistaken view of her consent. The focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (Ewanchuk, at para. 47; see also G.F. SCC, at para. 25).
- [139] Before an accused may assert an honest but mistaken belief in communicated consent, the defence must have an air of reality — meaning there is evidence upon which a properly instructed jury, acting reasonably, could acquit if it believed the evidence to be true (R. v. Cinous, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 65). A bare assertion by the accused that he believed the complainant was consenting will not lend an air of reality to an honest but mistaken belief in communicated consent. Rather, this assertion must be "supported to some degree by other evidence or circumstances" (R. v. Osolin, [1993] 4 S.C.R. 595, at pp. 648-49, quoting R. v. Bulmer, [1987] 1 S.C.R. 782, at p. 790, as quoted in R. v. Esau, [1997] 2 S.C.R. 777, at para. 14). Evidence raising an air of reality can come from the accused, the complainant, other persons, the factual circumstances of the case or "any other evidential source on the record" (Cinous, at para. 53).

- [140] Although the trial judge did not first address whether there was an air of reality to the appellant's defence, the complainant's full evidence would have been pertinent to this issue had the requisite analysis taken place. It may also have affected whether the appellant took reasonable steps; another legal issue left unaddressed by the trial judge.
- [141] Most crucially, if the complainant's evidence had been considered, as it should have been, there would have been a serious issue as to whether the appellant could have asserted or succeeded in this defence. The complainant, found to be credible and reliable, testified that she believed the appellant drugged her. The appellant denied doing so. This is a clear conflict of testimony on an important point. Consistent with the Crown's theory of incapacity by way of extreme intoxication, the trial judge did not believe it was necessary to determine whether the appellant placed drugs in her gin drink as the *actus reus* of the offence had been made out for the sexual activities at his home. While the trial judge may not have needed to reconcile this conflict to find she lacked capacity to consent, a finding on this fact was crucial to whether the court could lawfully accept the appellant's assertion that he had an honest but reasonable belief in her communicated consent. Anyone who administers a stupefying substance to facilitate sexual activity cannot have the requisite honest belief and may otherwise be legally disentitled from relying on this defence.
- [142] For the reasons above, I find that the trial judge's errors undermine the foundation of the verdict. The errors had a material bearing on the acquittal (Graveline, at para. 14), and the Court of Appeal was justified in ordering a new trial.

VII. Remedy and Disposition

- [143] The next issue concerns the appropriate scope of the new trial. The Court of Appeal divided on whether s. 686(8) could be used to limit the new trial to only the first event of alleged sexual assault at the park in Magog. Before the Court of Appeal, the Crown argued, citing Cowan, that an order for a full new trial was the proper remedy. Instead, by way of an ancillary order, the majority limited the new trial to the sexual activity in the park only. Mainville J.A. disagreed and concluded that, given the original indictment and s. 11(h) of the Canadian Charter of Rights and Freedoms, a new trial could not be limited to the events in Magog and that it would be inappropriate to use the extraordinary amending powers of s. 683(1)(g) of the Code to create a new multiple-count indictment (C.A. reasons, at paras. 93-100 and 102).
- [144] At the hearing before this Court, the Crown explained that [translation] "we decided not to appeal on the issue of limiting the new trial" (transcript, at p. 51). According to the Crown, [translation] "[w]e wanted the Supreme Court to be able to deal with the case quickly" (p. 51). As such, the Crown exercised its prosecutorial discretion against seeking leave to appeal against the Court of Appeal's order (R. v. Varennes, 2025 SCC 22, at para. 48, citing R. v. Anderson, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 44). Given the absence of a Crown cross-appeal and relevant argument, this Court's ability to intervene on the appropriate remedy is restricted, as the appellant has the right to fair notice and the right to be heard.

[145] As a result, I would leave for another day the question of whether the Court of Appeal was correct in concluding that Cowan fails to apply in these circumstances (see C.A. reasons, at paras. 25-36 (majority) and at paras. 95-98 (dissent)).

[146] For these reasons, I would dismiss the appeal.

English version of the reasons delivered by

The Chief Justice and Côté, Rowe and Moreau JJ. —

[147] This appeal as of right concerns the Crown's rights of appeal from an acquittal. A majority of the Quebec Court of Appeal accepted the Crown's argument that the trial judge had failed to consider, in his reasons, all of the evidence relating to the ultimate issue of the appellant's guilt or innocence. A review of the law applicable in this regard is in order. We will then set out the reasons why the appeal should be allowed and the verdict of acquittal restored.

I. The Crown's Limited Rights of Appeal From an Acquittal

[148] Section 676(1) of the Criminal Code, R.S.C. 1985, c. C-46, provides that Crown appeals from acquittals are limited to questions of law alone. The Crown may not appeal what it regards as an unreasonable verdict of acquittal (*R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 21). As Arbour J. noted in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, "as a matter of law, the concept of 'unreasonable acquittal' is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt" (para. 33).

[149] The Crown's limited rights of appeal reflect fundamental criminal law principles, particularly the protection against double jeopardy (*R. v. Hodgson*, 2024 SCC 25, at para. 29). There is a "basic repugnance" in Canadian law against subjecting a person more than once to the risk of loss of liberty on charges relating to the same facts (para. 30, quoting *Cullen v. The King*, [1949] S.C.R. 658, at p. 668). A verdict of acquittal may not be overturned lightly (*R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 15). Permitting appeals by the Crown based on unreasonable acquittals or questions of fact would go against the clear intention expressed by Parliament in s. 676(1) (a) of the Criminal Code (*Biniaris*, at para. 33). It would also undermine the integrity of the criminal justice system.

II. Limited Scope of the Fourth Error Identified in J.M.H.

[150] The questions of fact on which the Crown may not appeal in the context of an appeal from an acquittal include: the weight given to various pieces of evidence and the assessment of the credibility and reliability of witnesses (*R. v. Kruk*, 2024 SCC 7, at para. 82; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at para. 10). There is also no error of law arising from a disagreement over factual inferences to be drawn from the evidence (*R. v. George*, 2017 SCC

38, [2017] 1 S.C.R. 1021, at para. 24, citing *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 28).

- [151] Sometimes, shortcomings in the assessment of the facts actually constitute errors of law. In this regard, J.M.H. identified four situations: (1) the making of a finding of fact for which there is no evidence; (2) the legal effect of findings of fact or of undisputed facts; (3) an assessment of the evidence based on a wrong legal principle; and (4) a failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence (Hodgson, at para. 35, citing J.M.H.).
- [152] These categories are narrow and of limited application. They cannot, under the guise of an error of law, justify appellate intervention on what is in reality a question of fact. An appellate court “must take particular care” when assessing the errors alleged on an appeal from an acquittal (Kruk, at para. 219, per Rowe J., concurring). Such care is all the more warranted given that “[i]t is not . . . difficult for an experienced Crown counsel to frame an appeal in language suggesting that a question of law is there involved” (Hodgson, at para. 39, quoting *R. v. Odeon Morton Theatres Ltd.*, [1974] 3 W.W.R. 304 (Man. C.A.), at pp. 304-5).
- [153] This appeal concerns only the fourth error of law identified in J.M.H., that is, a “failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence” (Hodgson, at para. 35; J.M.H., at paras. 31-32; *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at para. 46). The disagreement between the judges of the Quebec Court of Appeal has to do with this fourth error (2024 QCCA 657, at paras. 43, 60 and 66), and the appellant and the respondent have limited their written and oral submissions to this alleged error (A.F., at paras. 1, 4 and 6-7; R.F., at paras. 1-3).
- [154] For an appellate court to find that a trial judge made the fourth error identified in J.M.H., however, the reasons must actually “demonstrate” that the judge failed to consider all of the evidence in relation to the ultimate issue of guilt or innocence (*R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296). Unless the contrary is demonstrated, it must be assumed that the judge considered all of the evidence (*Walle*, at para. 46; *R. v. Stephens*, 2024 ONCA 793, at para. 6; *R. v. Blanchard*, 2018 QCCA 1069, 42 M.V.R. (7th) 175, at para. 113, per Doyon J.A., dissenting).
- [155] Thus, a judge who does not deal with each piece of evidence or fails to record in detail the assessment of each piece of evidence does not necessarily make an error (J.M.H., at paras. 31-32). Quoting what Binnie J. had said in *Walker*, Cromwell J. reiterated that “[c]aution must be taken to avoid seizing on perceived deficiencies in a trial judge’s reasons for acquittal to create a ground of ‘unreasonable acquittal’ which is not open to the court under the provisions of the Criminal Code” (J.M.H., at para. 32, quoting *Walker*, at para. 2).
- [156] This Court’s teachings with respect to the ground of appeal based on insufficiency of reasons also apply where, as in this case, a party raises the fourth error identified in J.M.H. An appellate court must read the trial judgment functionally and contextually in light of the record as a whole, including the evidence adduced, the issues raised and the parties’

arguments (J.M.H., at para. 32; Walker, at paras. 2 and 20-22; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 26, 46, 53 and 55). This is why it is not appropriate to read part of a decision in isolation and to see therein, as a result of this unduly narrow reading, a failure to consider a significant portion of the evidence. The reasons cannot be divorced from their overall context. *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, makes this clear:

Appellate courts must not finely parse the trial judge's reasons in a search for error. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in [*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3], "[t]he foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded". [Citations omitted; para. 69.]

[157] This "flexible and functional" approach is tied "to the nature of the decision-making process at trial: reasons for judgment 'are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict'" (Kruk, at para. 84, quoting *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 525).

III. Incapacity to Consent in the Context of Sexual Assault and the Treatment of Circumstantial Evidence

[158] As we said at the outset, this appeal concerns the principles governing the Crown's rights of appeal from an acquittal. Nevertheless, in order to place this appeal in its proper context, we believe it necessary to discuss certain principles relating to sexual assault. This serves to illustrate that the trial judge neither erred in applying these principles nor failed to consider all of the evidence.

[159] A conviction for sexual assault requires proof beyond a reasonable doubt of two basic elements: that the accused committed the actus reus and that the accused had the requisite mens rea (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 23).

[160] The actus reus is unwanted sexual touching. The mens rea is the intention to touch, knowing of a lack of consent, either by words or actions, from the person touched, or being reckless or wilfully blind as to whether there was consent (*Ewanchuk*, at para. 23).

[161] The actus reus is established by proof of three elements: (1) touching, (2) the sexual nature of the contact, and (3) a lack of subjective consent by the victim (*G.F.*, at para. 25; *Ewanchuk*, at para. 25). The third element can be established by showing that "a complainant was either incapable of consenting or did not agree to the sexual activity in question" (*G.F.*, at para. 53 (emphasis added)).

[162] The first two elements of the actus reus are objective: it is sufficient for the Crown to show that the accused's actions were voluntary. In contrast, the question of whether the complainant agreed to the sexual activity must be assessed in a purely subjective fashion. This question must be analyzed from the standpoint of the complainant, not that of the

accused. Voluntary agreement to engage in sexual activity must be determined by reference to the complainant's actual state of mind towards the touching at the time it occurred (G.F., at para. 29; *Ewanchuk*, at para. 26; *R v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). Subjective consent must be present at the time the sexual activity takes place (s. 273.1(1.1) Cr. C.), and "[t]he only relevant period of time" for establishing whether the complainant consented "is while the touching is occurring" (*J.A.*, at para. 46).

- [163] It was clarified in *G.F.* that "where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question" (para. 24). The third element of the *actus reus* can therefore be established where, as mentioned, the Crown proves beyond a reasonable doubt either "that the complainant did not have an operating mind capable of consenting" or that she "did not agree to the sexual activity in question" (para. 47). Capacity to consent thus serves as a "precondition" to the complainant's voluntary agreement (para. 43). To be capable of giving subjective consent to sexual activity, the complainant must be capable of understanding four things: (1) the physical act; (2) the fact that the act is sexual in nature; (3) the specific identity of her partner or partners; and (4) the fact that she has the choice to refuse to participate in the sexual activity (para. 57). If the absence of any of these four things is proved, "the complainant is incapable of subjective consent and the absence of consent is established at the *actus reus* stage" (para. 58).
- [164] For the purpose of assessing the complainant's lack of agreement, the complainant's testimony is the only direct evidence of her state of mind (*Ewanchuk*, at para. 29). That testimony must nevertheless be assessed in light of all the evidence (at para. 29), including the circumstantial evidence arising from the accused's testimony, if any. The accused may raise a reasonable doubt against the complainant's assertion that she did not want sexual touching to take place (paras. 29-30 and 61).
- [165] In cases where the complainant has no memory of the sexual acts, proof of a lack of agreement will necessarily arise from circumstantial evidence (*R. v. Kishayinew*, 2020 SCC 34, [2020] 3 S.C.R. 502 ("*Kishayinew SCC*"), at para. 1). The testimony of a complainant who is unable to remember the sexual acts, but who does have memories of moments before and after the acts, will make it possible to draw factual inferences about whether she gave her agreement at the relevant time (para. 1; see also *R. v. James*, 2014 SCC 5, [2014] 1 S.C.R. 80, at para. 5). However, an accused cannot be found guilty on the basis of circumstantial evidence unless guilt is the only reasonable inference (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30). The various circumstances that can be considered include a complainant's pre-existing attitude that she would not have consented (*Fairy v. R.*, 2024 NBCA 92, 440 C.C.C. (3d) 377, at para. 42; see, however, the comments of Jackson J.A. in *R. v. Olotu*, 2016 SKCA 84, 338 C.C.C. (3d) 321, at para. 58, *aff'd* 2017 SCC 11, [2017] 1 S.C.R. 168, at para. 1), the fact that the complainant has a loss of memory, and the fact that she was intoxicated at the time of the sexual acts.

[166] Of course, the accused must be acquitted if the evidence is insufficient to establish his guilt beyond a reasonable doubt, and he never bears the burden of establishing his own innocence (Kruk, at para. 61, per Martin J., and para. 219, per Rowe J., concurring). As the dissenting judge of the Court of Appeal noted in this case, [translation] “[a]n accused’s testimony concerning the complainant’s consent, like any other testimony, is admissible in evidence and may be considered by the judge to determine whether the Crown has discharged its burden on this question” (C.A. reasons, at para. 78).

[167] The same principles apply to the assessment of the complainant’s capacity to consent. Only the complainant’s testimony can be considered as direct evidence of her physical and mental state at the time of the sexual acts. Nonetheless, circumstantial evidence, such as the testimony of third parties, may allow the Crown to establish beyond a reasonable doubt that the complainant’s state made her incapable of consenting to sexual activity. Consequently, the complainant’s testimony concerning her mental state is not necessarily enough to establish her incapacity. We are in full agreement with the following comments by Van Rensburg J.A. of the Ontario Court of Appeal on this point:

With respect to capacity to consent, while the complainant will often provide relevant evidence, the question is not whether she subjectively believed that she had or did not have capacity, but whether, based on all the evidence, the Crown has proven lack of capacity beyond a reasonable doubt. The evidence of an accused person can be relevant both to the assessment of the complainant’s credibility, and as circumstantial evidence to be considered on the question of capacity. While the complainant’s evidence and their credibility are important, the court must consider all the relevant evidence, including as in this case, the observations of other witnesses of the complainant’s consumption of alcohol, level of intoxication and conduct, to determine whether the complainant lacked the capacity to consent when the sexual act occurred: see, for example, [R. v.] C.P., [2019 ONCA 85, 373 C.C.C. (3d) 244,] at paras. 56-57; [R. v.] Kaczmarek, [2021 ONCA 771, 407 C.C.C. (3d) 34,] at paras. 40-45; and R. v. F.B.P., 2019 ONCA 157 at paras. 4-6. Although not required, in some cases there is expert evidence on the issue of capacity: see, for example, R. v. Al-Rawi, 2018 NSCA 10, 359 C.C.C. (3d) 237. [Emphasis added.]

(R. v. S.B., 2023 ONCA 784, 92 C.R. (7th) 172, at para. 51)

[168] It follows that the accused’s evidence may, like any other circumstantial evidence, be relevant in determining whether the complainant had the capacity to consent to a sexual act or whether she gave her agreement, as this Court recognized in Kishayinew SCC (see R. v. Kishayinew, 2017 SKQB 177 (“Kishayinew Sask. Q.B.”), at para. 94, rev’d 2019 SKCA 127, 382 C.C.C. (3d) 560, aff’d 2020 SCC 34, [2020] 3 S.C.R. 502, at para. 1).

[169] The trier of fact may believe the accused’s account or may find that it raises a reasonable doubt with respect to the accused’s guilt. This last point is crucial in disposing of this appeal, and our colleague overlooks it. Here, the appellant chose to testify at trial, and his testimony was characterized as credible and reliable (2022 QCCQ 63, at para. 152). Clearly, his testimony raised a reasonable doubt in the judge’s mind. This fundamentally

distinguishes this appeal from, for example, Kishayinew SCC, in which the exculpatory portions of the accused's testimony were rejected at trial (see Kishayinew Sask. Q.B., at paras. 81 et seq.).

IV. Application of the Principles

A. The Trial Judge Considered All of the Evidence

[170] The majority of the Court of Appeal held that the trial judge had made an error of law by failing to consider all of the evidence. In the majority's view, the trial judge's reasons showed that he had found that [translation] "the complainant's testimony was of no assistance in analyzing her state of mind at the time of the sexual acts in Magog" (para. 13; see also paras. 14 and 20). That conclusion was based on paras. 76-78 of the trial reasons (C.A. reasons, at para. 14), which read as follows:

[translation] Here the Court does not have the testimony of the key person to establish what was going on in the complainant's mind, that is, the testimony of the complainant herself.

The Ontario Superior Court, in *R. v. J.R.*, [2006 ONSC 22658, 40 C.R. (6th) 97,] arrived at the following conclusion:

"Absent expert evidence, a loss of memory or a 'blackout' is direct evidence of nothing except the fact that the witness cannot testify as to what happened during a particular period. . . . Thus, the only significance of memory loss, without more, is that the complainant cannot give direct evidence as to whether or not she consented to the sexual contact or whether or not she had the capacity to do so."

The accused's testimony is the only testimony left available to the Court regarding the complainant's state at the time of this sexual act. While the complainant reports having no memory of these moments, the accused describes a person who was fully consenting and able to consent to sex. [paras. 76-78]

[171] Respectfully, none of the above justifies the conclusion reached by the majority of the Court of Appeal. In no way did the trial judge suggest that the complainant's testimony was "of no assistance".

[172] First, para. 76 merely reflects the facts as they stood before the judge at that moment, nothing more, nothing less: the complainant had no memory of the sexual acts that, according to the appellant's testimony, had occurred in the park in Magog (see, e.g., *A.R.*, vol. II, at p. 293). The trial judge's reasons show that he was well aware of the usefulness of the complainant's testimony as circumstantial evidence (para. 81). He remained cognizant of the possibility of establishing the complainant's lack of subjective consent through circumstantial evidence (para. 82).

[173] Second, para. 77 and the quotation from *J.R.* are also not problematic. They must be placed back in their context. At trial, the Crown argued that the gaps in the complainant's memory were sufficient on their own to prove her incapacity to consent. Among other things, it

stated the following: [translation] “But if she does not remember, this necessarily means that she was incapable of consenting, Your Honour” (R.R., at p. 375). By quoting J.R. at para. 77 of his judgment, the trial judge clearly intended to respond to the Crown’s erroneous argument (R. v. Garciacruz, 2015 ONCA 27, 320 C.C.C. (3d) 414, at para. 57; R. v. Green, 2024 ABCA 118, at paras. 16-17; R. v. Kwon, 2024 SKCA 50, 438 C.C.C. (3d) 196, at para. 88, rev’d 2025 SCC 11, at para. 3, but only on the question of the appropriate remedy; see also R. v. Trejo, 2020 BCCA 302, 395 C.C.C. (3d) 58, at para. 65: “. . . there is a distinction between a complainant who has a ‘blackout’ and one who is ‘passed out’. The former may be capable of consent, while the latter is clearly not . . .”).

[174] Lastly, para. 78 contains no error. It simply states that only the appellant was able to testify with respect to the time when the sexual acts occurred in Magog, which is consistent with the evidence in the record. With respect, and contrary to what our colleague asserts, the judge did not say that the appellant’s testimony was the only evidence concerning the sexual activity (Martin J.’s reasons, at para. 122). Rather, it was the only testimony. The distinction is fundamental, because the judge later indicated that he was considering other circumstantial evidence: the testimony of the complainant’s mother and the testimony of the complainant herself about the calls she made (C.Q. reasons, at paras. 79-81). Moreover, the trial judge’s statement at para. 78 is correct, since “[t]he only relevant period of time . . . is while the touching is occurring” (J.A., at para. 46). The judge was well aware of this, writing that [translation] “the question to be answered by the Court must be narrowed down to a place and time coinciding with each of the sexual acts” (C.Q. reasons, at para. 60 (emphasis added); see s. 273.1(1.1) Cr. C.). Further, the judge was justified in relying on the appellant’s testimony as circumstantial evidence of “the complainant’s state” (para. 78). The appellant testified at length about the complainant’s state (including how she walked, talked, acted, looked, etc.) as it was objectively observable and perceptible at the time from an outside perspective (paras. 67-74). This was why the judge stated that “the accused describes a person who was fully consenting and able to consent to sex” (para. 78).

[175] In short, on the basis of a contextual and functional reading of paras. 76-78 of the trial judgment, it cannot be said that the reasons demonstrate that the judge failed to consider all of the evidence.

[176] The reasons of the majority of the Court of Appeal are focused solely on paras. 76-78 of the trial decision. As a result, they lose sight of the judge’s reasoning as a whole. The other paragraphs of the judgment confirm that, on the contrary, the trial judge did indeed consider all of the evidence, as he was required to do. One paragraph in particular is telling:

[translation] The Court is not, as in Kishayinew, in a situation where, in the absence of direct evidence, it finds itself within a framework of circumstantial evidence that leads to only one logical conclusion, namely that the complainant did not consent or could not, legally, consent. [para. 82]

- [177] Given that the reasons must be read as a whole and not in a vacuum, it is clear that the judge's reference to the circumstantial evidence is a reference to the [translation] "Background" section of his judgment, which is more than 30 paragraphs long and which summarizes the evidence presented to him (paras. 24-56). As the Quebec Court of Appeal previously wrote in another case, [translation] "it cannot be assumed that a judge who reviews all of the evidence forgets it later in their analysis" (R. v. Addala, 2022 QCCA 538, at para. 18; see also LSJPA — 1730, 2017 QCCA 2018, at para. 7). The "Background" section in this case is a part of the trial judgment that the majority of the Court of Appeal ignored. In contrast, the dissenting judge correctly noted that the pieces of circumstantial evidence purportedly omitted [translation] "were all dealt with by the trial judge, both in his description of the background to the case and in his analysis of the circumstances in which the sexual relations in Bonsecours occurred" (C.A. reasons, at para. 82 (emphasis in original; footnote omitted)). We are in full agreement with the dissenting judge in this regard.
- [178] We also note that the fact that the trial judge referred to Kishayinew SCC is a further indication of his mastery of the applicable law. The majority reasons in Kishayinew SCC confirm that, even where a complainant has memory gaps, circumstantial evidence can ground an inference that she did not consent to sexual touching (para. 1). The trial judge, being well aware of that judgment, was entitled to find that the factual situation in the case before him had to be distinguished, as it did not lead to "only one logical conclusion, namely that the complainant did not consent or could not, legally, consent" (para. 82).
- [179] The trial judge considered several pieces of circumstantial evidence again at the analysis stage, following his recitation of the facts. For example, he returned to the testimony given by the complainant's mother and characterized it as relevant, although he ultimately found that her version added little useful information (paras. 79-80). The trial judge also discussed the telephone call between the complainant and her father again. This was what led him to accept the appellant's explanation that the complainant had called her parents following a conversation they had just had about the death of one of the appellant's parents (paras. 80-81). This confirms once more that the trial judge considered all of the evidence.
- [180] When read in context and as a whole, in light of the live issues at trial, the reasons contain no error of law that justifies appellate intervention. The same conclusion that this Court reached in Walle, at para. 46, must be reached here: the reasons do not demonstrate a failure to consider all of the evidence in relation to the ultimate issue of the appellant's guilt or innocence. The majority of the Court of Appeal arrived at the opposite conclusion by favouring a decontextualized reading of the reasons. This is always to be avoided, particularly in the case of an appeal from an acquittal. When all is said and done, the reasons for the appellant's acquittal are very easy to discern: the Crown's evidence concerning the events in Magog did not lead to only one possible conclusion, and the appellant's testimony was found to be credible and reliable (see R.E.M., at para. 31; G.F., at para. 69).

B. The Trial Judge Did Not Consider the Appellant's Evidence as Direct Evidence of the Complainant's Subjective Consent

[181] The majority of the Court of Appeal viewed the trial judgment as indicating that the judge had used the appellant's testimony as direct evidence of the complainant's subjective state of mind, that is, as direct evidence of the complainant's agreement to the sexual acts (paras. 8 and 10-12). Our colleague Martin J. adopts this view by isolating the following paragraph of the trial decision:

[translation] Here, the evidence from the accused is probative as to the complainant's consent. This evidence is not contradicted by the complainant, as she has no memory of the situation.
[para. 83]

[182] We do not read this passage in the same way. The word "probative" does not mean "direct". "Probative" evidence can be either direct or circumstantial. Our colleague is aware of this, since she correctly states the difference between these two types of evidence (see paras. 57-59). In the context in which the word is used, the meaning of "probative" is plain: this testimony clearly raised a doubt in the trial judge's mind on the issue of whether or not there was consent, a finding to which we owe deference (Villaroman, at para. 71).

[183] Paragraph 82 of the trial judgment, quoted above, also confirms our conclusion that the trial judge did not find that the appellant's testimony was "direct evidence" of the complainant's state of mind. The judge himself noted the "absence of direct evidence" and stated that he had to rely solely on the "circumstantial evidence" (para. 82). The judge's consideration of the circumstantial evidence and his reference to Kishayinew SCC indicate that he was aware that no direct evidence concerning the complainant's state of mind was available. Accordingly, to infer that the judge may have found otherwise would be contrary to the presumption that "the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision" (R. v. Teskey, 2007 SCC 25, [2007] 2 S.C.R. 267, at para. 19; Lessard v. R., 2022 QCCA 1396, 422 C.C.C. (3d) 84, at para. 47). Indeed, even the majority of the Quebec Court of Appeal acknowledged that it was not clear from the trial reasons that the trial judge had in fact used the appellant's testimony as direct evidence of the complainant's subjective consent (para. 10).

[184] In any event, our colleague's interpretation of the word "probative" is at odds with the presumption of correct application of the law (G.F., at para. 74) — law on which the judge properly instructed himself elsewhere in his reasons (C.Q. reasons, at paras. 12, 58-59, 64, 87 and 90). Where there is ambiguity, the interpretation consistent with the presumption of correct application of the law must be given preference, which is entirely possible here (G.F., at para. 79).

[185] In sum, it cannot be concluded from para. 83 of the trial judgment that the trial judge used the appellant’s testimony as direct evidence of the complainant’s subjective state of mind (or of the complainant’s agreement to the sexual acts). As we said above, the judge knew full well that such reasoning was not permitted, and he properly instructed himself on the applicable law. At most, he used this testimony as circumstantial evidence, which he was authorized to do.

C. The Appellant Testified and Was Believed

[186] The trial judge characterized the appellant’s testimony as [translation] “credible and reliable overall” (para. 152). Contrary to what our colleague seems to suggest, this finding cannot be disturbed on appeal.

[187] Although the Crown was required to prove its case beyond a reasonable doubt for each of the two instances of sexual relations — in Magog and in Bonsecours — the assessment of the appellant’s credibility and reliability could be a global assessment, without having to be segmented by alleged sexual act (see, by analogy, *R. v. P.E.C.*, 2005 SCC 19, [2005] 1 S.C.R. 290, at para. 1; *Chénard v. R.*, 2024 QCCA 723, at para. 72). In considering whether the appellant was [translation] “trustworthy” (para. 142), the trial judge analyzed the appellant’s testimony generally and noted the following:

[translation] [he] explained his evening candidly and in great detail, adding information of an intimate nature about the relations with the complainant that was not directly alleged against him by the Crown, both for the period at the park in Magog and at his home. [Emphasis added; para. 145.]

[188] His finding that the appellant’s testimony was “credible and reliable overall” (para. 152) applies equally in relation to the events in Magog and those in Bonsecours.

[189] Thus, behind the debate over the failure to consider all of the evidence, what sets this case apart is that the appellant chose to testify and that his exculpatory version of the events as a whole was found to be “credible and reliable overall” (C.Q. reasons, at para. 152). Again, this finding relates to both the events in Magog and those in Bonsecours. His testimony was assessed at length in light of all of the evidence (paras. 127-50).

[190] The trial judge found that the appellant’s version [translation] “is not nonsensical” and that it and the complainant’s version could be cobbled together (para. 139, citing *R. v. Esau*, [1997] 2 S.C.R. 777, at paras. 15-16). This once again confirms that the complainant’s memories of the evening were not considered to be “of no assistance”. It is clear that the appellant’s testimony instead raised a reasonable doubt in the judge’s mind. In the circumstances, the judge had no choice but to acquit him (*Kruk*, at para. 62).

[191] In short, as the dissenting judge noted, this case can be distinguished from the other decisions cited by the majority of the Court of Appeal in which the complainant had memory gaps and [translation] “either the accused did not testify or the accused’s testimony with respect to consent was not found to be credible” (para. 79 (emphasis deleted)).

D. An Appellate Court May Not Intervene on Appeal From an Acquittal on the Basis of a Disagreement Over Questions of Fact

[192] In the context of a Crown appeal from an acquittal, an appellate court may not intervene with regard to questions of fact. The weight given to certain hypotheses put forward by witnesses and the factual elements that raise a reasonable doubt are matters for the trial judge. Respectfully, two points in our colleague’s reasons show that she is presuming to interfere with the trial judge’s findings of fact.

[193] First, the judge could validly find that he had a reasonable doubt as to the complainant’s lack of subjective consent in Magog, but not entertain such a doubt with regard to her incapacity to consent in Bonsecours.

[194] The argument that the complainant was incapable of consenting was made by the Crown in the form of a general allegation not tied to a specific period of time. As our colleague notes, the allegation of incapacity covered consent “throughout the evening” (para. 77). That allegation was never specifically associated with the time of the sexual acts that occurred in Magog.

[195] Our colleague recognizes that “no error arises solely from analyzing the allegations based on the two time frames in which the sexual activity occurred: on the contrary, it respects the need for contemporaneous consent” (para. 121). We agree. In the presence of circumstantial evidence, the judge had to consider whether — at the time of the sexual acts — “the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty” (Villaroman, at para. 18 (emphasis deleted), quoting *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33). Given that the evening the appellant and the complainant spent together extended over several hours, the judge could not simply accept the Crown’s general and unparticularized allegation.

[196] To be sure, it is not appropriate to assess the evidence in silos, and findings of fact must be considered in light of all of the evidence. However, it remains the case that, to be reasonable, each inference leading to a finding of fact must be grounded in evidence. Otherwise, it amounts to speculation (*Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 97, citing *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[197] The trial judge therefore had to first decide which evidence he accepted and which he rejected, then draw factual inferences solely from the evidence he accepted. The trial judge could then, on that basis, determine whether it could be found from the circumstantial evidence as a whole that the only reasonable inference was that the appellant was guilty (Villaroman, at para. 30). The trial judge was indeed required to consider the fact that the

complainant was in a state of incapacity in Bonsecours when he was considering the events in Magog. But the trial judge's finding that the complainant was in a state of incapacity in Bonsecours did not oblige him to find that the only reasonable inference was that the same was true in Magog.

[198] However, our colleague seems to criticize the trial judge for not reconciling his finding with respect to the complainant's incapacity in Bonsecours with his finding that such a state of incapacity had not been proved beyond a reasonable doubt for Magog (para. 122). Under the pretext of an error of law, she thus expresses her disagreement with the trial judge's assessment of the evidence and concludes that the acquittal for the events in Magog was unreasonable. Yet it is clear that an appellate court may not proceed in this manner (*R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157, at para. 15; *R. v. Beaulieu Boismenu*, 2024 QCCA 1074, at para. 6).

[199] Second, our colleague resurrects a theory regarding the complainant's memory gaps despite it having been rejected, noting at the end of her reasons that the complainant testified that she believed the appellant had drugged her. She writes that the trial judge had to make a finding of fact on this theory in order to decide the issue (para. 141).

[200] Respectfully, this is incorrect. Although the complainant was found to be credible, this does not mean that the judge accepted all the details of her testimony or that he was required to address each of her allegations. We endorse the remarks of the dissenting judge of the Quebec Court of Appeal, who clearly explained why the unsupported hypothesis that the appellant had drugged the complainant was not something the trial judge had to discuss in detail:

[translation] I note, first of all, the absence of evidence concerning the hypothesis that the respondent drugged the complainant. There is no toxicology report supporting this hypothesis, no psychological or medical assessment was adduced in evidence to substantiate it, no real evidence was filed for this purpose, and no testimony established it, the respondent having, moreover, denied it in his testimony, which was found to be credible and reliable. The complainant herself acknowledges that this is just a hypothesis. Moreover, the Crown acknowledged at trial that the theory of drug intoxication is immaterial to its case, and it is also not raising this theory on appeal, particularly given the lack of evidence to support it. Further, the respondent introduced evidence of the complainant's pharmaceutical drug use and her medical condition, which could, in his opinion, explain her memory loss. [para. 68]

[201] The trial judge did not err by not addressing this allegation, especially in a context where the Crown had admitted that the source of the complainant's intoxication [translation] "[wa]s immaterial" to its theory of the case (*R.R.*, at p. 325). In short, this is another example of our colleague intruding into questions of fact in respect of which an appellate court is required to show deference.

[202] On the whole, the evidence accepted by the trial judge — coupled with the deficiencies in the Crown’s case — left a reasonable doubt as to the events that occurred in Magog. The appellant was therefore entitled to be acquitted (Kruk, at para. 62, per Martin J., and para. 219, per Rowe J., concurring) and, in the absence of an error of law that had an impact on that verdict, the majority of the Court of Appeal should not have intervened. We conclude by noting that this Court recently warned against the temptation to expand the concept of error of law (Kruk, at para. 82, per Martin J., and para. 219, per Rowe J., concurring) and, by extension, the Crown’s right of appeal from an acquittal. Such an expansion could have “a profound impact on the interests of accused persons, especially due to the considerable anxiety created by the prospect of a new trial after a person has been acquitted” (Hodgson, at para. 31).

V. Ancillary Order Made Under Section 686(8) of the Criminal Code

[203] Although we would allow the appeal and restore the appellant’s acquittal, it nonetheless seems desirable to say a few words about the ancillary order made by the majority of the Court of Appeal. Before the Court of Appeal, there was a debate about the scope of *R. v. Cowan*, 2021 SCC 45, [2021] 3 S.C.R. 323, and thus about the appropriate order to be made: Did the court have to order a new trial in relation to the events in Magog and those in Bonsecours or only in relation to the events in Magog? In our view, the majority of the Court of Appeal did not err in limiting the order for a new trial to the events in Magog.

[204] In *Cowan*, the Crown advanced two theories at trial that could lead to a conviction for armed robbery: either the accused had committed the offence as a principal, or he had committed the offence as a party. Both of these theories were rejected by the trial judge. The Court of Appeal allowed the Crown’s appeal and ordered a new trial. Under s. 686(8) of the Criminal Code, it limited the scope of the new trial to the second theory, as the judge’s error related solely to that theory. With leave, the Crown appealed that ancillary order. This Court decided in favour of the Crown, because the ancillary order had the effect of bifurcating “the offence of armed robbery into two separate offences” (*Cowan*, at para. 57).

[205] Here, however, it is not in dispute that the count covered two temporally distinct incidents, which were therefore capable of constituting two offences of sexual assault. The appellant knew what the Crown was alleging against him and was well aware of the extent of his jeopardy (see C.A. reasons, at para. 30, fn. 20; R.F., at para. 102). In addition, the appellant did not seek severance of the double count, and the trial judge made no order to that effect. Moreover, the incidents can be distinguished from each other, given that they occurred a few hours apart and took place in two different towns located in different judicial districts. It was in this context that the trial judge conducted two independent legal analyses to determine whether the Crown had discharged its burden with respect to the events in Magog and those in Bonsecours.

- [206] The Crown [translation] “chose not to challenge the trial judge’s conclusion that the respondent had no criminal liability for the events in Bonsecours” (C.A. reasons, at para. 35; see also para. 31). The way in which the Crown exercised its discretion reflects the fact that the two analyses carried out by the judge for the two incidents are independent.
- [207] In short, the parties’ consistent position and the conduct of the trial and appeal proceedings show that two separate offences were alleged against the appellant, even though they were grouped together in a single count. This, in the words of Moldaver J., is the “critical distinction” between the facts of this case and those of Cowan (para. 66).
- [208] One last point is worth noting. As the majority of the Court of Appeal mentioned (at para. 35), ordering a new trial with respect to the Bonsecours incident seems contrary to s. 11(h) of the Canadian Charter of Rights and Freedoms, which protects any person charged with an offence against the possibility, “if finally acquitted of the offence, [of being] tried for it again”. Insofar as the Crown chose not to challenge the trial judge’s conclusion regarding the events in Bonsecours, the appellant was finally acquitted and should not be placed in jeopardy a second time.
- [209] In sum, there is no reason to interfere with the exercise of discretion by the majority of the Court of Appeal on this issue. The ancillary order made by the majority is not inconsistent with their principal order, as two separate offences had been alleged by the Crown. Finally, this order is essential to the interests of justice: it avoids breaching the appellant’s right not to be tried again for an offence of which he was finally acquitted.

VI. Conclusion

- [210] For these reasons, we would allow the appeal, set aside the judgment of the Court of Appeal and restore the appellant’s acquittal.

Appeal dismissed, Wagner C.J. and Côté, Rowe and Moreau JJ. dissenting.

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