

CANADA / JUDGMENT

R. v. Schank

2025 BCCA 345

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 345 R. v. Schank

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Schank,

2025 BCCA 345

Date: 20251010

Docket: CA49511

Between:

Rex

Respondent

And

Troy Stanley George Schank

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainant. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraphs 60 and 63 on October 16, 2025.

Before:

The Honourable Mr. Justice Butler

The Honourable Justice Riley

The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated

May 15, 2023 (conviction) (R. v. Schank, 2023 BCSC 931,

Kamloops Docket 111306).

Counsel for the Appellant:

S.J. Runyon

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

June 24, 2025

Place and Date of Judgment:

Vancouver, British Columbia

October 10, 2025

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Justice Gomery

Summary:

The appellant challenges his conviction for sexual assault. He argues that the trial judge erred by: (1) basing her credibility findings on misapprehensions of evidence, (2) shifting the burden of proof onto the accused to explain the complainant's departure, (3) relying on impermissible generalizations to find that the complainant's abrupt departure was inconsistent with consent, and (4) concluding that there was no "air of reality" to the defence of honest but mistaken belief in communicated consent. Held: Appeal dismissed. The trial judge did not materially misapprehend any evidence in concluding that the appellant's trial testimony was not credible, nor did she make any palpable and overriding errors. The trial judge's reasoning that the appellant's explanation for the complainant's departure "defie[d] common sense" did not rest on a general assumption about human behaviour. It rested upon her assessment that this particular complainant's manner of departing was inconsistent with the interaction as the appellant

described it. The judge did not reverse the burden of proof in considering the appellant's failure to explain the complainant's abrupt departure. She was required to evaluate the credibility of his testimony in the context of all the evidence. While the judge may have failed to assume the truth of the appellant's testimony in assessing whether there was an "air of reality" to the defence of honest but mistaken belief in communicated consent, the defence was nevertheless fatally flawed because his testimony did not reveal any reasonable steps taken to ascertain the complainant's consent.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

- [1] The appellant, Mr. Schank, seeks to overturn his conviction for sexual assault following a trial by judge alone in the Supreme Court.
- [2] The key legal issue at trial was whether the Crown could meet its burden of proving beyond a reasonable doubt that the complainant did not consent to the sexual activity in issue. Mr. Schank also advanced an argument of honest but mistaken belief in communicated consent. The trial judge decided the case on the basis of credibility findings, concluding that despite some frailties in her evidence, the complainant's testimony that she expressly told Mr. Schank that she did not want to engage in sexual activity with him because they had just met was credible and reliable. The judge found Mr. Schank's testimony asserting that the complainant consented or communicated her consent through her actions was not credible and did not give rise to a reasonable doubt. On all the evidence, the trial judge was satisfied beyond a reasonable doubt that Mr. Schank was guilty.
- [3] On appeal, Mr. Schank argues that the trial judge committed multiple errors of law in assessing the credibility of his trial testimony, and further erred in rejecting his assertion of honest but mistaken belief in communicated consent. For the reasons that follow, I would dismiss the appeal.

Factual Background

- [4] The events in issue took place at a private residence on the night of 22 May 2021, and into the early morning hours of the next day. Mr. Schank and the complainant were both guests at a small social gathering that began with a barbeque and continued into the night. The complainant and the host, Mr. W, were co-workers at a local bar. Mr. Schank was a friend of Mr. W.
- [5] The evidence at trial consisted of viva voce testimony from three witnesses. The Crown called the complainant and Mr. W. The defence called Mr. Schank.
- [6] Mr. Schank and the complainant did not know each other before the event, although there was some evidence that Mr. Schank had taken note of the complainant while she was working at the bar.

- [7] This brings us to the gathering at Mr. W's house. Early on in the evening, Mr. Schank and the complainant met or were introduced to each other, and spent some time together. They exchanged contact information and sent texts to each other over the evening.
- [8] The social gathering carried on until some time around midnight. As things were winding down, the complainant accepted the host's offer to stay the night. She was given the option to sleep in a spare bedroom or on the couch in the living room. She chose the latter. She got ready to go to sleep. She was wearing a borrowed night shirt and her underwear.
- [9] Mr. Schank then asked the complainant if she wanted to watch a movie and she agreed. They settled on a couch in the living room. Sexual activity ensued. The only two witnesses to the disputed events were the complainant and the accused.
- [10] The complainant testified that she and Mr. Schank were initially lying on opposite ends of the couch, head to head. Mr. Schank tried to kiss her and she rebuffed him, saying they had just met. He then suggested that they cuddle, and she agreed. They repositioned themselves on the couch, with the complainant lying on her side and Mr. Schank lying behind her, also on his side. The complainant described this in her trial testimony as "spooning". Mr. Schank slid his hand down the complainant's hip and tried to remove her underwear, and she responded by moving his hand and saying she did not want to.
- [11] As the movie continued to play, the complainant fell asleep. She awoke to find Mr. Schank having sex with her. Her underwear had been pulled down to her knees. She testified that when she first awoke she did not have her wits about her and she just "let it happen". Then she "clued in", realizing she had fallen asleep and that she clearly had not said "yes" to sex. She could not recall if Mr. Schank ejaculated. When it was over she got up, grabbed her clothes, and went into the bathroom.
- [12] Mr. Schank testified that while they were laying on the couch, they began kissing. Things progressed and they "decided to have sex". Each of them removed their own underwear. Mr. Schank was sexually aroused and believed the complainant was as well. She was "thrusting" her body against his. He began having intercourse with her. After about five minutes, the complainant got up from the couch and went into the bathroom.
- [13] On both accounts, when the complainant came out of the bathroom, she abruptly left, abandoning her plans to stay the night. Mr. W testified that the complainant was visibly upset and wanted to leave immediately. She asked him for the address so she could call a cab, waited on the porch for the cab to arrive, and then left.
- [14] In cross-examination, Mr. Schank was asked about a text message exchange with the complainant after the incident. Mr. Schank texted to ask the complainant what was wrong. In the course of the ensuing dialogue, both parties recounted their version of the incident. (These accounts were inadmissible for their truth, but admitted as part of the text dialogue to put Mr. Schank's text messages in context.) Mr. Schank's texts included phrases such as, "I'm sorry if I got the wrong impression", "I'm so sorry this all a big miss

understanding" [sic], "[maybe] less drinks next time", and "I miss interpreted the situation" [sic].

Trial Judge's Reasons (2023 BCSC 931)

- [15] The trial judge's reasons began with a summary of the witness testimony, followed by a review of the key legal concepts. This included a discussion of proof beyond a reasonable doubt, a review of principles governing credibility assessment and reasonable doubt in the context of a case where the accused offers exculpatory testimony as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 758, 1991 CanLII 93, and a summary of the essential elements of the offence of sexual assault.
- [16] Moving on to her assessment of the evidence, the trial judge noted that the complainant's testimony was "key" to the Crown's case and had to be assessed "very carefully". The judge reviewed the complainant's testimony in light of the various credibility and reliability issues raised by the defence in closing submissions, including the impact of the complainant's admitted consumption of alcohol and marihuana on the reliability of her testimony, inaccuracies in her physical description of Mr. Schank and her inability to identify him in court, and alleged gaps and inconsistencies in her account of the sexual conduct.
- [17] The trial judge found that the complainant presented as "an attentive, careful and responsive witness": para. 129. The judge also found that the complainant's testimony was "consistent with external evidence" and "partly corroborated" by Mr. W's testimony, with regard to such things as: her invitation to attend the barbeque, the layout of the house, the attendees, the fact that at one point the men left to get more beer, and the initial positioning of the complainant and Mr. Schank on the couch as they were watching the movie -- lying head to head with their bodies going in opposite ends of the couch: para. 130. The judge further reasoned that Mr. W's testimony "corroborate[d]" the complainant's evidence about her behaviour after the incident, in that she was "visibly upset" and wished to go home in a taxi, despite her earlier plan to stay the night: para. 131. The trial judge concluded that, "[o]verall, while there [were] some minor frailties in [the complainant]'s evidence, I found her to be a credible and reliable witness": para. 138.
- [18] The trial judge went on to assess Mr. Schank's credibility, through the lens of reasonable doubt and the analytical framework set out in *W.(D.)*: at para. 140. (To be clear, the trial judge was fully aware that her role was not limited to making a binary choice as to which of the two witnesses was more believable, having earlier instructed herself on this point: paras. 121-122, citing *R. v. J.M.*, 2021 BCCA 263 at para. 46; *R. v. E.A.G.*, 2020 BCSC 1691 at para. 185.)
- [19] The trial judge accepted that Mr. Schank was "unshaken" in his denial of non-consensual sexual activity, and observed that he displayed an even demeanor and answered all of the questions put to him in cross-examination: paras. 141-142. She then stated:

- [143] However, key parts of his evidence give me cause for concern regarding his credibility. Overall, when I consider the totality of the evidence including the text messages exchanged between him and [the complainant], I find that Mr. Schank's evidence is simply incapable of belief. His evidence was unreasonable in a number of respects, in ways that was self serving.
- [20] The trial judge went on to give "examples" of her credibility concerns, in four bullet points, followed by a fifth point that was addressed in somewhat more detail. I would summarize the trial judge's five concerns as follows:
- (i) Regarding Mr. Schank's level of intoxication, he admitted consuming seven to eight drinks over the course of the evening, and maintained that he was not intoxicated. The trial judge found it "very likely he consumed more than the number of drinks he testified to". She did not find Mr. Schank's claim that he was not intoxicated to be credible and was "not convinced that his recollection of the events is as clear as he claims": para. 144, bullet point 1.
 - (ii) Regarding the complainant's statements in rebuffing Mr. Schank's sexual advances, his testimony was that she did say she wanted to "get to know" him, but this was a topic that they spoke about "throughout the evening". This explanation did "not make any sense" to the trial judge. In her view, the question put by Crown counsel was clear, "but Mr. Schank's response was not and therefore not credible": para. 144, bullet point 2.
 - (iii) The trial judge had "concerns" about "gaps in Mr. Schank's testimony". By way of example, the judge cited his evidence about how the parties were positioned on the couch. Mr. Schank's testimony "did not address" how his position changed from lying on opposite ends of the couch positioned head to head, to Mr. Schank and the complainant cuddling together on the same end of the couch. The judge noted that the complainant's description of the positioning on the couch was supported by independent testimony from Mr. W: para. 144, bullet point 3.
 - (iv) There was "no explanation from Mr. Schank" about what led the complainant to abruptly go to the bathroom and then depart from the house after the sexual activity. The judge stated that, "[i]t defies common sense that if the sexual activity was consensual as Mr. Schank urges me to accept, why [the complainant] would go to the bathroom, change into her clothes and then leave abruptly with very few words communicated to Mr. Schank": para. 144, bullet point 4.
 - (v) With regard to the post-incident text message exchange, the trial judge found Mr. Schank's testimony that "the misunderstanding" referred to in his texts was "around the text messages themselves" was "simply not borne out in a plain reading of the messages when read in their entirety": para. 146. Further, Mr. Schank's testimony in re-examination that the "misunderstanding" related to the whole evening, or everything that was going on, was "simply not believable" and made "no sense": para. 147.

- [21] The trial judge also considered Mr. Schank's assertion of honest but mistaken belief in communicated consent. She reasoned that "even if" she were to accept Mr. Schank's testimony about the complainant kissing him, pulling her underwear down, and thrusting against him, this would not amount to communicated consent to sexual intercourse: paras. 148-150. The judge found "no evidence that Mr. Schank took reasonable steps to ascertain consent", and "no evidence" that he "honestly believed" the complainant had "communicated consent". The judge concluded that the defence of honest but mistaken belief in communicated consent had "no air of reality in this case": para. 152.

Issues Raised on Appeal

- [22] Mr. Schank argues that the trial judge erred by: (1) basing her credibility findings on misapprehensions of the evidence, (2) shifting the burden of proof onto the accused to explain what led the complainant to leave Mr. W's home in the manner that she did, (3) relying on impermissible generalizations to find that the complainant's abrupt departure was inconsistent with consent, and (4) concluding that there was no "air of reality" to the defence of honest but mistaken belief in communicated consent.

Analysis

Appellate Review of Credibility Findings

- [23] Given the recognized expertise of trial judges in assessing and weighing evidence, and the "familiarity" that trial judges acquire in presiding over the entirety of trial proceedings, deference is owed to their factual findings: *R. v. Kruk*, 2024 SCC 7 at para. 83. Credibility findings, which often rest on "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", are particularly deserving of appellate deference: *Kruk* at para. 81, citing *R. v. Gagnon*, 2006 SCC 17 at para. 20.
- [24] Appellate review of credibility findings must also be "mindful of the acute practical difficulties trial judges face in articulating why a particular witness was believed or disbelieved": *Kruk* at para. 84. This is one of the reasons why the trial judge's reasons must be read as a whole, in a functional and contextual analysis: *R. v. G.F.*, 2021 SCC 20 at paras. 5, 69. The appeal court must not engage in a line-by-line parsing of the trial judge's reasons in search for error: *R. v. N.D.*, 2024 ONCA 777 at para. 29.
- [25] In the absence of extricable legal error, a trial judge's credibility findings will only be revisited where they are shown to be the product of "palpable and overriding error": *Kruk* at para. 82; *Gagnon* at para. 10. This is a high bar. An error is only palpable where it is "plainly seen" or "obvious": *Kruk* at para. 97, citing *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38; *R. v. R.M.*, 2023 BCCA 455 at para. 159. Even where an error is palpable, appellate intervention is not justified unless the error is also overriding, in the sense that it "goes to the very core of the outcome of the case" or "erode[s] the result": *R.M.* at para. 159 (emphasis

in original); *R. v. Nuttall*, 2018 BCCA 479 at para. 269, citing *Benhaim* at paras. 38-39.

- [26] A trial judge's verdict may also be called into question where the judge's reasoning process rests on a material misapprehension of the evidence. A decision that is tainted by a misapprehension of evidence yields a verdict that is not "true", such that allowing it to stand would amount to a miscarriage of justice: *R. v. Lohrer*, 2004 SCC 80 at para. 1, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221, 1995 CanLII 3498 (Ont. C.A.).
- [27] As the following passage from *R. v. Osinde*, 2021 BCCA 124 demonstrates, a material misapprehension of evidence may arise from or implicate a trial judge's assessment of witness credibility, although the standard to be met by an appellant in establishing such a misapprehension is a "high" one:
- [17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes "as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence": *Morrissey* at 218.
- [18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge's reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.
- [19] Although a trial judge is uniquely positioned to make credibility assessments, where those assessments are based on misapprehensions of evidence and played a critical role in reaching a conviction, the assessments and the verdict will be insupportable: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. This is so even when the evidence adduced at the trial was capable of supporting a conviction: *Lohrer* at para. 1.
- [20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: "[t]he plain language or the thrust of the reasons must disclose an actual mistake": *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56-57, 59, 61-62. If so, then the reasoning that led to a conviction is based on "unsteady ground": *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge's reasoning process.

[28] The outcome in *Osinde* provides a useful example of what can constitute a material misapprehension of evidence that calls into question the soundness of a trial judge's verdict. *Osinde* was a sexual assault case in which the trial judge made findings about a verbal confrontation between the accused and the complainant's friend the day after the disputed incident. The trial judge rejected the accused's testimony that he did not know what the friend was talking about, finding that he had been confronted "about having raped" the complainant. However, the trial record revealed that neither the complainant's friend nor the accused himself gave any testimony that the conversation included any mention of a "rape" or "sexual assault". In the result, the trial judge misapprehended the evidence on a point that was "one of the building blocks" on which he rested his conclusion that the accused was not credible: *Osinde* at para. 25. Because "[i]t [could not] be said with confidence" that the trial judge would have reached the same conclusion without the mistaken finding, the judge's misapprehension of the evidence gave rise to a "miscarriage of justice" such that the conviction could not stand: *Osinde* at para. 26.

Reviewing the Trial Judge's Credibility Findings

- [29] The trial judge concluded that Mr. Schank's trial testimony was not credible, rejected it, and found that it did not raise a reasonable doubt. On appeal, Mr. Schank argues that this conclusion is tainted by misapprehensions of evidence, palpable and overriding errors, and at least one extricable legal error. The trial judge gave five examples or specific points of concern to support her conclusion that Mr. Schank's testimony was not credible and did not raise a reasonable doubt. The analysis below addresses each of the trial judge's five credibility concerns, considered in light of the errors alleged by the appellant. In doing so, I bear in mind that these points were not necessarily of equal weight or concern to the trial judge, and that the trial judge's reasons must be read as a whole, functionally and contextually.
- [30] Before reviewing the five points cited by the trial judge in support of her conclusion that Mr. Schank was not a credible witness, I will first address the trial judge's comment that Mr. Schank's evidence was "unreasonable in a number of respects, in ways that [were] self serving": para. 143. The appellant argues that this remark -- either on its own or in conjunction with the judge's remark about the absence of an explanation from Mr. Schank about the complainant's abrupt departure -- gives rise to a "palpable concern that the trial judge engaged in circular reasoning [in] attributing to Mr. Schank a motive to lie by assuming he is guilty".
- [31] In support of this position, Mr. Schank relies on *R. v. Laboucan*, 2010 SCC 12 at para. 12, in which Justice Charron writing for the Court explained that, while there is a common-sense proposition that a witness's interest in a proceeding may be relevant to credibility, the fact that the witness is the accused raises a "specific concern". This is because "it cannot be assumed that the accused must lie in order to be acquitted, unless his guilt is no longer an open question": *Laboucan* at para. 12, citing *R. v. B.(L.)* (1993), 13 O.R. (3d) 796 at 799, 1993

CanLII 8508 (C.A.). Justice Charron went on to reason that this factor is "unhelpful", and as a general rule trial judges would be "well advised" to avoid it. However, she declined to elevate this concern to an absolute rule, because when "read as a whole", the trial judge's reasons may reveal that "the consideration of the accused's motive to lie did not undermine the presumption of innocence": Laboucan at paras. 14-18.

- [32] In *R. v. Corby*, 2016 BCCA 76, Justice Kirkpatrick made a similar point, explaining that suggesting an accused has a motive to lie based on the desire to secure an acquittal, and then using that as a factor weighing against the accused's credibility is circular reasoning which flies in the face of the presumption of innocence. It assumes the accused is guilty and that his denial of guilt is a lie, motivated by a desire to avoid conviction: Corby at paras. 18-19. She repeated the admonition in Laboucan, that trial judges would be well advised to avoid consideration of the accused's interest in the outcome of the proceedings as a factor bearing on the credibility of the accused's testimony: Corby at para. 24. However, Kirkpatrick J.A. also acknowledged that remarks of this sort must be considered in the context of "the trial and the reasons as a whole", and concluded that the trial judge's reference to motive to lie was one of several considerations in his credibility assessment. Read in context, the comment did not undermine the presumption of innocence: Corby at paras. 20, 23-24.
- [33] Returning to this case, I do not agree with the appellant that the trial judge's use of the term "self serving" was indicative of either circular reasoning, or an assumption of guilt that eroded the presumption of innocence. Read in context, the trial judge's comment was simply an explanation for why she considered the unreasonable features of Mr. Schank's testimony to tell against his credibility. The trial judge held that Mr. Schank's testimony was "unreasonable", "in ways that [were] self serving". The judge's point was that Mr. Schank gave "unreasonable" answers designed or intended by him to suit his position.
- [34] Consider, for example, the trial judge's finding that there were "gaps" in Mr. Schank's testimony. The basis for that finding is addressed in more detail below. For present purposes, it will suffice to say that the "gaps" in Mr. Schank's account happen to suit his narrative. It was not merely that Mr. Schank left out or glossed over certain aspects of the incident, but also that the lack of detail allowed him to avoid comment on specific features of the incident for which it would have been difficult for him to account.
- [35] Having addressed that preliminary concern, I move on to address the five "examples" the trial judge gave in support of her conclusion that Mr. Schank's testimony was "incapable of belief" and "unreasonable in a number of respects".
- [36] The trial judge's first point of concern had to do with Mr. Schank's level of intoxication. She concluded, after "considering all of the evidence", that she was unable to accept Mr. Schank's assertion that "he was not intoxicated", and was "not convinced that his recollection of events [was] as clear as he claims". In reaching this conclusion, the trial judge reasoned that it was "very likely [that Mr. Schank] consumed more than the number of drinks he testified

to". On appeal, Mr. Schank says this was a misapprehension of the evidence, because there was no suggestion from any of the witnesses and nothing else in the trial record upon which the judge could find that Mr. Schank in fact consumed more than the seven to eight drinks he admitted to consuming over the course of the evening.

- [37] Even accepting that this could be characterized as a mischaracterization of the evidence as opposed to an inference drawn from all the evidence, in my respectful view it would not meet the test for a material misapprehension of evidence, in the sense of playing an "essential role" in the reasoning process that led to the conviction.
- [38] The thrust of Mr. Schank's testimony was that he was "not intoxicated" such that his consumption of alcohol had no bearing on his behaviour at the time of the incident, or his subsequent recollection of the events. Quite apart from the trial judge's suggestion that Mr. Schank may have had more than the seven or eight drinks he admitted to consuming, there was ample evidence in the record to support the judge's conclusion that he was minimizing the effect of his alcohol consumption. This evidence included his admitted consumption of seven to eight drinks over the course of the evening, and his post-event text messages referencing alcohol consumption in the context of an assertion that he may have misinterpreted the situation. (While inadmissible for the truth of their contents, the text messages were admissible to assess the credibility of Mr. Schank's testimony concerning his extent of impairment by alcohol.)
- [39] Reading the reasons as a whole, even if one were to accept that the trial judge misapprehended the evidence as to the actual number of drinks Mr. Schank consumed, the effect of that error does not leave the trial judge's conclusions concerning the credibility of Mr. Schank's testimony about alcohol consumption "on unsteady ground", to borrow a phrase from Justice's Frankel's reasons in *Osinde*. The trial judge's finding as to the number of drinks Mr. Schank consumed was a singular feature of the broader finding that Mr. Schank was minimizing the effect of his alcohol consumption, which in turn became one of five reasons the judge gave for rejecting his testimony.
- [40] The trial judge's second concern had to do with Mr. Schank's response to the complainant's assertion that she said no to his sexual advances because she had just met him. The trial judge found Mr. Schank's account -- that the complainant said she wanted to get to know him several times that evening, but not when they were kissing on the couch -- to lack credibility. On appeal, Mr. Schank argues that the trial judge misapprehended the evidence in stating that the questions put to Mr. Schank in cross-examination were clear, but Mr. Schank's response was not. I do not agree that this reasoning involved any misapprehension of evidence. It was open to the trial judge to assess the exchange between Mr. Schank and Crown counsel during cross-examination. Her impression was that Mr. Schank answered the specific assertion that the complainant said no to his sexual overture because she had only just met him with a vague response about things he and the complainant had discussed over the course of the evening. The judge's finding on this pointed turned on her analysis of the evidence, not a mistake in what the evidence was.

- [41] The third reason the trial judge gave in support of her conclusion that Mr. Schank's testimony was not credible had to do with what she referred to as "gaps" in his account of the events on the evening in question. By way of example, the judge noted the absence of any testimony from Mr. Schank about how the parties went from lying on opposite ends of the couch to the position where they were kissing and then progressed into what he characterized as consensual sexual intercourse. On appeal, Mr. Schank argues that this finding was somehow flawed or erroneous because "[n]either the crown nor the defence asked Mr. Schank about [the] respective body positions [of the parties] as events unfolded on the couch".
- [42] Having reviewed the transcript of Mr. Schank's testimony in both direct and cross-examination, I am not convinced that this criticism has any merit. Mr. Schank's description of the sexual encounter itself was brief. While not a bare denial, it did not offer much detail. That was the backdrop for the judge's observation about "gaps" in Mr. Schank's testimony.
- [43] Most critically, Mr. Schank's account of the circumstances in which he and the complainant were said to have engaged in consensual sexual intercourse on the couch did not include any description of how they ended up on the same side of the couch, which is where he says they began to engage in mutually consensual sexual activity. To go back a step, Mr. Schank appeared to agree with the testimony of the complainant, supported by Mr. W's evidence, that Mr. Schank and the complainant were initially lying head-to-head, with their bodies going in opposite directions on the couch. Yet Mr. Schank never described, either in direct or in cross-examination, how the parties ended up moving from those positions to the position he says they were in when they kissed and had consensual sexual intercourse. On this record, it was open to the trial judge to find that the apparent "gaps" in Mr. Schank's account undermined the credibility of his testimony.
- [44] The trial judge's fourth concern about Mr. Schank's credibility had to do with the complainant's hasty departure following what he characterized as a consensual sexual encounter. The trial judge reasoned that there was "no explanation" from Mr. Schank about what led the complainant to depart so abruptly. In the trial judge's view, it "defies common sense" that the complainant would have gone to the bathroom, changed, and left so abruptly, with "very few words communicated to Mr. Schank", if the sexual activity was consensual as alleged by Mr. Schank. On appeal, Mr. Schank says this finding was tainted by extricable legal error in (i) relying on "impermissible assumptions" about human behaviour, and (ii) shifting the burden of proof onto Mr. Schank by requiring him to prove a reason for the complainant's behaviour.
- [45] I propose to consider the first of these two arguments under the analytical framework laid out in *Kruk*. In that case, the Supreme Court grappled with the question of whether a trial judge's reliance on "ungrounded common-sense assumptions" should be recognized as an extricable error of law. The majority concluded that it should not, because such a rule would invite appellate intervention based on the parsing of trial reasons, and would countenance attacks on "generic statements" made in the course of credibility assessments so as to

improperly frame any credibility finding based on human behaviour as impermissible stereotyping: Kruk at paras. 85-86, 92. The majority explained that the "faulty use" of common-sense assumptions should "continue to be controlled by existing standards of review and rules of evidence", and went on to set out a general analytical framework for considering such arguments: Kruk at paras. 3, 93-97.

- [46] Where a trial judge is said to have placed improper reliance on common-sense assumptions in the context of a credibility assessment, the appeal court should first ask itself whether the impugned reasoning truly involves an assumption, as opposed to a case-specific finding based on the evidence: Kruk at para. 94. If the judge's reasoning does in fact rest on an assumption about human behaviour, the appeal court must next identify the relevant standard of review: Kruk at para. 95. If the assumption involves a recognized error in law, including but not limited to improper reliance on "myths and stereotypes about sexual assault complainants", then the standard of review will be correctness: Kruk at para. 96. In the absence of some extricable error of law, the standard of review will be palpable and overriding error: Kruk at para. 97.
- [47] Applying that reasoning in the present appeal, I do not agree with the appellant's submission that the trial judge rested her decision on any assumption about human behaviour. The mere fact that the trial judge used the term "defies common sense" does not mean that her reasoning rested on a general assumption about human behaviour. Rather, I interpret the trial judge's reasoning to be that, in the circumstances of this case, the manner in which the complainant departed from the residence did not comport with Mr. Schank's account of the incident as a consensual sexual encounter. In other words, this particular complainant's manner of departing was, in the judge's view, inconsistent with the nature of the interaction as Mr. Schank described it.
- [48] As explained in *R. v. Sandhu*, 2024 BCCA 34 at para. 24, the trier of fact is entitled to consider "the complainant's (and the accused's) conduct during and after the event to ask whether that conduct is consistent or inconsistent with the assertion of non-consent" (emphasis in original). Although *Sandhu* was decided before the Supreme Court's ruling in *Kruk*, the point being made is that case-specific reasoning based on a party's reaction to an event, or the party's conduct following the event, does not necessarily involve resort to generalized assumptions about human behaviour.
- [49] Even if one were to accept the appellant's submission that the trial judge's conclusion involved some reliance on common-sense assumptions about a person's actions following a sexual encounter, the relevant standard of review would be palpable and overriding error, and I agree with the respondent that the judge's reasoning did not disclose any such error. There is ample support in the case law for the notion that "post-incident" demeanor may be taken as circumstantial evidence to support a complainant's allegation that a particular sexual encounter was non-consensual: *R. v. Rose*, 2021 ONCA 408 at paras. 22, 26; *R. v. A.J.K.*, 2022 ONCA 487 at para. 43; *R. v. Vasnich*, 2022 ONCA 822 at para. 5.

- [50] The appellant relies on *Kruk*, in which the trial judge in one of the two cases under appeal was found to have erred in reasoning that a person would not abruptly and unceremoniously drive away after engaging in consensual sexual intercourse. The majority in *Kruk* reasoned that this was a "palpable" error of fact because, "as a matter of logic, the speed at which someone leaves after sexual activity generally has no bearing whatsoever on whether the activity was consensual or non-consensual": *Kruk* at para. 125 (emphasis in original). The majority went on to find that the error was not "overriding", taking into account the many other reasons the trial judge gave for rejecting the accused's trial testimony: *Kruk* at para. 126.
- [51] Accepting the logic of the majority reasoning in *Kruk* that, at an abstract level, the speed at which a person departs after a sexual interaction says nothing about whether the interaction was consensual or non-consensual, the same cannot be said about context-specific consideration of post-event conduct or demeanour. In *Rose* at para. 22, the appeal court accepted that it was open to a trial judge to find that the complainant's version of events was supported by video evidence showing her in an obviously distraught emotional condition following the sexual activity in issue. In *A.J.K.* at paras. 43-44, the court reasoned that it was permissible for a trial judge to rely on evidence of the complainant's post-incident "emotional disintegration" to support a conclusion that the sexual activity in issue was non-consensual.
- [52] In this particular case, there was objective evidence that immediately after the sexual activity, the complainant departed Mr. W's home, abandoning her plan to stay the night. I refer here to the testimony of Mr. W, who confirmed that the complainant was visibly upset when she left. Mr. Schank also acknowledged this in his text messages, about which he was questioned at trial. Thus, what the trial judge referred to as the complainant's abrupt departure consisted not only of the speed at which she left the residence, but her demeanour, and her otherwise unexplained change in plans.
- [53] The appellant's second argument concerning the circumstances of the complainant's departure is that the trial judge shifted the burden of proof by requiring him to provide an explanation for the complainant's behaviour. The appellant submits that the credibility of his trial testimony ought not to have turned on his "inability to explain the complainant's thinking". He argues that in light of the presumption of innocence, it was an extricable legal error for the trial judge to "require him to testify about what motivated the complainant to leave".
- [54] In support of this position, the appellant relies on *R. v. Swain*, 2021 BCCA 207, a case in which the trial judge was found to have erred in law by focusing on the accused's failure to "explain why the complainant would have fabricated her version of events", which "had the effect of shifting the burden of proof onto the appellant": *Swain* at para. 59. In my view, *Swain* is distinguishable from the case at bar, for two reasons.

- [55] First, the trial judge properly instructed herself on the burden of proof, and the reasons read as a whole do not reveal any misapplication of that burden. The Court reached the opposite conclusion in Swain: at paras. 53-59. In this case, the trial judge's reasons give no indication that she imposed a burden on Mr. Schank to prove anything. Having chosen to testify in his own defence, the trial judge was required to evaluate his testimony in the context of all the evidence. One of the reasons the judge gave for finding Mr. Schank's testimony to lack credibility was that his claim to have had consensual sex with the complainant was, in the judge's view, logically inconsistent with the complainant's post-event behaviour. There was nothing in Mr. Schank's account of the incident that would otherwise explain that behaviour. There was, in my view, nothing improper in this line of reasoning.
- [56] Second, the trial judge in Swain was focused on the accused's failure to offer an explanation for why the complainant would fabricate an allegation of sexual assault against him. This subject matter is particularly fraught with legal complexity and risk, because among other things, "the trier of fact must not look to an accused to explain why a complainant has made the allegations they have or be under any impression that the accused has an onus to demonstrate that the complainant has a motive to fabricate evidence in order to achieve an acquittal": Swain at paras. 30, 33. By contrast, the trial judge in this case did not look to Mr. Schank to put forward some reason for the complainant to make a false allegation against him, rather, the judge reasoned that Mr. Schank's account lacked credibility because it did not include any explanation for the complainant's post-event conduct and demeanor.
- [57] The fifth point the trial judge gave in support of her conclusion that Mr. Schank's trial testimony was not credible was his explanation for the post-event text messages. Mr. Schank testified that when he texted, "I'm so sorry this is all a big miss understanding" [sic], he was referring to the text message exchange itself, and not the sexual activity. The trial judge found that this testimony was not credible because it was simply not borne out by a plain reading of the text message exchange. The appellant does not allege any error in this finding. The finding is, in my view, significant, because it provides a compelling and easily-understood justification for the trial judge's conclusion that Mr. Schank's testimony was not credible and did not leave her with any reasonable doubt about his guilt.
- [58] In response to the complainant's post-event text message assertions about the sexual activity (which, to be clear, are not admissible for the truth of their contents), Mr. Schank texted that he was "sorry if [he] got the wrong impression", was "so sorry this all a big miss understanding" [sic], and that he "miss interpreted the situation" [sic]. The trial judge found that Mr. Schank's trial testimony about the texts was "not borne out in a plain reading of the messages", and his subsequent effort to explain in re-examination that "the misunderstanding related to the whole evening" as opposed to the sexual activity was "simply not believable and makes no sense": paras. 146-147. In short, Mr. Schank's unsuccessful effort to explain away his comments in the text message exchange clearly undermined the credibility of his trial testimony in the eyes of the trial judge.

- [59] In summary, based on a careful and contextual reading of the judge's reasons, and a full appreciation of the degree of appellate scrutiny of credibility findings as discussed in the case law, I find no reviewable error in the trial judge's credibility analysis.

Honest But Mistaken Belief in Communicated Consent

- [60] The appellant argues that the trial judge erred in finding no "air of reality" to his submission on honest but mistaken belief in communicated consent, because in applying the "air of reality" threshold, the trial judge must "[assume] the evidence relied upon by the accused to be true". The appellant submits that even though the trial judge appeared to start the analysis on the right footing by considering whether the argument could succeed "if" she accepted Mr. Schank's testimony (para. 150), the judge fell into error when she stated that there was "no evidence that Mr. Schank honestly believed that [the complainant] communicated consent" before concluding that the defence of honest but mistaken belief in communicated consent had "no air of reality in this case" (para. 152). I would not give effect to this ground of appeal, for three reasons.
- [61] First, although the judge undertook an analysis of Mr. Schank's submission on the issue of honest but mistaken belief in communicated consent, on my reading of the reasons as a whole, she clearly did so in the alternative. The trial judge expressly rejected Mr. Schank's testimony "as it relates to the sexual activity with [the complainant]", finding that it did not leave her with a reasonable doubt: para. 154. The judge went on to find, on all the evidence that she did accept, that the Crown had proven its case beyond a reasonable doubt: paras. 155-162. In the result, the trial judge was satisfied beyond a reasonable doubt that the complainant's account of the incident was what happened. On that account, there were no words and no conduct that would qualify as communication of consent. Hence the judge's credibility conclusions lead inexorably to a finding of guilt, making it unnecessary for the trial judge to have entertained Mr. Schank's argument about honest but mistaken belief in communicated consent. I therefore do not agree with Mr. Schank that the trial judge's ultimate conclusion that his testimony did not raise a reasonable doubt was predicated on the rejection of his position on honest but mistaken belief in communicated consent.
- [62] Second, on a somewhat related point, on the trial judge's findings, there was no scope for the doctrine of honest but mistaken belief in communicated consent to apply. The testimonial accounts offered by the complainant and Mr. Schank were diametrically opposed, and the key question was one of credibility bearing on whether the complainant did or did not consent. Having accepted the complainant's evidence that she expressly told Mr. Schank she did not consent and then awoke to find Mr. Schank having sex with her, and having considered and rejected Mr. Schank's testimony that events unfolded differently, the trial judge was not obliged to consider his argument on honest but mistaken belief in communicated consent. It would only have been necessary for the judge to consider this argument if she had some doubt "as it relates to the sexual activity", which she did not.

[63] Third, while the trial judge did appear to make an error by failing to assume the truth of Mr. Schank's testimony -- including his asserted belief that the complainant communicated consent through her actions -- for the purposes of the "air of reality" analysis, the error was of no moment and therefore harmless. To explain, even if one were to assume for the purposes of the air of reality analysis that Mr. Schank's testimony about the complainant's actions was true, and that he honestly believed the complainant had communicated her consent through those actions, the defence was fatally flawed because Mr. Schank's testimony did not reveal any reasonable steps taken to ascertain the complainant's consent as contemplated in s. 273.2(b) of the Criminal Code, R.S.C. 1985, c. C-46. The law requires a party intending to engage in a particular form of sexual activity to take reasonable steps to ascertain the other party's consent to that particular activity before proceeding. The requirement for reasonable steps is heightened in circumstances such as these, where Mr. Schank and the complainant had just met, were unfamiliar with each other, and had been drinking: *R. v. Barton*, 2019 SCC 33 at paras. 107-108; *R. v. Sanclemente*, 2021 ONCA 906 at paras. 93, 100; *R. v. G.D.L.*, 2024 BCCA 193 at para. 60. On these facts, the trial judge reasoned that there was no "air of reality" to Mr. Schank's position on the issue of honest but mistaken belief in communicated consent. The trial judge made no error in reaching that conclusion, which on its own would have been determinative on the issue.

Disposition

[64] I would dismiss the appeal.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Gomery"

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