

CANADA / JUDGMENT

R. v. Roth

2020 BCCA 240

COURT

British Columbia Court of Appeal

DECIDED

27 August 2020

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2020 BCCA 240 R. v. Roth

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Roth,

2020 BCCA 240

Date: 20200827

Docket: CA46173

Between:

Regina

Respondent

And

Tyler Jordan Roth

Appellant

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Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated March 11, 2019 (R. v. Roth, 2019 BCSC 645, Prince George Docket 46140-2).

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(via videoconference):

R.S. Fowler, Q.C.

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(via videoconference):

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

June 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 27, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

Summary:

After a trial by judge alone, the appellant was convicted of sexual assault. He appealed the verdict on two bases: (1) that the trial judge scrutinized the defence evidence more rigorously than the evidence of the Crown; and (2) that the appellant's cross-examination was improper and undermined the fairness of the trial. Held: Appeal allowed. The conviction is set aside and a new trial is ordered. The judge's credibility assessment was tainted by three errors in principle. She engaged in speculative reasoning; she relied upon the fruits of improper cross-examination in her assessment of the appellant's testimony; and she failed to appreciate and resolve significant inconsistencies in the complainant's evidence. In their cumulative effect, the errors in principle resulted in an unbalanced scrutiny of the evidence that necessitates a new trial.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] This is an appeal from conviction for sexual assault, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The fact of sexual activity was not in dispute. The issue at trial was whether the activity was consensual. The trial judge's credibility findings were critical to that analysis.
- [3] The appellant contends that the judge committed reversible error in her assessment of credibility. He says the judge reviewed the appellant's evidence more strictly than that of the complainant. The appellant also says his cross-examination was improper and that it undermined the fairness of his trial.
- [4] For the reasons that follow, I would allow the appeal on the first of these complaints, set aside the conviction and order a new trial. The judge erred in law by taking an unbalanced approach to the assessment of credibility and it resulted in an unfair trial.

Background

Overview of Trial Evidence

- [5] For purposes of the appeal, a general overview of the evidence will suffice. Greater detail will be included, where necessary, in resolving the specific issues raised by the appellant.
- [6] The appellant was 24 years old at the time of trial. The complainant was 21. The offence occurred close to two years earlier, on January 1, 2017.
- [7] The appellant and complainant ran into each other at a nightclub in downtown Prince George. They knew one another, as the appellant was a high school friend of the complainant's brother. Both had been drinking. By the time they met up, the complainant had consumed about six rum and cokes. The appellant had consumed six beers. The complainant had two or three more drinks at the nightclub; the appellant testified that he had four more drinks.
- [8] They chatted and danced together. The complainant said that while dancing, the appellant tried to kiss her. She turned her head away and told him not to. The appellant said the kissing was mutual. A witness at the club testified that he saw the appellant try to kiss the complainant several times and that she was "constantly putting her head down". However, towards the end of the evening, it appeared to the witness that she kissed him back.
- [9] The nightclub shut down at around 3:00 a.m. The complainant and appellant agreed to share a cab. The appellant said there was mutual kissing while waiting for the cab. The complainant said there was a kiss, but it was one-sided and initiated by the appellant.

- [10] The complainant provided the cab driver with directions to her residence. She testified that while in the cab, the appellant initiated sexual contact, trying to kiss her and putting his hand inside her pants. She resisted, pushing his hand away. The appellant said there was mutual touching throughout the cab ride, which included the complainant touching his penis.
- [11] When the cab arrived at the complainant's residence, both parties exited. The driver described the complainant as drunk, "but not that drunk", about a "six out of ten". The appellant was also "drunk". The cab driver put him at "eight out of ten". The complainant described the appellant as "definitely more intoxicated" than she was. When the cab pulled into the driveway, the driver noted that the appellant was a "little bit sleepy". The complainant had to wake him up so that he could pay the fare.
- [12] The complainant and appellant provided starkly different versions about what happened next.
- [13] The complainant said she thought the appellant would carry on to his residence. She went into her house. A couple of minutes later, she looked out her living-room window and saw that the appellant was standing in the driveway. Because she was concerned he was intoxicated and would "freeze" out there, she invited him into her house and showed him a spare bedroom in which he could spend the night. She then went to her bedroom, which was downstairs.
- [14] She said that while she was undressing, the appellant came into her room, pushed her onto the bed and sexually assaulted her. This included ripping off her underwear and holding her hands above her head while removing his pants and getting on top of her. She repeatedly told him "no" and to stop. The appellant did not respond. She tried to free her hands and wriggle out of his grip, but he was strong.
- [15] The sexual assault included vaginal intercourse, forced fellatio, and an attempt at anal intercourse. The complainant testified that she did not want to have sex, that she was tense and not lubricated. The vaginal and anal penetration were painful. It felt like her vagina was "getting ripped". The complainant stopped resisting because she felt "paralyzed" and thought that if she let the appellant do what he wanted, the assault would stop. Eventually it did stop, without the appellant reaching orgasm. He rolled over and appeared to pass out or fall asleep.
- [16] The complainant said that after she got home, she realized she had left her phone in the cab. She testified that during the sexual assault, she asked the appellant if she could use his phone to call the cab. He agreed but told her not to call anyone else. She called her phone. The cab driver answered and said he would bring the phone back to the residence. The driver testified that when he arrived, he waited for five minutes, but no one came to the door. He left. The complainant said she did not get to the door in time because the appellant prevented her from doing so.

- [17] She said she then convinced the appellant to let her call again. She told the appellant "basically anything that [she] thought that he wanted to hear" to get use of his phone, including that she would not tell the driver about what was happening and that she would come straight back downstairs. The driver agreed to return to the residence a second time. When the complainant went to the front door to retrieve the phone, the appellant was watching her from the door to the downstairs bedroom and had told her that she had to come back downstairs. She complied because she was afraid of what might happen if she did not do what he asked. She did not say anything to the cab driver about what was going on. When she got back downstairs, the sexual assault continued.
- [18] In his testimony, the appellant said all of the sexual contact was consensual. He denied being drunk, although he acknowledged being "buzzed" by the time the nightclub closed. However, he "knew what was happening".
- [19] He testified that after exiting the cab, he went into the residence with the complainant. She realized she had left her phone in the cab and she used his phone to arrange for the driver to bring it back. They sat on the couch, kissing and touching each other. The complainant stood up, grabbed his hand, and led the appellant downstairs to her bedroom.
- [20] The appellant said that once they were in the bedroom, they had consensual vaginal intercourse. There was no resistance from the complainant. To the contrary, she was "jumping up and down" while on top of him and "moaning". He said there was no difficulty with the vaginal intercourse. He acknowledged spitting on his hands several times to lubricate his penis, but said this is his "general practice". He said the complainant did not indicate that she was in pain during the vaginal intercourse.
- [21] The appellant testified that the complainant got out of bed once to check for the cab driver, and then asked to use his phone a second time. She left the bed again when she heard the driver at the door and retrieved her phone. He remained in the bedroom.
- [22] The appellant said once the complainant returned with the phone, they continued to have vaginal sex. At some point, his penis came out of the complainant's vagina "by mistake". She reached around and grabbed it, guiding it to her anus. They made an attempt at anal sex, but she told him that it hurt. He stopped having intercourse, without ejaculating, lay down beside the complainant and fell asleep.
- [23] The complainant testified that once the appellant was asleep, she ran out of the bedroom with her phone, grabbed her two dogs and locked herself in the bathroom. She said she was crying hysterically and having a hard time breathing. She called various friends or acquaintances for help.

- [24] Some of these people attended the residence. One of them said that when she answered the complainant's phone call, the complainant was "sobbing" and the witness "could barely understand her". When that witness arrived at the residence, the complainant met her at the front door. They went upstairs and the witness stayed with the complainant in the bathroom. The complainant was crying and shaking, and appeared scared.
- [25] Other of the people who arrived at the residence went down to the complainant's bedroom. They found the appellant on the bed. He was naked and lying on his stomach. There was an extreme odour of alcohol on his breath, "[l]ike a brewery". With some difficulty, they woke the appellant. A physical altercation ensued, with some of these individuals throwing punches at the appellant. They removed him from the house, wearing only his pants and without shoes. At some point, he came to a door at the back of the house and asked for his shoes and shirt. Once provided, the appellant left.
- [26] The appellant testified that after falling asleep on the complainant's bed, he next remembered being in a lot of pain, with his arm twisted behind his back. He was "given a beating". He then recalled being in the backyard, lying in the snow and wearing only his pants. He walked up to a door of the residence, begged for his shoes and shirt, and walked to a friend's house. His friend helped him clean up and called the appellant's father. This same friend also reached out to the complainant, asking what happened. She denied having seen the appellant after the nightclub. When informed he had been beaten, the complainant told the witness she was unaware of that fact.
- [27] The appellant's father testified that when he retrieved the appellant, the latter was bleeding from his head. He was shaking and "shivering uncontrollably". It was approximately 7:30 a.m. The appellant seemed "very wide awake" and was not intoxicated. Later that morning, the appellant's father went to the complainant's residence, asking about what happened to his son and for the return of the appellant's wallet and phone. Initially, the complainant said she had not seen the appellant. The appellant's father threatened to call the police. The complainant subsequently acknowledged that the appellant had been at her house and said "he was rough with [her]". She testified she told the appellant's father that the appellant had been "extremely forceful with [her] when [she] didn't want it".
- [28] The complainant underwent a sexual assault examination following the incident. The physician who examined her testified as an expert witness with "specific expertise in Emergency medicine and in sexual assault examination". He saw a "fresh abrasion" (described elsewhere as a "lesion"), to the complainant's anus (meaning it had occurred in the past 24- 48 hours) approximately two millimetres long and one millimetre deep. He also saw an abrasion (or "lesion") to the posterior fourchette ("very bottom of the vagina"). It was two millimetres in length and one millimetre in depth. The doctor did not see any abnormalities inside the vagina. He acknowledged that the vaginal abrasion could be caused by "vigorous intercourse" or "rough sex". The anus is more susceptible to injury and an abrasion can result from something put in the anus only once. The doctor testified that both of the abrasions would hurt and opined it is unlikely that a person who sustained

those forms of injury would continue to have intercourse because it would be very painful. This would probably be the case even if the person was intoxicated.

Closing Submissions

- [29] Trial counsel for the appellant described the case as one of oath-against-oath, "with some ... extraneous evidence thrown in". He encouraged the judge to accept the appellant's evidence about the consensual nature of the sexual activity, or, at the very least, to find that it raised a reasonable doubt.
- [30] The defence submitted that the complainant's evidence contained numerous inconsistencies and suggested that she fabricated the absence of consent. Trial counsel offered various theories for the fabrication, including that the complainant did not want the person she had been dating to know she had sex with someone else; that she did not want her father to know; and that she alleged non-consent to cover up or justify the injuries sustained by the appellant when removed from her home. Trial counsel further submitted that "[i]f this was as bad as what [the complainant] said it was", she would have run for the cab when the driver came back with her phone, and her failure to do this or to call 9-1-1 made her narrative implausible.
- [31] The Crown argued that the appellant was not credible. He was lying about his level of intoxication and about how the sexual activity unfolded. The Crown said the complainant adequately explained any internal inconsistencies in her evidence, differences between her testimony and other witnesses were "explainable by the passage of time, intoxication", and that the defence theories about the rationale underlying her assertion of non-consent had no air of reality.

Reasons of the Trial Judge

- [32] The judge's oral reasons for conviction are indexed as R. v. Roth, 2019 BCSC 645 ("RFJ"). Consent was the main issue at trial.[1] Whether the Crown proved the absence of consent "turn[ed] largely on credibility" (at paras. 3, 35).
- [33] Before making her findings on the elements of the offence, the judge instructed herself in accordance with R. v. W.(D.), [1991] 1 S.C.R. 742, and the principles governing the assessment of evidence when an accused testifies at trial.
- [34] The judge did not find the appellant to be a credible witness. She rejected his testimony and it did not leave her with a reasonable doubt on consent (RFJ at para. 50).
- [35] The judge acknowledged there were parts of the appellant's testimony that she could not dismiss because they were consistent with evidence provided by the complainant and other witnesses (a fact conceded by the Crown at trial). However, she found "there were other aspects of [the appellant's] testimony that were both internally and externally inconsistent" (RFJ at para. 41).

[36] Specifically, the judge found that:

- a) the appellant's testimony about kissing and mutual touching for the duration of the cab ride was inconsistent with the driver's evidence that the appellant had fallen asleep by the time the cab arrived at the complainant's residence. From the judge's perspective, if there had been kissing and mutual touching throughout the ride, it "makes no sense" that the appellant would fall asleep, "particularly given his testimony that he was a fit and healthy young man who regularly worked out and trained as a power lifter and that he was only 'buzzed' and not drunk" (RFJ at paras. 41-42);
- b) the appellant's evidence in cross-examination on the sequence of events in the downstairs bedroom was inconsistent with what he said in direct examination. In cross, he testified that while engaged in vaginal intercourse, his penis "came out by mistake", the complainant guided it towards her anus, and he then attempted anal intercourse, but it failed. He went to sleep and there was no further sexual activity. However, in direct examination, he acknowledged putting his penis in the complainant's mouth and said that this occurred between anal and vaginal intercourse (at paras. 43-44);
- c) the appellant testified that the complainant made a "sharp inhale" of breath during the attempted anal intercourse and told him that it hurt. He stopped and there was no further sexual activity. In cross-examination, he denied that the complainant showed any sign of pain during vaginal intercourse and, had she done so, he would have noticed because he was paying close attention. The judge found this evidence "incredible" and the "most troubling" aspect of the appellant's testimony given the medical evidence surrounding the vaginal lesions: "If the lesion to [the complainant's] anus was sufficient to invoke a pain response and cause her to cry out in pain, logic and common sense suggests that when she suffered a similar lesion to her vagina she would also feel and either express or demonstrate pain" (at para. 45); and,
- d) the appellant's evidence that he "was not drunk at any point in the evening [was] entirely at odds with the observations of the cab driver, who described [the appellant] as being drunk, an eight out of ten, and having fallen asleep in the cab". It was also inconsistent with the descriptions of his condition when awoken by the people who attended the residence after-the-fact; the appellant's inability to remember anything between being hit in the bedroom and waking up in the snow; and a prior statement to police in which he said he "woke up under the balcony" (at paras. 46-47).

[37] The judge found the appellant's evidence to be "contrived and self-serving". In her view, he had "tailored" his testimony with a view to minimizing his degree of intoxication. He tried to create an impression that he had a "full and complete recall" of what happened at the complainant's residence, when, in fact, "that was not the case". In his testimony, the appellant described the vaginal intercourse as "vigorous". Crown counsel cross-examined him on that choice of language. The judge found that the appellant described the sex that way "because [the doctor] had used that term to describe the mechanism of injury to [the

complainant's] vagina". She also found that when asked about a prior statement to police, the appellant became "combative" with Crown counsel (RFJ at paras. 48-49).

- [38] In assessing the complainant's credibility, the judge found her to be a "sincere and forthright witness" who did not "embellish her story". She was not "argumentative or evasive" (RFJ at para. 51).
- [39] The judge acknowledged there were difficulties with the complainant's evidence. There were inconsistencies between her testimony and prior statements she had made about the events. However, the judge found that the defence was only able to impeach the complainant on "peripheral details and her evidence with respect to the core allegation of sexual assault was generally consistent and was supported by other Crown evidence" (RFJ at paras. 51-52).
- [40] The judge stated that "[a]fter listening to [the complainant's] evidence and observing her demeanour when she was asked about these prior statements, it appeared to [her that the complainant] was genuinely attempting to tell the truth". She was "not defensive or evasive when inconsistencies were pointed out and she seemed to be trying to search her memory". She "also readily admitted, on several occasions during cross-examination, that she could not remember certain details" (RFJ at para. 55).
- [41] From the judge's perspective, the complainant's evidence about the pain she experienced during the sexual activity was "entirely consistent with the objective evidence" of the physician who examined her, including his observations of injury (RFJ at para. 56, 63). The "generally minor" inconsistencies in her testimony were "easily explained by the ordinary frailties of memory and the circumstances of the described incident" (at para. 57). The judge rejected the defence theory of fabrication, finding that much of it was "based on myths and stereotypes" (at para. 62). The witnesses who attended the complainant's residence after the fact confirmed that she was emotionally upset. They described her as "distraught, hysterical, scared, and shaken" (at para. 64).
- [42] The judge found that the evidence she accepted was "consistent only with the Crown theory, which is that the [appellant] initiated forceful sexual activity with [the complainant] when he was highly intoxicated" (RFJ at para. 65). She found that the complainant did not consent to sexual intercourse, repeatedly said "no" to the appellant, and told the appellant that she did not want to have sex (at para. 66).
- [43] The judge found that the Crown proved the appellant inserted his penis into the complainant's vagina, anus, and mouth without her consent, and that he "knew that the complainant did not consent to sexual activity or was reckless or wilfully blind to such lack of consent" (RFJ at para. 68). Accordingly, she entered a conviction for sexual assault.

Issues on Appeal

- [44] The appellant advances two grounds of appeal. He says: (1) the judge's assessment of credibility as between the appellant and the complainant was "unreasonable, uneven and unfair"; and (2) the Crown's cross-examination of the appellant was improper, undermining the fairness of the trial.

Discussion

- [45] The appellant has raised distinct grounds of appeal. However, there is overlap. The appellant says that in making her credibility assessment, the judge relied upon the fruits of the improper cross-examination. As a result, my discussion of the first ground of appeal will include reference to some of the complaints made under the second. Ultimately, it is because of the combined effect of concerns raised under both grounds of appeal that I consider a new trial warranted.

Did the Judge Err in her Credibility Assessment?

- [46] The judge correctly instructed herself on the W.(D.) framework. The appellant does not suggest that she misunderstood the governing principles. Instead, he takes issue with her application of those principles. The appellant contends that the credibility findings underlying the W.(D.) determination were unfairly skewed in favour of the Crown.
- [47] It is an error of law for a trial judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown. See, for example: *R. v. Singh et al.*, 2020 MBCA 61 at paras. 31-33; *R. v. Mehari*, 2020 SKCA 37 at para. 29; *R. v. Murray*, 2020 BCCA 42 at para. 82; *R. v. E.H.*, 2020 ONCA 405 at paras. 40-41; *R. v. Willis*, 2019 NSCA 64 at paras. 40-45; *R. v. Wanihadie*, 2019 ABCA 402 at paras. 34-43; *R. v. Kiss*, 2018 ONCA 184 at paras. 82-83; *R. v. Gravesande*, 2015 ONCA 774 at paras. 18-19, 43.
- [48] The standard of review for this error is correctness: *Mehari* at para. 30; *Willis* at para. 11.
- [49] This is a notoriously difficult ground of appeal to make out: *Mehari* at para. 31; *R. v. Radcliffe*, 2017 ONCA 176 at paras. 23-26, leave to appeal to SCC ref'd, 37671 (7 December 2017). A trial judge has a unique advantage in hearing and seeing witnesses as they testify: *E.H.* at para. 44. Because of that fact, as well as other considerations, appeal courts afford substantial deference to a trial judge's assessment of credibility, interfering with their credibility findings only in the face of overriding and palpable error: *R. v. Wright*, 2019 BCCA 327 at paras. 23-24; *R. v. Vuradin*, 2013 SCC 38 at para. 11.
- [50] Consequently, to obtain a new trial on the ground that the judge applied different standards in the assessment of credibility, an appellant must persuade the appeal court of a demonstrably flawed assessment methodology or reasoning process that affected the credibility determination: see *Wanihadie* at para. 36 and the cases cited therein.

[51] For this reason, successful claims of an unbalanced approach to the assessment of credibility have often involved other identifiable errors, such as a misapprehension of material evidence; speculative reasoning; an overemphasis on demeanour; or a failure to consider testimony in the context of the evidence as a whole. Again, see Wanihadie at para. 38 and the cases listed there.

[52] As the Crown properly emphasizes, it is not the role of an appeal court to wade into a trial judge's credibility findings, "retry the case and draw inferences the trial judge was not prepared to make" (respondent's factum at paras. 69, 78). A claim of "uneven" scrutiny will not succeed if what lies at the heart of the challenge is a complaint about the judge's interpretation of the evidence, or the mere fact that the judge did not find the appellant credible. Instead, as stated in *Gravesande*, an appellant must:

19 identify something clear in the trial judge's reasons or the record indicating that a different standard of scrutiny was applied and something sufficiently significant to displace the deference due to a trial judge's credibility assessments: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) at para. 59; *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362 (Ont. C.A.), at para. 98.

[Emphasis added.]

[53] The appellant says that in this case, it is "clear" from the judge's reasons that different standards were applied. Having read the reasons, in the context of the record as a whole, I agree with that submission.

[54] More specifically, I find that the credibility assessment as between the appellant and the complainant was rendered uneven by three errors in principle:

- a) the trial judge adversely assessed the appellant's evidence using speculative reasoning;
- b) her credibility assessment relied upon the fruits of improper cross-examination; and,
- c) the judge failed to appreciate significant inconsistencies and contradictions involving the complainant's evidence and to resolve them before accepting the complainant's evidence as proving non-consent.

[55] It is not necessary to decide whether any one of these errors in principle, standing alone, would be sufficient to displace the high deference afforded to a judge's credibility findings: *Murray* at para. 82. All three are present in this case and I have concluded, based on their cumulative effect, that the judge applied different standards to her credibility assessment. In so doing, she committed a reversible error of law that resulted in an unfair trial.

Assessing the Appellant's Credibility with Speculative Reasoning

[56] One of the reasons provided for rejecting the appellant's testimony was the judge's conclusion that the evidence of the appellant falling asleep in the cab (observed by the driver), was inconsistent with his description of "kissing and mutual sexual touching" for the duration of the ride (RFJ at para. 41). The judge found it "makes no sense" that the appellant

would fall asleep given the ongoing sexual activity described by him, his testimony that he was not drunk and, in particular, his evidence that "he was a fit and healthy young man who regularly worked out and trained as a power lifter " (at para. 42).

- [57] The description of the appellant as a "power lifter" first emerged during cross-examination. Crown counsel asked the appellant about his physical condition, including his weight and level of fitness. The appellant testified that he weighed between 200 and 210 pounds and worked out as a powerlifter, which he said involves "lifting heavier weights in three different variations". He agreed with the Crown that he was strong enough to pick a "340 or 350-pound man up off the floor".
- [58] As the cross-examination unfolded, the Crown made use of the appellant's training as a powerlifter to challenge various aspects of his testimony.
- [59] For example, the appellant testified that he had a very limited recollection of what occurred between being woken up in the downstairs bedroom and coming to in the backyard of the complainant's residence. Crown counsel suggested to him that this was because he was in a "drunken, intoxicated state". He had been removed from the house through the front door and then, because of his intoxication, he must have been wandering about in a dazed state, with no idea of where he was.
- [60] During this exchange, Crown counsel asked the appellant to confirm that he was taken out the front door, rather than the back. He testified that he could not say one way or another because he did not know. The Crown suggested it would make no sense to throw him out the back door, which would necessitate climbing two flights of stairs: "If you're taking a powerlifter who can pick a 340 guy up off the ground, out of a house, you're going to pick one flight of stairs instead of two?" The appellant agreed with the basic logic of that proposition, but stated again that he could not personally confirm whether that is what happened. The Crown took the appellant's testimony as not "[disputing] that aspect" of the evidence from the witnesses who removed him from the complainant's home.
- [61] The appellant's status as a powerlifter arose again during questioning about the attempted anal intercourse and, more specifically, the appellant's assertion that after the complainant told him the anal intercourse hurt, sexual activity between them stopped, the appellant laid on the bed with the complainant, and he fell asleep:

Q: Right. And after this attempt at anal intercourse, you just lay there and cuddle and then go to sleep?

A: I didn't want to continue if she was in pain.

Q: No ejaculation?

A: No.

Q: Just lay, just gave up and cuddled and went to sleep?

A: Yes, sir.

Q: A 24-year-old power lifter -- that was -- that was fine?

A: Yeah. If she was in pain, I did not want to continue.

[Emphasis added.]

[62] Finally, the subject arose again during cross-examination about falling asleep in the cab. The appellant testified that if he had fallen asleep, it would have been only for a couple of minutes "at the very end, before -- while [they] were pulling in the driveway". Crown counsel agreed that this is what happened. He then suggested that the appellant fell asleep because he was "blacked out drunk, or bordering on blacked out drunk". The appellant denied that premise, saying he had been awake since 8:00 a.m. the morning before and thought it was "entirely possible [he] could have fallen asleep, due to exhaustion, dancing and ingesting alcohol, but not to the point where [he was] black-out drunk ". From the questions that followed, it is clear Crown counsel thought the appellant's explanation lacked credibility:

Q: You never said anything about being exhausted in your evidence in chief, did you?

A: Well, I didn't feel -- sorry. Sorry. I'm misleading you. Not that I was exhausted, but physical activity does make you tired.

Q: We all know physical activity can make you tired, but are you now saying that the 24 year old -- sorry. How old were you at the time?

A: Twenty-two, sir.

Q: Twenty-two year old, fit, powerlifter, who's buzzed, very drunk, just spent the night dancing at the bar, picked up this girl, spent the ride kissing with her, as you claim, just happened to fall asleep in the cab before paying for it at her house; is that what you're saying?

A: Yeah, it's entirely possible, sir.

[Emphasis added.]

[63] The appellant says it was improper for him to be cross-examined with reference to "offensive stereotypes of male behaviour" (appellant's factum, para. 60), and that the use of a stereotype or generalization about people who train as powerlifters to assess his credibility unfairly prejudiced the judge's approach to his evidence. The Crown does not address the use of a stereotype or generalization in its factum. Rather, it takes the position that even if there was some impropriety in Crown counsel's use of the impugned descriptor, the judge's finding of an inconsistency between the appellant's testimony about what occurred in the back seat of the cab and the fact of falling asleep was logical and amply supported by the evidence.

- [64] The appellant is correct that as a matter of legal principle, it is wrong for a judge to make a negative credibility finding based on a "stereotypical assumption or generalization" that is lacking in an evidentiary foundation: *R. v. Kodwat*, 2017 YKCA 11 at para. 41; *R. v. Thompson*, 2019 BCCA 1 at paras. 52-69; *R. v. Quartey*, 2018 ABCA 12 at paras. 2, 21, *aff'd* 2018 SCC 59.
- [65] Moreover, although judges are entitled to rely on their human experience in assessing the plausibility of a witness's testimony, they must avoid speculative reasoning that invokes "common sense" assumptions not grounded in the evidence: *R. v. Cepic*, 2019 ONCA 541 at paras. 19 -27; *R. v. Perkins*, 2007 ONCA 585 at paras. 30-42.
- [66] I do not agree with the appellant that in assessing his credibility, the judge relied on "stereotypes of male behaviour". In my view, that submission overreaches. However, the reasons for conviction do reveal a speculative assumption about this appellant's ability to sustain prolonged physical effort based on his training as a powerlifter. Moreover, that assumption played an integral role in disbelieving the appellant's narrative about sexual interaction during the cab ride.
- [67] There was no dispute that if the appellant fell asleep in the cab, it was only for a brief time at the end of the ride when the driver pulled into the complainant's driveway. The driver described the appellant as "a little bit sleepy". He said the complainant was pushing the appellant, saying, "Wake up and pay the cab driver." The appellant awoke and proceeded to pay the fare with a credit card.
- [68] The judge found the appellant's assertion of active mutual touching throughout the cab ride logically irreconcilable with falling asleep at the end of it. That inconsistency weighed against the appellant in the credibility assessment. It is clear from the judge's reasons that the fact the appellant was someone who regularly worked out and trained as a powerlifter played a material role in the determination. Implicit in the judge's analysis is the assumption that because of the appellant's level of fitness as a powerlifter, he would not have fallen asleep had there been the type and duration of sexual interaction that he described in his evidence.
- [69] Respectfully, I fail to understand this reasoning.
- [70] There was no evidence that people training as powerlifters, including the appellant, are somehow less susceptible to the effects of fatigue resulting from a long day, physical activity and the consumption of alcohol, or that active sexual touching and brief sleep at the end of a cab ride cannot logically co-exist. Indeed, the cab driver, who the judge described as an "uninterested and objective witness" (RFJ at para. 46), testified that he heard "kissing sounds" coming from the back seat "kind of all the way through" the ride, and, at one point, his "seat was scratching with the knees, or like shoes" from the back seat. He did not look back because he was concentrating on driving. However, *prima facie*, his evidence was consistent with the appellant's version of events, namely, activity in the back seat over the course of the ride, followed by brief sleep at the end. The appellant also provided a plausible explanation

for falling asleep. He said he was tired from a combination of having been up since 8:00 a.m. the morning before, physical activity, and drinking. That evidence was uncontradicted.

- [71] In my view, the credibility of the appellant's evidence about the events in the cab, including his explanation for why he may have fallen asleep, was discounted on the basis of an unfounded (and therefore speculative) assumption about his physical stamina arising from his training as a powerlifter. The assumption was developed in cross-examination; regrettably, it then made its way into the judge's credibility analysis.
- [72] There was evidence that the appellant exhibited physical strength when being removed from the home. One witness said that notwithstanding the appellant's intoxication, he was "still very strong, still had a lot of fight in him, and he definitely had the drive to do damage". Another witness described the appellant as a "big, stocky, bodybuilding kind of guy". The complainant described the appellant as muscular and strong. However, even assuming the accuracy of that testimony, it did not provide an evidentiary foundation from which to conclude that had someone of the appellant's physical training been engaged in mutual sexual touching during the cab ride, he could not have also briefly fallen asleep at the end.
- [73] In assessing the credibility of testimony, a trial judge is entitled to draw inferences that "flow logically and reasonably from established facts": *R. v. MacIsaac*, 2015 ONCA 587 at para. 46. When inferences reflect conjecture and speculation, based on stereotypical reasoning, a generalization about a particular role or type of individual, unfounded assumptions or otherwise, it amounts to legal error: *MacIsaac* at para. 46, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.) at 530-531; *R. v. Pilkington*, 2019 BCCA 374 at paras. 20-21. In my view, that is what occurred here and it tainted the judge's credibility assessment.

Assessing the Appellant's Credibility Relying on Improper Cross-Examination

- [74] In rejecting the appellant's testimony, the judge stated that she had "difficulties with [his] evidence of his sobriety on the night in question" (RFJ at para. 46). She found his testimony on this issue inconsistent with the evidence of the cab driver, as well as the evidence surrounding what occurred when he was awoken by the persons who attended the complainant's residence after she called for assistance (at para. 47). From the judge's perspective, the appellant's testimony reflected a "deliberate attempt to minimize his level of intoxication" (at para. 49).
- [75] The judge also found that the appellant's evidence was "contrived and self-serving" (RFJ at para. 48). As support for that conclusion, she pointed to the fact that the appellant "admitted that he had described vaginal intercourse with [the complainant] as vigorous because Dr. Byrne had used that term to describe the mechanism of injury to her vagina" (at para. 48).

[76] In his direct examination, the appellant testified that the complainant voluntarily "participated" in sexual intercourse. He described the vaginal intercourse this way: "When she was on top she was jumping up and down, hips hitting. Like, it was -- I would describe it as vigorous. It was rough." When cross-examining the complainant, defence counsel put this theory to her, namely, that she "consensually had vigorous or rough sex with [the appellant], with both of [them] having been on top on various occasions".

[77] The judge found that in describing the sexual interaction as "vigorous", the appellant deliberately chose a word that aligned with the doctor's evidence, presumably to maximize the benefit of the expert's acknowledgment that "rough" (but consensual) sex could cause the type of injuries sustained by the complainant. Indeed, the doctor's evidence on this point was highlighted by the defence in closing submissions:

the doctor said that vigorous sex can -- can cause the lesions that he ultimately found. In other words, the doctor's saying the two lesions he did discover are as consistent with vigorous sex as they are with an alleged sexual assault, although he normally only sees people who come to him who are complaining of sexual assault.

[78] The appellant says the judge's approach to both of these issues, the appellant's testimony about intoxication and his use of the word "vigorous", was flawed. The conclusions drawn by the judge, which negatively influenced her assessment of the appellant's credibility, derived from improper cross-examination. On a review of the record in this case, I find that submission persuasive.

[79] First, I will address the appellant's evidence about intoxication.

[80] In direct examination, the appellant described himself as having a "buzz" while at the nightclub. However, he said he "knew everything that was going on". He also testified that he was "on the same level of intoxication" as the complainant. (In her evidence, the complainant said she "could definitely feel the alcohol" by the time they reached her residence and she described herself as "a little drunk").

[81] In cross-examination, the Crown repeatedly challenged the appellant on his level of intoxication. According to my reading of the cross-examination, the Crown put to the appellant on at least 20 occasions, either directly or indirectly, that he was "drunk" on the date in question. During some of these exchanges, the Crown described him as "borderline black-out drunk".

[82] The intoxication issue pervaded the cross-examination, with the Crown submitting in closing submissions that the appellant was "lying about his alcohol intoxication", "minimizing his evidence in that regard" and was "clearly far drunker than he [said] he was". Crown counsel held out the appellant's testimony about his state of sobriety as the "first" reason for rejecting his evidence. He described the testimony as "entirely self-serving". The Crown accused the appellant of having "underplayed his intoxication because he knew that if he admitted to it, it would undermine his reliability with respect to his version of events".

[83] Standing alone, the Crown rigorously testing the appellant's evidence on his intoxication would not concern me. His level of impairment by alcohol, before, during and after the sexual activity, was a live issue at trial. It was relevant to, among other things, the possible impairment of his thinking processes, the presence or absence of inhibition, his physical behaviour during the sexual interaction, his responsiveness (or lack thereof) to asserted resistance by the complainant, and the reliability of his recollection. His state of sobriety was canvassed with a number of the witnesses at trial (including the complainant), and it formed a material part of the Crown's theory of the case. As noted in *R. v. Trochym*, 2007 SCC 6, effective cross-examination by the Crown serves the truth-finding function of a trial as much as cross-examination by the defence (at para. 177, citing *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168 (Ont. C.A.) at 176).

[84] However, I agree with the appellant that the manner in which the subject of intoxication was explored in the appellant's cross-examination was problematic because it was bound up with demands made of him that he explain the evidence provided by others, or that he comment on the veracity of their testimony. Examples include the following:

Q: These guys who testified at this trial about you being intoxicated, smelling like a brewery, the cab driver, [the complainant] -- all these people who testified that you were drunk -- they're all -- they got it wrong?

Q: Why would the cab driver say you were an eight out of ten drunk?

Q: How do you explain the evidence of these guys down in the house, about the smell on your breath, about your behaviour? How do you explain that? Do you dispute their evidence on that point?

Q: And I'm talking about the totality of the evidence; right? We have [J.C.], who you would agree, based on his evidence, clearly has a lot of experience with intoxicated people; right?

A: He does, yes.

Q: Yeah. He said you were drunk?

A: He also said that I did not act like a drunk person.

Q: Right. He said you acted like a high, drunk person?

A: That's what he said, yes.

Q: Yeah. How do you account -- like, do you dispute their evidence, that you appeared like you were intoxicated when you woke up?

[Emphasis added.]

- [85] Appellate courts have long considered this type of questioning to be improper. For one, questions that ask an accused person to explain or account for the evidence of other witnesses tend to "shift the burden of proof from the Crown to the accused": *R. v. Ellard*, 2003 BCCA 68, at paras. 21-22; *R. v. Belcourt*, 2019 BCCA 435 at para. 69; *R. v. M.F.T.*, 2012 BCCA 428 at para. 41. In so doing, they carry a substantial risk of unfairly prejudicing the trial process.
- [86] The Crown accepts that some of the questions posed to the appellant invited speculation; however, it says that in the context of the cross-examination as a whole, those questions did not undermine the fairness of the trial. Moreover, the appellant was tried by a judge sitting without a jury, a form of trial in which problematic cross-examination arguably carries reduced prejudicial impact. It is apparent from her reasons that the judge was alive to the legal principles she was obliged to apply in convicting the appellant, including the presumption of innocence. Crown counsel was entitled to put the facts testified to by other witnesses to the appellant in cross-examination. Defence counsel did not object to the impugned questions and the judge did not place any weight on the answers. In any event, she grounded her factual findings about the appellant's intoxication in the evidence of witnesses other than the appellant.
- [87] I do not accept that the cross-examination on the issue of intoxication had negligible impact in this case. The judge rejected the appellant's evidence on consent, the main issue at trial, and found that it did not raise a reasonable doubt. One of the findings underlying the rejection was that the appellant's "evidence at trial appear[ed] to have been a deliberate attempt to minimize his level of intoxication" (RFJ at para. 49). In my view, the judge's finding of "minimization" was enabled by the problematic cross-examination, during which the appellant was asked more than once to explain or account for related observations made by other witnesses. There is a readily apparent nexus between these parts of the cross-examination and the credibility assessment.
- [88] The questions posed to the appellant invited him to provide reasons for why the Crown's witnesses observed the things they described, or why they formed the opinions about his intoxication that they expressed at trial. The appellant endeavoured to do that. For example, he suggested that the cab driver could have described him as drunk because he saw that the appellant had fallen asleep. He said the strong odour of alcohol in the downstairs bedroom could have arisen from the fact that the complainant had also been drinking. As such, there were actually two people contributing to the odour. He said the descriptions of him as intoxicated when woken in the bedroom were equally consistent with him being "hit in the head and disoriented". He had also been pulled from a "deep sleep".

[89] The Crown's repeated invitation to provide reasons for the evidence of other witnesses laid the groundwork, in material part, for a finding that the appellant was intentionally trying to distance himself from the descriptions of him as intoxicated. The judge found precisely that and her finding carried significance in the credibility assessment, tainting the reasoning process (RFJ at paras. 47-49).

[90] That brings me to the use of the word "vigorous".

[91] As noted, the appellant described the vaginal intercourse as "rough" or "vigorous". In cross-examination, Crown counsel challenged the appellant's use of the term "vigorous":

Q: Mr. Roth, you've testified that at the time you started having sex with [the complainant] you were essentially on your way to being sober; right?

A: Yes, sir.

Q: Not drunk at all?

A: Yes, sir.

Q: You started having what, in your view, is passionate sex with her; right?

A: Yes, sir.

Q: Vigorous sex?

A: Yes, sir.

Q: Did you use that word 'cause the doctor said it, or is that a word you would normally use?

A: No, it was because the doctor said it. It was --

Q: And that's going on. The sex has gone on for at least fifteen minutes; right -- by the time she stops to get her phone or --

A: Yeah.

[Emphasis added.]

[92] As stated, in finding that the appellant was not a credible witness, the judge took into account the fact that he "admitted that he had described vaginal intercourse with [the complainant] as vigorous because Dr. Byrne had used that term to describe the mechanism of injury to her vagina" (RFJ at para. 48, emphasis added).

[93] I agree with the appellant that the judge went too far with this finding. I say that for two reasons: (1) although the appellant acknowledged using the word "vigorous" because the doctor did, he did not say it was because of (or intended to align with) the doctor's testimony about the mechanism of injury; and (2) the appellant's answer in cross-examination was interrupted by Crown counsel and therefore incomplete. As such, it is not at all clear what the appellant intended by the use of the word "vigorous", vis-à-vis the doctor. He was about to provide an explanation, but that did not occur.

- [94] The judge assigned the appellant's answer a sinister intent, namely, that it represented a deliberate effort by him to align his narrative about the physicality of the vaginal intercourse with the doctor's evidence on the mechanism of injury. On the appeal, the Crown says the judge was entitled to take this approach. The question put to the appellant was "straightforward" and his answer was "responsive". There was no objection by his trial counsel (which the Crown says speaks volumes about the perceived degree of prejudice), and the appellant did not seek an opportunity to say anything more about it. Furthermore, his use of the word "vigorous" did not form a material part of the judge's credibility analysis (respondent's factum at paras. 50, 52).
- [95] I accept the Crown's submission that as a general proposition, "two dashes in a transcript" does not an unfair cross-examination make. As noted in *Belcourt*, an "imperfect cross-examination is not necessarily an unfair one" (at para. 48). The entitlement to cross-examine is "broadly construed" and counsel on both sides have considerable latitude in the number and nature of the questions posed, including questions that are specifically aimed at testing a witness's credibility: *R. v. Lyttle*, 2004 SCC 5 at para. 44; *Belcourt* at para. 18; *R. v. A.C.*, 2018 ONCA 333 at para. 48; *R. v. Lawrence*, 2015 BCCA 358 at para. 69, leave to appeal to SCC ref'd, 36756 (14 April 2016). To seek appellate relief based on an unfair cross-examination, the appellant must show that the cross-examination actually compromised the fairness of the trial: *Belcourt* at para. 48.
- [96] However, there are cases in which a single interrupted answer may carry significance, even when considered in the context of the entirety of the record, because of the role the answer plays in the judge's analysis. *R. v. Luk*, 2016 BCCA 403 exemplifies this point. There, the prosecutor's interruption of the only defence witness during cross-examination, which prevented the witness "from clarifying a point central to the entire case" (at para. 37), was found to warrant a new trial. Moreover, the absence of an objection by defence counsel did not prevent that outcome. Credibility was a significant issue in *Luk* and the witness's testimony was rejected because of an inconsistency he was not given an opportunity to explain (at para. 39). Consequently, the Court found a "real appearance" of trial unfairness (at para. 41).
- [97] This case is not on all fours with *Luk*. There are factual distinctions, and the answer at issue here was not the "lynchpin of [the judge's] rejection" of the appellant's evidence (at para. 38). However, I find the principles discussed in *Luk* instructive.
- [98] Here, the appellant was interrupted while responding to a question that was intended to challenge the veracity of his assertion that he had consensual, albeit vigorous, intercourse with the complainant. Consent was the main issue at trial. The Crown's question implied that in using the word "vigorous", the appellant had intentionally engaged in testimonial artificiality. The answer to the question was incomplete. An adverse inference was then drawn from the incomplete answer, consistent with the Crown's theory about the appellant's use of the word, and it is clear from the reasons for conviction that the adverse inference played a not-insignificant role in the judge's finding of "contrived and self-serving" testimony

(RFJ at para. 48). I agree with the appellant that in these circumstances, reliance on the interrupted answer tainted the judge's credibility assessment.

Inconsistencies Involving the Complainant's Evidence

- [99] In a prosecution for sexual assault, whether the Crown has proved the absence of consent is determined subjectively, "by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred": *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 26. If the trial judge believes the complainant's statement that she did not subjectively consent to the sexual contact, the Crown will have met its burden on this element of the offence (at para. 29).
- [100] Whether a judge accepts an assertion of non-consent is "a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct" (*Ewanchuk* at para. 30). As such, in defending a charge of sexual assault, it "is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place" (at para. 29). In deciding that claim, the trial judge will consider "whether the totality of the complainant's conduct is consistent with her claim of non-consent" (at para. 30).
- [101] The appellant contends that in this case, the trial judge wrongly "ignored or glossed over material inconsistencies and other problems with the complainant's evidence" when completing the analysis spoken of in *Ewanchuk* (appellant's factum at para. 71). His factum identifies numerous aspects of the complainant's testimony that he says raised serious questions about her overall credibility. The appellant says the judge failed to account for these issues in her assessment of the complainant's evidence. Moreover, once considered, the judge's conclusion that difficulties with the complainant's testimony were "generally minor" and "easily explained by the ordinary frailties of memory and the circumstances of the described incident", cannot withstand scrutiny (RFJ at para. 57). Instead, what becomes clear is that the lens brought to the review of the complainant's evidence, and, ultimately, to acceptance of her assertion that she did not consent to sexual activity, was more tolerant and forgiving than the lens employed for the appellant.
- [102] In its factum, the Crown has charted the inconsistencies flagged by the appellant and offers explanatory context for them, or challenges the appellant's characterization of their significance. The Crown says the judge's reasons make it clear that she had a good grasp of the evidence and understood the defence claim that "inconsistencies in [the complainant's] evidence should be enough to create reasonable doubt about her veracity" (RFJ at para. 38). Her reasons include a detailed review of the evidence, she understood the bases on which the defence claim was made, and, given her unique advantage as the trier of fact, the judge was entitled to find that the inconsistencies belaboured by defence counsel at trial were minor and adequately explained. It is the Crown's position that the evidentiary difficulties emphasized by the appellant in the appeal, even if not fully considered by the judge, would have made no difference to the overall credibility analysis.

- [103] The Crown correctly points out that assessing credibility "is not a science" and "[i]t is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events": *R. v. Gagnon*, 2006 SCC 17 at paras. 20-21; see also *Wright* at para. 25. For this reason, appellate courts must tread lightly when asked to review credibility findings.
- [104] It is also the case that a trial judge "is not required to resolve every inconsistency raised by the defence before accepting the evidence of a complainant and basing a conviction upon it": *Mehari* at para. 33, citing *R. v. R.A.*, 2017 ONCA 714, *aff'd* 2018 SCC 13; *R. v. J.L.*, 2018 ONCA 756 at para. 41. Nor is a trial judge obliged to ensure that their reasons for conviction advert to every piece of evidence that was tendered and considered at trial: *R. v. H. (J.M.)*, 2011 SCC 45 at para. 32.
- [105] However, on the record in this case, the appellant has persuaded me that the reasons for conviction, read as a whole, reflect a failure to appreciate and resolve a number of inconsistencies and contradictions involving the complainant's evidence that carried significance to the overall credibility assessment.
- [106] I will start with external inconsistencies.
- [107] In her reasons, the judge noted "aspects" of the appellant's testimony that were "both internally and externally inconsistent" (RFJ at para. 41; emphasis added). In negatively assessing his credibility, she took into account conflicts between the appellant's evidence and the testimony of the cab driver (at para. 46); the doctor who examined the complainant (at para. 45); and the witnesses who made observations of the appellant when they attended the complainant's residence after the fact (at para. 47).
- [108] However, when assessing the complainant's credibility, the judge focused predominantly on internal inconsistencies (by which I mean, inconsistencies within the complainant's testimony, or between her testimony and statements made before trial).
- [109] Defence counsel cross-examined the complainant on various pre-trial statements (RFJ at paras. 51-54). The judge found that the complainant's testimony on those points:
- [55] was not material or inconsistent with the more significant parts of her evidence. After listening to her evidence and observing her demeanour when she was asked about these prior statements, it appeared to [the judge] that [the complainant] was genuinely attempting to tell the truth. She was not defensive or evasive when inconsistencies were pointed out and she seemed to be trying to search her memory. She admitted that she was a little drunk on the night of the incident and she readily admitted that she had been "beating herself up" because she was having difficulty recalling the precise sequence of events. She also readily admitted, on several occasions during cross-examination, that she could not remember certain details.

[57] The inconsistencies in [the complainant's] evidence pointed out by defence counsel on cross-examination were generally minor and easily explained by the ordinary frailties of memory and the circumstances of the described incident. In my view, those inconsistencies do not compromise [the complainant's] credibility with respect to the core allegation.

[Emphasis added.]

[110] There is no indication in the credibility analysis that the judge substantively considered any external inconsistencies--contradictions between the complainant's evidence and the testimony of other witnesses--other than to recognize, generally, that the evidence of the appellant and the complainant was "diametrically opposed on the issue of consent" (RFJ at para. 34).

[111] The judge found the complainant's testimony to be consistent with the cab driver's description of the appellant's level of intoxication, the doctor's evidence about the vaginal and anal lesions, and the observations made of the complainant's emotional state by witnesses who attended her residence after the fact. However, as explained in *R. v. S.(D.D.)*, 2006 NSCA 34, the judge was obliged to look:

51 at all of the evidence not simply to see if there was other evidence which supported and enhanced that of the complainant, but also to determine if there were evidence that contradicted or tended to contradict that of the complainant; and more importantly, whether that evidence, or lack thereof, created a reasonable doubt.

Cited with approval in *Willis* at para. 44; emphasis added.

Asking whether there is evidence that contradicts, or tends to contradict, a complainant's testimony is important because one of the factors to consider in assessing a witness's credibility and the reliability of their evidence is whether their evidence "harmonizes with independent evidence that has been accepted": *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296. The "testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison" (*Stenner* at para. 187).

[112] In fairness to the trial judge, counsel for both sides spent considerable time at trial on the issue of impeachment with reference to the complainant's pre-trial statements. In light of that focus, the judge had to consider and address the issue. However, there were also external inconsistencies or contradictions arising from the complainant's testimony that were significant to assessing her overall credibility as a witness and the reliability (or accuracy) of her narrative. That narrative, of course, included the assertion of non-consent at the time of the sexual activity. The trial judge did not identify or address those inconsistencies in her reasons. In my view, they required acknowledgement and, importantly, resolution in the credibility determination.

[113] First, the complainant's description of events in the cab ride and the observations of the cab driver were *prima facie* inconsistent.[2] In direct examination, the complainant testified that after she and the appellant got in the cab, they did not talk a "whole lot" or do anything

else. Then, at one point during the drive, the appellant tried to touch the complainant on her legs. He also tried to put his hands down her pants (twice). She said she pushed his hand away and told him not to do that. The appellant also tried to kiss her. She pulled away before his lips made contact with her. In cross-examination, she acknowledged, based on her testimony at the preliminary inquiry, that she voluntarily "hugged" the appellant in the cab. However, she said that happened only once.

- [114] The cab driver testified that he heard "kissing sounds" coming from the back of the cab and that his seat was "scratching". He believed the scratching was because of knees or shoes against the back of his seat. He testified that the kissing sounds lasted for "[m]ost part of the trip ". He missed the turn to the complainant's street "because they were kissing or something that time ". At no point did he hear anyone say "stop" or words to that effect. The cab was a "small car" and if someone in the back seat had been saying those sorts of things, he would have heard it "[f]or sure".
- [115] A second external inconsistency emerges from the complainant's testimony about what happened when the cab arrived at her residence. The cab driver testified that the appellant and complainant did not exit the cab until after the appellant paid the fare using a credit card. When they arrived at the residence, the complainant was pushing the appellant, telling him to wake up and pay for the ride. Once the fare was paid, the two of them got out of the cab and the driver left.
- [116] The complainant testified that the cab pulled into the driveway, she got out, had a "couple of puffs" from a cigarette, and then went inside the house to let her two dogs out. The appellant was in the cab and she said goodbye to him. She went in through her front door, took her shoes off, went into the kitchen and let her dogs out the back. She then "turned around and looked out the [living room] window and the cab was gone and [the appellant] was still standing there". She thought this was about a couple of minutes after she entered the house. The complainant said she opened the front door and asked the appellant what he was doing. He replied that he could not afford to take the cab the rest of the way and she then told him that he could come inside and sleep in the spare bedroom. She did not want him to have to walk home. It was "probably minus twenty out at that time". The appellant went inside with her.
- [117] In cross-examination, defence counsel put a prior statement to the complainant in which she told police that she smoked outside of the cab while the appellant paid the fare and that they went into the house together, before she let her dogs out (consistent with the appellant's version). When asked if the description given to police was "true", she said "no". She said that when she gave that statement, her "head was still a blur from what had happened".
- [118] The cab driver's evidence about his second return to the complainant's home with her phone was also inconsistent with the complainant's testimony. The driver testified that he approached the residence and knocked on the door. The complainant came out of the house

and offered to pay for returning her phone. She told him that she only had a debit card, but could go to the bank if he required cash. He replied that was not necessary, the complainant "smiled and went back in". The driver said that while speaking with the complainant, she came completely out of the house and closed the door behind her because there were two dogs that were trying to come out, "one small one and one big one". She was wearing the same clothes she had been wearing when he first dropped her off.

- [119] In her testimony, the complainant said the cab driver knocked on the door and the appellant stopped having sex with her. He "let [her] put a hoodie on". That was the only thing she was wearing. The appellant told her that she had better come back and to not say anything. She agreed, went upstairs and opened the front door. The cab driver was there and gave her the phone. She offered to pay him, but he said it was okay. The interaction lasted probably less than a minute. While this was happening, the appellant was standing at the bottom of the stairs, watching her. The cab driver turned around and walked away. The complainant closed the door and went back downstairs. The appellant was still at the bottom of the stairs, waiting for her. They went back into the bedroom. The complainant "just kind of sat on the bed because [she] was scared of what would happen". She did not know how the appellant would react if she did not do what he told her to do. He pushed her back on the bed and continued to have sex with her.
- [120] In cross-examination, the complainant denied that when she spoke with the cab driver at the door, she was wearing the same thing as when the driver dropped her off. She also said she only opened the door "about half way". She agreed she was not acting in a way that might indicate to the driver "something bad had happened to [her]". She said she "was told not to". The complainant said she turned her mind to asking the driver to call the police, but she was scared of the appellant. She did not know what the "consequences" would be. The complainant agreed that after getting her phone back and while still at the top of the stairs, she "checked" her phone and "[petted] the dog".
- [121] There was also a significant internal inconsistency involving the complainant's evidence that finds no mention in the judge's reasons on credibility, relating directly to the manner in which the appellant was said to have forced the sexual activity in the bedroom.
- [122] The complainant testified more than once that during the sexual activity, the appellant held her arms above her head, with one hand around both wrists. He had her "arms above [her] head in one hand and managed to get -- slip his pants off with the other hand" at the start of the interaction, and then held her hands above her head for much of the time. The complainant tried to move her arms, but could not because the appellant was very strong. He had "really large arms and broad shoulders and when he pushed [her] onto the bed and stuff it almost seemed effortless". She testified that when forcing fellatio, the appellant had one hand around her throat, beneath her chin, and his other hand on the back of her head, pushing her into him. It was terrifying and hurt. At one point during the vaginal intercourse, he also had his hand on her throat.

- [123] At the hospital, the complainant described the sexual interaction to the examining doctor. She said the appellant held her down by putting his hand over her throat and holding down her hands. Contrary to her testimony, she told the doctor that her hands were held "down by her side". Defence counsel asked the complainant about that description in cross-examination. She said it was a "mistake" and the result of being tired.
- [124] As noted, the judge acknowledged that the complainant's evidence "was not without its problems"; however, she characterized those problems as "generally minor" and found that they related only to "peripheral" matters (RFJ at paras. 51, 52, 57). In my view, the external and internal inconsistencies highlighted in these reasons were not minor. Nor were they restricted to peripheral matters. In collectively casting the frailties with the complainant's evidence as she did, I can only conclude that the trial judge failed to appreciate the nature and extent of some of those inconsistencies, and their materiality.
- [125] The problematic parts of the complainant's evidence, highlighted here, did not involve her testimony on the primary fact in dispute, namely, her assertion that she did not subjectively consent to the sexual activity at the time it occurred. However, the inconsistencies were nonetheless material to assessing the complainant's overall credibility and the reliability of her testimony, including, indirectly, her testimony on the issue of consent. The inconsistencies were tethered to evidence relevant to the extent and mutuality of sexual interaction during the cab ride, the dynamics surrounding the appellant's entry into the complainant's home, the degree of control the appellant exerted over the complainant during the sexual interaction and while in her home, and the complainant's fear. If the judge found that the complainant lacked sincerity or honesty on the latter aspects of her evidence, although certainly not determinative, those findings could assist in evaluating and weighing the evidence specific to the principal issue at trial, namely, consent. For a helpful discussion on the meaning of materiality, see David M. Paciocco, "'Truth and Proof': The Basics of the Law of Evidence in a 'Guilt-Based' System" (2001), 6 Can. Crim. L. Rev. 71 at 86.
- [126] Evidence contradicting the complainant's description of one-sided sexual touching in the cab, and the absence of kissing, could affect the credibility of her testimony that throughout her interaction with the appellant in the cab, the appellant was the one who initiated the sexual contact; the contact was unwanted; and the complainant physically and verbally resisted.
- [127] Evidence inconsistent with the complainant's testimony that she exited the cab, said goodbye and then entered her residence alone, seeing the appellant only once she looked out her front window, could affect the credibility of her description of the nature of the dynamics between the complainant and the appellant upon arrival at her home. The complainant testified that she expected the appellant to carry on to his own residence. Evidence that she waited in or outside of the cab while the appellant paid the fare, and that they then entered the house together, is arguably also consistent with a different expectation and intention.

- [128] Contradictions between the testimony of the cab driver and the complainant surrounding the return of her phone also carried significance to assessing the complainant's credibility. This portion of the evidence included the fact that the complainant did not say anything to the cab driver about what was occurring in the residence.
- [129] Let me pause here to note that the judge correctly rejected defence counsel's improper suggestion, based on this evidence, that the "mere fact" the complainant did not say something about a sexual assault to the driver (or call the police), undermined her credibility on the issue of consent (RJF at paras. 59-61). It is an error for a judge to ground an adverse credibility finding in stereotypes or erroneous "common sense" assumptions about how a sexual assault complainant is expected to act, including that they would immediately disclose the fact of an assault or seek assistance: *R. v. A.R.D.*, 2017 ABCA 237 at para. 9, *aff'd* 2018 SCC 6; *R. v. A.B.A.*, 2019 ONCA 124 at paras. 5-7. As noted in *R. v. Lacombe*, 2019 ONCA 938 at para. 31: "myths and stereotypes about sexual assault victims have no place in a rational and just system of law". See also *R. v. Barton*, 2019 SCC 33 at para. 1.
- [130] However, this does not mean that the evidence surrounding the driver's attendance at the home, including the complainant's conduct during that interaction, was not open for consideration in the credibility assessment and the trial judge was obliged to steer away from it. The risk of myths and stereotypes distorting a judge's fact-finding or reasoning process does not prohibit use of a complainant's behaviour for all analytical purposes (assuming the evidence surrounding that behaviour is properly before the court). Although a piece of evidence may carry the potential for impermissible reasoning, it may also have a permissible role to play as a circumstance to consider in assessing the evidence as a whole, in the context of the case's particular "factual mosaic": *R. v. D.(D.)*, 2000 SCC 43 at para. 65; *Kiss* at paras. 101-102. In my view, what *A.R.D.* and like cases warn against is the improper use of this type of evidence, not any use at all.
- [131] On this point, I agree with the comments of professor Lisa Dufrainmont in "Myth, Inference and Evidence in Sexual Assault Trials", (2019) 44 *Queen's L.J.* 316 at 353:

Criminal courts carry the heavy responsibility of ensuring that every accused person has a fair trial. Subject to the rules of evidence and the prohibition of particular inferences, this requires that the defence generally be permitted to bring forward all evidence that is logically relevant to the material issues. Repudiating myths and stereotypes means rejecting certain discriminatory lines of reasoning, but it does not make whole categories of evidence irrelevant or inadmissible. Indeed, sweeping prohibitions that would rule out any consideration of particular forms of evidence are avoided as inconsistent with the accused's right to make full answer and defence and with our overall approach to finding facts. Outside the prohibited lines of reasoning identified as myths, relevance remains an elastic concept that leaves a wide scope for reasoning from logic and human experience.

[Emphasis added; internal references omitted.]

[132] Based on what is now a well-established line of authority, it is unquestionably improper to "anchor" the use of a complainant's conduct before, during or after an alleged sexual assault, and the inferences drawn from it, in discredited assumptions: *Lacombe* at paras. 47, 55. A conclusion drawn from a complainant's behaviour, including delayed disclosure, not reporting the sexual assault to someone in authority, or not reaching out for assistance when able to do so, cannot find its "genesis, or provenance, in dangerously presumptive generalizations or assumptions about the normative behaviour of a sexual assault complainant": *R. v. Roberts*, 2017 NWTCA 9 at para. 65 (emphasis added). This will constitute error.

[133] In *A.R.D.*, for example, an acquittal for alleged sexual offending was set aside because the sole reason provided by the trial judge for [the acquittal] was that he "would have expected some evidence of avoidance either conscious or unconscious" but found there "was no such evidence." The finding that there was no evidence that the complainant avoided the respondent or changed her behaviour after the alleged incidents of sexual touching, was deemed inconsistent with her evidence of having been abused, thus negatively affecting her credibility and raising a reasonable doubt.

(at para. 31; underlining added, italics in the original.)

See also 2018 SCC 6, *aff'ing*, at para. 2.

[134] In *Lacombe*, another case overturning an acquittal, the trial judge "attributed significance" to the complainant's failure to report the assault, but did not explain the reason for that significance. Ultimately, the judge was found to have relied on the stereotypical view that a failure to immediately report a sexually aggressive act reflects either that the aggression did not occur, or that there was consent (at paras. 40-41). The Court emphasized, at para. 42, that "[d]elayed reporting, standing alone, does not assist in evaluating whether an account alleging a consensual encounter is true or raises a reasonable doubt" (emphasis added). The same is true of other behaviours, including, but not limited to, remaining in an assaultive situation, not reaching out to seek assistance when the opportunity arises, or continuing to associate with the alleged offender after the fact.

[135] *A.R.D.*, *Lacombe* and similar cases tell us it is prohibitory for judges to assess a complainant's conduct based on what one would "expect" to see from a sexual assault victim, or to allow that expectation to inform the reasoning process. Trial judges must ensure that myths, stereotypes, presumptive generalizations or unfounded assumptions do not, consciously or sub-consciously, seep into and distort their admissibility determinations, credibility assessments, findings of fact, or the reasoning process brought to bear on the elements of the offence. An inability to identify the legitimate probative value of this type of evidence will speak volumes about whether, overtly or impliedly, the judge has engaged in impermissible reasoning. If a judge can only, or principally, explain the relevance or analytical significance of a complainant's behaviour on grounds that it is not what they would have expected from a victim of a sexual assault, or with reference to a

myth or stereotype, they will have fallen into error.

- [136] Objectively assessing a complainant's conduct in the context of the particular facts of a case, for a demonstrably proper and articulable purpose, does not constitute error. This is so even where that conduct may involve the complainant's reaction to an alleged sexual assault: *R. v. Durocher*, 2019 SKCA 97 at paras. 106-112.
- [137] In this case, contradictions in the evidence surrounding the return of the complainant's phone could affect the credibility of her assertion that although she adverted to asking the driver to call police, she could not (and did not) do so because she was afraid that the appellant would get angry and react negatively towards her. The effect of her testimony was that, while at the door, the complainant was under the appellant's continued control, he was monitoring her from the bottom of the stairs, and it was not until the appellant eventually fell asleep that there was opportunity for her to safely extricate herself and reach out for assistance. On the driver's evidence, the complainant was beyond the appellant's reach when speaking with him outside of the home; she had broken free of his ability to monitor her interaction with the driver; she had someone immediately available to her and away from the appellant for the purpose of assistance; and, objectively, she had an opportunity to extricate herself.
- [138] In this context, if the cab driver's evidence was accepted, then the failure to say anything to him about the appellant's conduct carried relevance in assessing the complainant's credibility and the reliability of her narrative. Not because one would expect a complainant to reach out whenever sexual activity is non-consensual. That would constitute impermissible reasoning. Rather, the relevance of the complainant's behaviour to the credibility assessment lies in the juxtaposition between the driver's evidence of her as being out of the home and therefore beyond the appellant's reach, and the complainant's description of continued control by the appellant that effectively rendered her unable to seek assistance, even though she turned her mind to doing so.
- [139] That brings me to the last of the evidentiary inconsistencies highlighted in these reasons. The description provided to the doctor on how the complainant's hands were held down during the sexual interaction was important to assessing the credibility of the complainant's narrative about the manner in which the assault physically unfolded and the control exerted by the appellant. This inconsistency did not relate to peripheral matters. Instead, it went directly to the application of force by the appellant and the manner in which he physically facilitated sexual aggression.
- [140] On balance, the absence of a demonstrated appreciation for, and grappling with, the inconsistencies and contradictions noted here supports the appellant's submission that in making her credibility findings, the judge applied a more rigorous scrutiny to the defence evidence than to that tendered by the Crown.

- [141] While internal and external inconsistencies with the appellant's evidence resulted in the judge rejecting much of his testimony, significant inconsistencies involving the complainant's evidence were generically cast as minor, treated as relevant only to peripheral matters, and found to be easily explained away on grounds of confusion and lack of memory. Those inconsistencies required careful and critical assessment, especially in a case in which the complainant acknowledged having twice been untruthful about her interaction with the appellant when confronted after the fact; once with the appellant's friend who made enquiries of her, and then later when speaking with the appellant's father. Both times, she denied having seen the appellant after the nightclub. If the judge found that the complainant lacked sincerity or honesty in the aspects of her evidence that have been highlighted here, although certainly not determinative, those findings could assist in then evaluating and weighing the evidence specific to the primary issue in dispute at trial.
- [142] Failing to conduct a critical assessment of testimonial weaknesses that could undermine the Crown's evidentiary foundation on an essential element of the offence can be indicative of uneven scrutiny: Mehari at para. 34; Willis at para. 44. In my view, that is what happened here. There were significant inconsistencies and contradictions involving the complainant's evidence that the trial judge did not appear to consider, or, if she did consider them, there is no indication that she resolved them in a substantively meaningful way. Once combined with the speculative reasoning in assessing the appellant's credibility, and the judge's unfortunate reliance on improper cross-examination, the overall effect is sufficient to displace the high deference afforded to credibility findings.
- [143] I have reached my conclusion on the appellant's first ground of appeal, appreciating that, for good reason, this type of a challenge to a verdict rarely succeeds. I also recognize that it is not properly the role of an appeal court to engage in a "quantitative analysis" of whether the trial judge found more aspects of the appellant's testimony problematic than the complainant's evidence. Instead, the court must "review the reasons as a whole to determine whether the trial judge approached the evidence with an open mind and dealt with conflicting accounts or inconsistencies in the evidence of both parties fairly. Standing alone, being disbelieved does not translate into uneven scrutiny": R. v. Bartholomew, 2019 ONCA 377 at para. 31 (emphasis added).
- [144] As noted, it is also the case that reasons for conviction need not advert to every piece of evidence or discrepancy involving a complainant's evidence that have been pressed by the defence. However, there are cases in which a judge's failure to articulate the bases on which they have reconciled significant inconsistencies supports appellate intervention: R. v. Dinardo, 2008 SCC 24 at para. 26. It may also be an indication of uneven scrutiny: Mehari at para. 34. The appellant has not challenged the guilty verdict on the ground of insufficient reasons. However, I have found the principles underlying the outcome in Dinardo informative in assessing the appellant's first ground of appeal.

- [145] There, it was noted that where a defence primarily rests on the overall lack of credibility and reliability of a complainant's testimony (which was clearly the case here), it is "incumbent" upon the trial judge to explain--even in succinct terms--how she resolved significant difficulties with the evidence (Dinardo at para. 29). An accused person is "entitled to know why the trial judge is left with no reasonable doubt": *R. v. H.(D.)*, 2016 ONCA 569 at para. 35. Whether a judge has fulfilled that obligation will necessarily involve a case-by-case determination, with reference to the record as a whole. In this case, I am satisfied the absence of an indication that the judge recognized and grappled with significant inconsistencies involving the complainant's evidence supports the appellant's claim of uneven scrutiny.
- [146] When a trial judge applies different standards in assessing the credibility of evidence that carries significance to evaluating the Crown's burden on an essential element of the offence, the accused person has not received a fair trial: *Kiss* at para. 82. This is so even where the evidence, considered as a whole, is capable of supporting a conviction: *Mehari* at para. 29; *Gravesande* at para. 43.
- [147] On the latter point, let me be clear. I do not say it was not open to the judge to reach the credibility determinations that she did. Although there were inconsistencies involving the complainant's evidence, there was also evidence consistent with her assertion of non-consent, including the doctor's observation of physical injury and the observations of the complainant's emotional state post-incident that were consistent with her description of having undergone a traumatic, non-consensual experience. I do not say that the inconsistencies involving the complainant's evidence were fatal to accepting her evidence. As a matter of fundamental principle, a judge is entitled to resolve inconsistencies in the context of the entirety of the evidence and to accept all, none or only part of a witness's evidence. I also accept that the appellant's evidence came with its own difficulties. The judge provided a number of reasons for rejecting his testimony, some of which did not involve the fruits of improper cross-examination and found ample support in the record.
- [148] This appeal is not about whether the trial judge should have rejected the appellant's evidence or should have found that it did not raise a reasonable doubt. It is not about whether the judge rightly accepted the complainant's version of events, including her assertion that she subjectively did not consent to the sexual activity. Instead, the only question decided here, is whether the judge took a balanced approach to the process by which she arrived at her credibility findings.
- [149] In my view, the analytical flaws discussed in these reasons reveal in their cumulative effect that it was not a balanced process. As a result, in the particular circumstances of this case, the judge committed a reversible error of law that necessitates a new trial.

Did the Cross-Examination Result in an Unfair Trial?

[150] In light of the conclusion reached on the first ground of appeal, it is not necessary to determine whether the appellant's cross-examination, standing alone, resulted in a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Code, requiring that the guilty verdict be set aside.

Disposition

[151] For the reasons provided, I would allow the appeal under s. 686(1)(a)(ii) of the Code based on an error of law, set aside the conviction for sexual assault, and order a new trial.

[152] Appropriately, given the nature of the errors advanced in this appeal, the Crown did not invoke the curative proviso under s. 686(1)(b)(iii).

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fenlon"

[1] The trial judge found that the defence of honest but mistaken belief did not arise on the evidence (RFJ at para. 34). The appellant takes no issue with that finding.

[2] I note that the sexual activity said to form the subject matter of the charge in this case was the activity that occurred in the complainant's bedroom. It is not apparent from the record before the Court whether the evidence of kissing at the nightclub, kissing while waiting for the cab, or kissing and sexual touching during the ride to the residence was the subject of review under s. 276.1 of the Code, or related common law principles: see the discussion in *R. v. C.M.M.*, 2020 BCCA 56 at paras. 175-183. The appellant did not raise the necessity of an admissibility ruling on this evidence as a ground of appeal, or, if an admissibility hearing in fact occurred, any errors in relation thereto. As such, I have proceeded on the assumption that this evidence was properly before the trial court and open for consideration by the judge, including in her assessment of credibility.

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Prepared on 29 October 2026 · Esheria