

CANADA / JUDGMENT

R. v. Smith

2020 BCCA 271

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 271 R. v. Smith

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Smith,

2020 BCCA 271

Date: 20201008

Docket: CA45680

Between:

Regina

Respondent

And

Mark Anthony Smith

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant, referred to in this judgment by the initials K.S-T. This publication ban applies indefinitely unless otherwise ordered.

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

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated June 19, 2018 (R. v. Smith, 2018 BCSC 1376, Vancouver Docket 27207-2).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

J. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

October 11, 2019

Written Submissions filed:

November 5, 18, 2019

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2020

Dissenting Reasons by:

The Honourable Madam Justice Dickson

Written Reasons by:

The Honourable Madam Justice Newbury (page 31, para. 88)

Concurred in by:

The Honourable Madam Justice Saunders

Summary:

Majority of Court of Appeal allows appeal of a conviction for sexual assault on basis that trial judge failed to rule on admissibility of certain evidence tendered as prior inconsistent statements of the complainant, and failed to address that evidence in her assessment of complainant's credibility. The trial judge also stated that there was no real dispute as to what had happened between the complainant and the defendant, when there was a real issue to be resolved. Application of "misapprehension of evidence" as described in R. v. Morrissey (1995) 97 C.C.C. (3rd) 193 (Ont. C.A.). Dickson J.A., dissenting, would have dismissed the appeal on the basis that trial judge had simply interpreted the evidence differently from the defence and found that there

was a dispute about consent.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Overview

- [1] The appellant, Mark Smith, was convicted of sexually assaulting K.S-T., a 20-year-old woman he met at a party held at his apartment in June 2010. At trial, K.S-T. testified that after the party she slept beside Mr. Smith, fully clothed, and awakened to find him trying to pull off her shorts. Although she resisted, she said, Mr. Smith pulled her shorts down, flipped her over and penetrated her vagina with his penis from behind while holding her arms above her head, at which point she stopped struggling. The sexual intercourse lasted for a few minutes. K.S-T. testified that she did not consent.
- [2] K.S-T. also testified that, after the sexual intercourse ended, she and her friend, Kaylee Johnston, quickly left the apartment. She said they discussed the attack briefly and she told Ms. Johnston she did not want to report it to police. However, in 2015 K.S-T. decided to report the attack and, shortly thereafter, Mr. Smith was charged with two counts of sexual assault. Count one concerned the June 2010 attack on K.S-T.
- [3] At trial, Mr. Smith acknowledged that he had sexual intercourse with K.S-T. on the night they met, but claimed it was consensual. The judge did not believe him. She accepted K.S-T.'s account as credible and reliable, convicted Mr. Smith on count one and acquitted him on the other count, which involved a different complainant.
- [4] Mr. Smith appeals the conviction. He contends the judge mistook the substance of K.S-T.'s prior statements to Ms. Johnston and failed to consider or give them proper effect in assessing K.S-T.'s credibility and reliability. He also contends that the judge committed a palpable and overriding error in finding there was "no real dispute about what happened" between himself and K.S-T., which tainted her analysis of K.S-T.'s evidence and her credibility.
- [5] For the reasons that follow, I would dismiss the appeal.

Background

Trial Evidence

- [6] The trial lasted 12 days and several witnesses testified. However, the relevant evidence for present purposes is that of K.S-T., Mr. Smith and Ms. Johnston. Accordingly, I will review only the key aspects of their evidence.

- [7] On June 12, 2010, K.S-T. and Ms. Johnston went to the Biltmore Cabaret, where they drank, danced and socialized throughout the evening. When the cabaret closed, they went with an acquaintance, Nick Ismirnioglou, to an after-party at Mr. Smith's apartment. K.S-T. and Mr. Smith had never met before the party. She testified that she had little, if any, interaction with him at the party and denied that he flirted with her while it was going on.
- [8] When the party broke up, K.S-T., Ms. Johnston, Mr. Ismirnioglou, Mr. Smith and another man remained behind at the apartment. K.S-T. testified that Ms. Johnston and Mr. Ismirnioglou went into a bedroom, leaving her in the living room with Mr. Smith and the other man. She said that she told Mr. Smith she would "crash" on the couch, but he replied she could not because his friend was sleeping there and he suggested she sleep in his bed. She accepted this suggestion. K.S-T. testified that she went into Mr. Smith's room, she laid beside him on top of the covers fully clothed, he kissed her briefly, she "kind of" kissed back, he turned over and they both went to sleep.
- [9] K.S-T. went on to testify that she slept for a while, but awakened to find Mr. Smith above her, trying to pull her shorts off. She said she resisted and said "No" repeatedly, but he continued to pull at them, turned her over onto her stomach and eventually got her shorts down around her knees. Then, she said, "he raped me from behind, and he held my arms above my head and I couldn't struggle anymore." She testified that "[h]e inserted his penis in my vagina" for "a few minutes", then he stopped, turned over and fell asleep again. According to K.S-T., Mr. Smith did not speak throughout the attack.
- [10] After the attack, she testified, K.S-T. was "kind of in shock at what had happened." She waited until Mr. Smith was asleep, grabbed her things and sought out Ms. Johnston, telling her "We've got to go, like we need to go now." K.S-T. said that she, Ms. Johnston and Mr. Ismirnioglou quickly left the apartment and, in the elevator, she told Ms. Johnston "that Mark had raped me. And, uh, I don't remember really saying any of the details. I just wanted to get out of there." She went on to say that she called in sick for work and, when they discussed the attack over coffee at JJ Bean, she told Ms. Johnston she did not want to go the police because "it would be his word against mine."
- [11] K.S-T. estimated that she had about five drinks over the course of the evening and smoked some marijuana. She acknowledged that she was intoxicated, but, she said, not to an extreme extent. Although she initially decided not to report the attack to the police, K.S-T. testified that she was working at a rape crisis centre in 2015 when she saw Mr. Smith's name on a board of reported assailants and decided to do so. She contacted Ms. Johnston to let her know she had made the report and provided her name to the police.
- [12] K.S-T. was cross-examined at length by defence counsel. The cross-examination had two predominant themes, both based on the premise that she consented to the sexual intercourse with Mr. Smith. First, defence counsel suggested that when the sexual intercourse occurred, K.S-T. was unsure of whether it was rape, which is why she did not report it immediately. Defence counsel further suggested that, over time, her memories and

perceptions were coloured by her work at the rape crisis centre and seeing Mr. Smith's name on the board there. K.S-T. adamantly disagreed, stating "No, I knew it was rape right away." In advancing this theme, defence counsel put it to K.S-T. that she told Ms. Johnston in the immediate aftermath of the incident that she did not know if what took place was rape. K.S-T. responded that she did not remember making that statement to Ms. Johnston.

- [13] The second predominant theme of the cross-examination was that K.S-T.'s memories and perceptions were compromised by her extreme intoxication and negative feelings toward Mr. Smith, whose failure to complete the sexual intercourse and inattention made her feel rejected. In advancing this theme, defence counsel put it to K.S-T. that it was physically impossible for Mr. Smith to penetrate her vagina from behind as she described without her cooperation in facilitating the act. Again, she disagreed. He also put it to K.S-T. that, in describing the event to Ms. Johnston, she said "I woke up and he was inside of me". She responded, variously, "I didn't say that to her" and "I don't remember saying that." K.S-T. further disagreed with defence counsel's suggestions that she may have blacked out from drunkenness, could not remember everything that happened and simply remembered kissing Mr. Smith, thought she fell asleep and next remembered his penis being inside her vagina.
- [14] For his part, Mr. Smith denied that he sexually assaulted K.S-T. He testified that he and K.S-T. flirted at the party and, when it broke up, he invited her stay in his bed. He said he went into his room, fell asleep, awakened when she got into bed with him, fell asleep and awakened again, this time to find K.S-T. facing him on the bed and fidgeting. They started "making out", he said, he unbuttoned and pulled down her shorts, she kicked them off, they continued to make out for about a minute and then "I had sex from behind with her."
- [15] Mr. Smith described the act of sexual intercourse in some detail. He said that he went "went around the back" of K.S-T., she leaned into him, and "her butt was up into me and her knees were bent forward" in a so-called "all fours" position. He denied that K.S-T. was flat on her stomach, denied forcing her into any position and denied holding her arms or restricting her movement. Rather, Mr. Smith said, K.S-T. cooperated in the sex act, she did not say "No" or resist and she actively pushed her weight into him. He also said that neither he nor K.S-T. spoke while the sexual intercourse was taking place.
- [16] According to Mr. Smith, the sexual intercourse stopped when he lost his erection. He said that he rolled over and laid down, K.S-T. asked him what was wrong and he either did not respond or said, "I can't" (his testimony on this point varied). He went on to say that they laid in the bed for about a half-hour, K.S-T. "huffed" several times, "scrunched her face up" and then left the bedroom. About five minutes later, he said, she shouted something at him and left the apartment with Ms. Johnston and Mr. Ismirnioglou.
- [17] The two other key Crown witnesses were Ms. Johnston and Mr. Ismirnioglou. Ms. Johnston described the evening at the Biltmore, attending the after-party at Mr. Smith's apartment and falling asleep there with Mr. Ismirnioglou. She testified that she awakened to find K.S-T.

looking for her bag and stating, "I need to get the fuck out of here", at which point she, Mr. Ismirnioglou and K.S-T. left the apartment. Ms. Johnston said that K.S-T.'s demeanour was frantic, she was "in shock" and she urgently wanted to leave. She also said that, in the elevator, K.S-T. told her something important.

[18] Crown counsel asked the court to enter into a voir dire with respect to K.S-T.'s statement to Ms. Johnston. On the voir dire, Ms. Johnston testified that, in the elevator, K.S-T. told her "I woke up and he was inside of me". She also testified that, later that morning, K.S-T. said that "she woke up, he was inside of her, and then she tried to get him off and he was holding her arms down and that she was on her stomach and he had come in from behind." Ms. Johnston testified further that K.S-T. seemed to be in denial "because I suggested she go to the police and she said she didn't want to, that it wasn't a big deal, it lasted just a few minutes".

[19] Defence counsel cross-examined Ms. Johnston both the voir dire and the trial proper regarding K.S-T.'s statements to her on the morning of the incident. In the trial cross-examination, he put portions of Ms. Johnston's police statement to her and she confirmed that, as she told the police, "I was like you were raped [K.S-T.], like he raped you. And she was like, well I don't know if he did, like it was only for a few minutes". She also confirmed her impression was that something very traumatic had just happened to K.S-T., that K.S-T. knew what had happened and that K.S-T. "just wanted to forget about it".

[20] In the course of cross-examination, Ms. Johnston expanded further upon her exchange with K.S-T.:

Q: And I'm going to suggest to you there that's what your impression was from talking to her at coffee the next morning, was that you thought she'd been raped and she didn't seem to realize or think that that's what happened, correct?

A: My impression was that Mark put himself inside of [K.S-T.] without consent and [K.S-T.] shared that with me the following morning. And when I hear that, that to me is rape. And so that is what I experienced.

Q: And you and her didn't seem to be on the same page as far as that conclusion, correct?

A: We were on the same page in the sense that she was telling me what had happened and I was listening. Where we weren't on the same page that day was the severity of the fact that it had happened, regardless of the - even though it had only been a couple of minutes.

Q: And when you said to the police, "I don't think she realized what had happened and just wanted to forget about it." You were telling the truth to the police there about your impression of your - your conversation with her, correct?

A: That was my impression but I feel like that one sentence doesn't summarize the entire - the entire situation.

- [21] Ms. Johnston also stated that her memories of what K.S-T. told her were "crystal clear" despite the passage of eight years.
- [22] Mr. Ismirnioglou was comparatively vague in his testimony regarding what took place eight years earlier. He described some general memories of the party and confirmed that he left the apartment with K.S-T. and Ms. Johnston the next morning. In the course of his testimony, Mr. Ismirnioglou stated that K.S-T. appeared angry and really upset and she yelled "Thanks for the coke" at Mr. Smith as they were leaving. Then, he stated, in the elevator, she said something about "unconsensual sex" and may have used the word "rape". He also stated that, a few days later, he confronted Mr. Smith about K.S-T.'s allegation of non-consensual sex and Mr. Smith told him the "hook up" was consensual.

Positions of Counsel

- [23] After the evidence was adduced, counsel made submissions on whether the evidence on each of count of sexual assault was admissible as similar fact evidence on the other count. Two days later, the judge ruled that none of the evidence was admissible as similar fact evidence. Following her delivery of the ruling, counsel made submissions on the admissibility of K.S-T.'s prior statements to Ms. Johnston in the aftermath of the alleged attack.
- [24] Crown counsel argued that K.S-T.'s statements to Ms. Johnston were consistent with her trial testimony and admissible on "the recent fabrication issue", namely, to rebut the defence assertion that K.S-T. delayed reporting to police because she was unsure if what happened was rape until she saw Mr. Smith's name on the rape crisis centre board. In support, he relied on *R. v. Ellard*, 2009 SCC 27, and contended that any statement she made before seeing his name there could be used for the limited purpose of rebutting the suggestion that she was unsure if she was raped until that point in time. In advancing this submission, he reviewed Ms. Johnston's evidence regarding the details of K.S-T.'s prior statements. He also emphasized that, if admissible, "the court should obviously not use them in any way to corroborate the surrounding details and generally the credibility of the complainants, but if admitted what they do is they rebut any suggestion that [K.S-T.] was unsure about what happened, because that is the defence contention."
- [25] For his part, defence counsel addressed Ellard by arguing that, in this case, one of the defences was K.S-T. fabricated her allegation of sexual assault immediately after the intercourse stopped because she was upset with Mr. Smith for rejecting her. On that analysis, he submitted, K.S-T.'s statements to Ms. Johnston were made after the motive arose and thus did not qualify as prior consistent statements. In addition, he argued, K.S-T.'s statements were not prior consistent statements, they were prior inconsistent statements because they did not accord with her trial evidence. In other words, he said, K.S-T.'s statements to Ms. Johnston that "I woke up and he was inside of me" and her purported uncertainty as to whether the sexual encounter was rape differed significantly from her trial testimony. In his submission, as prior inconsistent statements they were admissible to

impugn her credibility and reliability but not to rebut an allegation of recent fabrication.

[26] Defence counsel also noted that Ms. Johnston testified on both the voir dire and on cross-examination at trial regarding K.S-T.'s prior statements. As a result, he stated, he did not require an immediate ruling on the admissibility of the voir dire evidence in order to make his closing arguments. The judge advised counsel that she was not in a position to rule immediately on the prior consistent statement issue and suggested that closing arguments could be postponed until the ruling was available. However, both counsel wished to proceed immediately. Therefore, counsel made their final submissions without knowing whether K.S-T.'s statements to Ms. Johnston would be ruled admissible as prior consistent statements and, in doing so, both dealt with Ms. Johnston's evidence regarding K.S-T.'s statements on the day of the alleged attack.

[27] In his final submissions, defence counsel argued that K.S-T. had reshaped her memories and perceptions of her encounter with Mr. Smith and emphasized what she "appears to have told" Ms. Johnston in support of this argument. In particular, he submitted that K.S-T. was initially ambiguous about what had happened with Mr. Smith and argued her prior statements to Ms. Johnston cast doubt on her memory of what actually took place. He also questioned how it could be possible that K.S-T.'s memory was not affected by her work at the rape crisis centre and suggested her discussions with Ms. Johnston created "cross-over information" between them. He suggested further that it was physically impossible for the sexual intercourse to have occurred as K.S-T. described.

[28] Defence counsel summarised Mr. Smith's position like this:

the submission of the defence is that it was either a blackout or other - some form of sleep, making out, altered consciousness, something, as per what she told Ms. Johnston, which was, "I woke up and he was inside me." And [K.S-T.] doesn't recall the portion of the time in between the kissing and then the next thing she remembers is him being inside of her, and her own evidence is in essence at that point she was passive and silent, and although she may not have been internally consenting it would have been honest but mistaken belief in consent, if nothing else at that point, if that's the scenario that happened or that that's the scenario that can create a doubt about what happened, or alternatively she was an active participant in the sexual activity and she was upset when Mr. Smith stopped, rolled over and ignored her. She had low confidence at that time. She never had a long-term boyfriend and she was upset, and as time wore on her perception and memory of the incident was shaped by her job experience, her radical feminist belief system, and seeing his name at the rape centre.

[29] Crown counsel's position was that K.S-T. was a credible and reliable witness whose account of the attack was corroborated by her post-attack demeanour. He submitted the defence argument that she was affected by her work at the rape crisis centre had "zero traction" given what she said to Ms. Johnston in the immediate aftermath of the attack. In other words, he submitted, K.S-T.'s statements to Ms. Johnston amounted to prior consistent statements that rebutted the defence allegation of recent fabrication. He also submitted that the fact K.S-T.

initially questioned the seriousness of the event and did not report it until she learned Mr. Smith may have done it again did not render her account improbable.

- [30] In support of his position, Crown counsel emphasized the absence of any motive on K.S-T.'s part to lie about what happened with Mr. Smith on the night that she met him. He also argued that Ms. Johnston's memory of exactly what K.S-T. said in the aftermath of the attack was inevitably affected by the passage of time. Nevertheless, he stated:

in the main, in my submission their details are similar, there are certainly inconsistencies, and I submit that they would be explained by the significance of events or the lack of significance of the events to the witnesses, the passage of time, combined with having no reason to think about the event

Reasons for Judgment

- [31] The judge began by outlining the essential elements of the offence of sexual assault and several key aspects of the evidence. She recounted the witnesses' descriptions of attending the Biltmore Cabaret and the after-party, then summarised K.S-T.'s evidence on direct and cross-examination regarding the attack (at paras. 14-15, 31-36). Her summary included K.S-T.'s testimony that she woke up to find Mr. Smith pulling her shorts off, that she resisted and that he flipped her over and raped her from behind while holding her arms over her head (at paras. 31-32). She also summarised K.S-T.'s evidence that, after the rape, she left the apartment with Ms. Johnston and Mr. Ismirnioglou as soon as Mr. Smith fell asleep (at paras. 36-37).
- [32] The judge noted Ms. Johnston's description of K.S-T.'s demeanour when they left the apartment as "one of shock" and wanting to leave with a "franticness or urgency about it" (at paras. 38-39). She also noted K.S-T.'s testimony that she made a remark in the elevator but did not remember describing the details, that she called in sick "because she felt like shit because she had been raped" and that she told Ms. Johnston she did not want to go to the police, as well as Mr. Ismirnioglou's testimony that, in the elevator, K.S-T. was upset and may have used the word "rape" (at paras. 41, 44-45). She noted further that, in the trial proper, Ms. Johnston described her conversation with K.S-T. at JJ Bean in her police statement. In particular, she noted, Ms. Johnston told the police that, after K.S-T. spoke about what happened, she (Ms. Johnston), said "[h]e raped you" and K.S-T. replied "she did not know, it was only for a few minutes" (at para. 46).
- [33] The judge went on to describe the witnesses' accounts of events after the incident. She summarised K.S-T.'s testimony that, in January 2015, she saw Mr. Smith's name on the rape crisis centre board and decided to come forward to police (at para. 51). She noted K.S-T.'s testimony that she did not think her work at the rape crisis centre coloured her memory, that "her perception in 2015 was the same as 2010" and that "she did not have to think about whether rape had occurred or not, nor was she unsure about whether it was rape" (at para. 52). She also noted the Crown tendered evidence on the voir dire as to what K.S-T. said to

Ms. Johnston to rebut a notion of recent fabrication, but stated, "I am not going to refer to that evidence in this portion of my reasons" (at para. 55).

- [34] After outlining the Crown evidence, the judge turned to Mr. Smith's evidence. She summarised his description of having consensual intercourse with K.S-T., noting he denied that he pulled down K.S-T.'s shorts, denied that she laid flat on her stomach during the intercourse and denied that he held her arms and restricted her movements (at paras. 60-61). She also noted Mr. Smith's testimony that, in his experience, "my partner would have to be cooperative and lean into me" to enable him to have sex with her from behind, his assertion that K.S-T. "never told him to stop or said no" and his description of the sexual intercourse stopping after a few minutes and K.S-T. leaving the apartment (at paras. 61-65, 70). Then she described his interactions with the police in 2015 (at paras. 72-78) and outlined the evidence on the other count of sexual assault.
- [35] Next, the judge outlined legal principles relevant to her determination. These included the legal framework in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and several myths and stereotypes recognized in Canadian jurisprudence with respect to sexual assault (at paras. 188-95). She noted that a sexual assault complainant's post-event conduct can be corroborative, that a lack of motive to lie can sometimes support a complainant's credibility and that a court can consider the demeanour of a witness, but must not place too much emphasis on it, citing various authorities in support (at paras. 196-99). Citing *R. v. Polo Cedeno*, 2005 ONCJ 91, she also remarked that a drunken consent to sexual contact is still valid consent (at para. 200).
- [36] The foregoing principles stated, the judge returned to Mr. Smith's evidence. She stated that the manner in which he testified changed between direct examination and cross-examination and she found some of those changes reflected untruthfulness on his part (at paras. 201-11). Then she analysed count one of the indictment, the June 2010 incident involving K.S-T.
- [37] The judge began her analysis by finding that K.S-T. drank four or five drinks, but did not ingest cocaine, on the evening in question (at para. 212). She noted K.S-T.'s admission that the kissing in the bed was consensual, accepted that she was lying on her stomach during the sexual intercourse and rejected Mr. Smith's assertion that he could not have had sex with K.S-T. as she described, which the judge labelled the "impossibility of the position" theory (at paras. 220, 222-29). After also noting that K.S-T. and Mr. Smith agreed the intercourse was brief and that penetration required the use of a hand (at paras. 230-32), she contrasted K.S-T.'s testimony that she said "no" three times with Mr. Smith's testimony that she said nothing and positioned her body to achieve intercourse (at para. 233). She noted further that K.S-T. and Mr. Smith agreed there was no conversation between them before or during intercourse and stated that this fact "supports K.S-T.'s evidence that she did not consent to have sexual intercourse with Mr. Smith" (at paras. 234-35).
- [38] Under the heading "Post-event demeanour", the judge found that K.S-T.'s post-event demeanour also supported her evidence:

[238] In addition to what [Mr. Ismirnioglou] and [Ms. Johnston] described in the elevator, [Ms. Johnston] describes K.S-T.'s body language and demeanour as that she was in shock. [Ms. Johnston] agrees that she described K.S-T. as sleepy and not totally aware, but hungover. She says K.S-T. was fully functioning. Mr. Smith is not in a position to disagree with that assessment. He observed K.S-T. scrunch up her face, but beyond that he did not see her once he [sic] left the bedroom.

[239] I find that K.S-T.'s demeanour post-event supports her version of what occurred between her and Mr. Smith in bed, and that she did not consent to it.

[Emphasis added.]

[39] Under the heading "Not reporting", the judge rejected Mr. Smith's position that K.S-T.'s work at the rape crisis centre caused her to re-evaluate what happened on the night in question:

[240] K.S-T. did not wish to report the incident to police and did not in 2010. She did so after she saw Mr. Smith's name on a board at the rape crisis centre where she worked in 2015. She says that her perception in 2015 was the same as 2010. She did not have to think about whether rape had occurred, nor was she unsure about whether it was rape. She did not determine it was rape after working at the rape crisis centre.

[241] The defence suggests that it was K.S-T.'s working at the rape crisis centre that caused her to consider that she had been raped by Mr. Smith in 2010. Mr. Smith asserts that K.S-T. was prompted to report him by seeing his name, by her study of feminist analyses in literature, and by working with rape victims. This, the defence argues, caused her to re-evaluate what happened between her and Mr. Smith in 2010.

[242] I reject that position. Her not reporting in 2010 is not to be considered as an adverse inference. She is clear on what happened when she spoke to her friend right after the event. There is no real dispute about what happened with Mr. Smith. The dispute is whether she consented to it or willingly participated in it.

[243] I have already found that K.S-T. did neither.

[Emphasis added.]

[40] Under the heading "Inconsistencies", the judge noted that there were alleged inconsistencies in K.S-T.'s evidence regarding what she was wearing on the evening in question. However, she found, to the extent they existed, these inconsistencies were insignificant (at para. 244). Notably, the judge did not find that K.S-T.'s evidence was inconsistent with Ms. Johnston's evidence regarding her statements after the event about what happened.

[41] Under the heading "Recent fabrication", the judge noted that prior consistent statements are generally inadmissible, citing Ellard (at para. 245). Then she said this:

[246] I find that K.S-T.'s direct examination and cross-examination was clear. In fact, there is no dispute about what occurred between her and Mr. Smith. The difference is his theory about the impossibility of the position and whether she demonstrated consent. She says she said no three or four times. Mr. Smith did not hear her say anything. He certainly did not hear her say yes.

[247] Mr. Smith's defence is that she must have consented because she was leaning back into him as he penetrated her vagina with his penis and that he could not have done so otherwise, due to the impossibility of the position theory that I have already rejected.

[Emphasis added.]

[42] The judge labelled the penultimate heading "Revenge theory". After remarking it is a rape myth that women claim rape for revenge, she acknowledged the need to consider Mr. Smith's suggestion to this effect, rejected his revenge theory and found Mr. Smith guilty on count one:

[248] ... This theory of revenge does not make any sense.

[249] Why would K.S-T. be mad that Mr. Smith was unable to complete sexual intercourse, even if she did lack self-confidence at the time? Mr. Smith's assertion in this regard is illogical and I reject it.

[250] I do not believe Mr. Smith's evidence that he and K.S-T. engaged in consensual sexual intercourse in June 2010 when she was in his bed. I am not left in doubt by the evidence of the accused. I am convinced, beyond a reasonable doubt, of Mr. Smith's guilt on Count 1. The Crown has established all the elements of the offence, including the actus reus. There was touching of a sexual nature. K.S-T. did not consent to it, based on her evidence of what occurred and by her internal state of mind towards the touching at the time it occurred. I find that Mr. Smith had the intention to touch K.S-T. and that he knew or was reckless or wilfully blind to K.S-T.'s lack of consent.

Issues on Appeal

[43] The issues for determination are:

- a) Did the judge misapprehend the evidence by:
 - i. mistaking its substance in finding that K.S-T. was "clear on what happened" in her statements to Ms. Johnston?
 - ii. failing to consider or give proper effect to K.S-T.'s prior statements to Ms. Johnston in assessing her credibility and reliability?
- b) Did the judge commit a palpable and overriding error in finding that there was "no dispute" about what happened between K.S-T. and Mr. Smith?

Standard of Review

- [44] The applicable standard of review when an appellant seeks to overturn a conviction based on an alleged misapprehension of the evidence is well-established. In *R. v. Lohrer*, 2004 SCC 80, Justice Binnie affirmed the test is as set out in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.):
- [2] The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".
- [45] As Justice Doherty explained in *Morrissey*, 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 evidence": at 538. If a judge is mistaken regarding the substance of material parts of the evidence and those errors play an essential part in the reasoning process that results in a conviction, the conviction is not based on the evidence and a miscarriage of justice results because the conviction is not a "true" verdict: at 541. Where, as here, a principal issue at trial is credibility such that the evidence of one witness is accepted and that of another witness is thus excluded, the findings must be based on a correct apprehension of the evidence because "[w]rong findings on what the evidence is destroy the basis of findings of credibility": *R. v. Dewar*, 2001 BCCA 561 at para. 23, citing *Whitehouse v. Reimer* (1980), 116 D.L.R. (3d) 594 at 595 (Alta. C.A.).
- [46] However, as Justice Stromberg-Stein stated in *R. v. Swales*, 2014 BCCA 350, it is not enough for an appellant to suggest a different interpretation of the evidence or to point to some evidence that arguably weighs against a judge's factual findings. Mere differences in interpretation of the evidence do not establish that the evidence was misapprehended. Rather, they reflect disagreement with the judge's differing view of the evidence: at para. 49.
- [47] In *R. v. Sinclair*, 2011 SCC 40, Justice LeBel described the circumstances in which a misapprehension of the evidence will be material to the judge's reasoning, and thus amount to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code, namely, "if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground": at para. 56. In *R. v. Kaemmer*, 2019 BCCA 136, Justice Hunter distilled the legal principles that emerged from *Sinclair*:
- [28] Two principles emerge from the summary of the law set out in *Sinclair*:
- (i) a misapprehension of the evidence will only vitiate a conviction if the error was a central element of the judge's reasoning on which the conviction is based; and

(ii) the means of determining whether the error was a central element of the judge's reasoning is to consider whether striking it from the judgment would leave the trial judge's reasoning on unsteady ground.

[48] The standard of review that applies to factual findings is also well established. An appellate court will only interfere with a judge's findings of fact if there is an obvious (palpable) and material (overriding) error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5-6, 10. Whether a witness is credible is a question of fact. Trial judges have the advantage of hearing and observing the witnesses and their factual findings are accorded a high degree of appellate deference, especially findings based on assessments of credibility: *R. v. Thla Ceu*, 2018 BCCA 480 at paras. 34, 37.

[49] Further, the fact that a judge does not discuss all of the evidence led on a given point does not mean that the judge ignored it. Judges are not obliged to detail every aspect of their factual deliberations in reasons for judgment: *R. v. Walle*, 2012 SCC 41 at para. 46. Nor are they obliged to spell out every finding or inference of fact or credibility. Perfection is not the standard for reasons to be sufficient: *Thla Ceu* at para. 47. Rather, reasons must show that the judge grappled with the substance of the live issues for determination and the logical connection between the evidence and the decision must be discernible: *R. v. R.E.M.*, 2008 SCC 51 at para 64. As Justice Cromwell stated in *R. v. Villaroman*, 2016 SCC 33, a judge's reasons must be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with "an appreciation of the purposes or functions for which they are delivered"" at para. 15; *Zhang v. Cute-Go Novelty Inc.*, 2016 BCCA 451 at paras. 3-4.

Did the judge mistake the substance of the evidence in finding that K.S-T. was "clear on what happened" in her statements to Ms. Johnston?

[50] Mr. Smith contends that the judge misapprehended the evidence by mistaking the substance and context of K.S-T.'s statements to Ms. Johnston shortly after the incident. In his submission, in finding that K.S-T. "is clear on what happened when she spoke to her friend right after the event" (at para. 242), she mistook the substance of the evidence of what K.S-T. said to Ms. Johnston in the aftermath of the alleged attack. According to Mr. Smith, the evidence was that K.S-T. was uncertain about what had happened and that, faced with K.S-T.'s uncertainty, Ms. Johnston told her "he raped you" and K.S-T. responded "I don't know if he did, like it was only for a few minutes". He submits K.S-T.'s expression of uncertainty belies any suggestion that she was "clear" in her statement to Ms. Johnston about what took place.

[51] In support of his submission, Mr. Smith emphasizes that even Crown counsel acknowledged that K.S-T. initially questioned the seriousness of what had happened. He says this characterization was based on K.S-T.'s statement to Ms. Johnston doubting whether the sexual encounter was rape and the context in which her expression of uncertainty was made, which included her earlier statement in the elevator that she awakened to find Mr. Smith "inside of me". He also emphasizes the defence position at trial that K.S-T.'s statement

to Ms. Johnston that she was uncertain of whether Mr. Smith raped her was inconsistent with her trial testimony. According to Mr. Smith, that prior inconsistent statement was relevant to K.S-T.'s reliability and credibility and the judge should have considered it in that light, but, due to her mistake as to the substance of the evidence, she did not.

- [52] I am not persuaded by these submissions. Mr. Smith's contention that the judge mistook the substance of the evidence regarding K.S-T.'s prior statement to Ms. Johnston expressing uncertainty amounts to no more than a disagreement with the judge's interpretation of the evidence. It does not establish a misapprehension of the evidence. On the contrary, in my view, the judge's interpretation of the substance of the evidence in this regard was reasonable, logical and well-supported. She did not err in rejecting the defence position that K.S-T. expressed uncertainty about whether "what happened" was rape and in declining to interpret the evidence of K.S-T.'s prior statement to Ms. Johnston in this regard as inconsistent with her testimony at trial.
- [53] I reach this conclusion for the following reasons.
- [54] First, the judge did not make a specific finding regarding the exact words that K.S-T. spoke to Ms. Johnston eight years earlier, nor was she obliged to do so. In my view, it would have been surprising if she had made a precise finding regarding the exact words K.S-T. spoke given the passage of time and the context in which the conversation took place. Instead, the judge made an implicit and general finding regarding the gist of the conversation, namely, that when K.S-T. spoke to Ms. Johnston in 2010 she told Ms. Johnston substantially what she told the police in 2015 and the court at trial--that Mr. Smith had intercourse with her without her consent (as the judge put it in shorthand form, "what happened"). As I read the judge's reasons, that is the sense in which she found in para. 242 that K.S-T. was "clear" on "what happened" when she spoke to Ms. Johnston right after the event. This finding is supported by the evidence of both K.S-T. and Ms. Johnston.
- [55] Second, the judge made the impugned finding that K.S-T. was "clear on what happened when she spoke to her friend" under the heading "Not reporting". She did so in the context of rejecting the defence theory that K.S-T. was initially unsure of whether Mr. Smith had raped her, but that her work at the rape crisis centre caused her to re-evaluate and see what occurred in a different light (at paras. 240-42). In other words, the judge interpreted the evidence regarding K.S-T.'s statement about "what happened" as consistent with K.S-T.'s trial testimony and inconsistent with the defence allegation that her perception was influenced by her work at the rape crisis centre several years after the event took place. This reflected the judge's acceptance of the Crown's argument that the statement rebutted the defence's allegation of recent fabrication.
- [56] Third, Ms. Johnston's trial evidence concerning her conversation with K.S-T. was not particularly precise in its content or expression. The same was seemingly true of K.S-T.'s statement to Ms. Johnston in 2010. As noted above, on cross-examination, Ms. Johnston agreed that she had told police "I was like you were raped [K.S-T.], like he raped you. And she

was like, well, I don't know if he did, like it was only for a few minutes". She also testified that her impression from the conversation of what K.S-T. was telling her "was that [Mr. Smith] put himself inside of [K.S-T.] without consent and [K.S-T.] shared that with me the following morning. We were on the same page in the sense that she was telling me what had happened and I was listening. Where we weren't on the same page that day was the severity of the fact that it had happened, even though it had only been a couple of minutes".

- [57] In my view, it was open to the judge to accept Ms. Johnston's evidence regarding the overall import of K.S-T.'s statement, as she understood it. In other words, an available interpretation of Ms. Johnston's evidence was that K.S-T. told her, in substance, that Mr. Smith put his penis in her vagina without her consent for a few minutes and it seemed to Ms. Johnston that K.S-T. did not seem to realize the severity of the fact because "it was only for a few minutes" (which, needless to say, has nothing to do with whether it was "rape" or not). As she testified, that is how Ms. Johnston interpreted K.S-T.'s statement at the time.
- [58] When the judge's reasons are read as a whole, in my view it is apparent that she accepted Ms. Johnston's overall impression of the substance of K.S-T.'s statement as accurate and reliable. Although she did not make a finding regarding K.S-T.'s exact words, the judge was satisfied that, contrary to the defence submission, K.S-T. did not tell Ms. Johnston that she did not know what happened in the sense that she did not know if Mr. Smith had non-consensual intercourse with her (raped her). Rather, she found, K.S-T. was always clear that Mr. Smith had non-consensual intercourse with her, but that, because it was brief ("I don't know, it was only for a few minutes"), she was not inclined to report it to police. This interpretation of Ms. Johnston's evidence is consistent with K.S-T.'s evidence that working at the rape crisis centre did not cause her to re-evaluate "what happened", change her perception of "what happened" and then report it to police. In other words, as I will discuss further below, the judge treated the evidence of K.S-T.'s statement to Ms. Johnston as rebutting the allegation of recent fabrication.
- [59] I find additional support for my view that the reasons, read as a whole, show the judge interpreted the body of evidence regarding K.S-T.'s statement to Ms. Johnston as a prior consistent statement, not a prior inconsistent statement, in the next section of the reasons. Under the heading "Inconsistencies", the judge refers to certain inconsistencies in K.S-T.'s trial testimony (at para. 244); however, she does not refer to K.S-T.'s statement to Ms. Johnston regarding whether what happened was rape. As I read the reasons, this is because she had just found that K.S-T.'s statement to Ms. Johnston on "what happened" was "clear" in that it was consistent with her trial testimony and thus, as noted in para. 55 above, it rebutted the allegation of recent fabrication.
- [60] In sum, in my view the judge interpreted the evidence regarding K.S-T.'s statement to Ms. Johnston expressing uncertainty about what happened in the foregoing manner and it was open to her to do so. It follows that I would not accede to this ground of appeal.

Did the judge fail to consider or give proper effect to K.S-T's prior statements to Ms. Johnston in assessing her credibility and reliability?

- [61] Mr. Smith also contends that the judge misapprehended the evidence by failing to consider or give proper effect to K.S-T's prior statements to Ms. Johnston in assessing K.S-T's credibility and reliability. His argument on this ground of appeal has two distinct prongs.
- [62] First, Mr. Smith submits that the judge failed to consider or give effect to K.S-T's stated uncertainty about whether what happened was rape and to her statement that "I woke up and he was inside of me" as prior inconsistent statements on material factual issues. In his submission, those statements were starkly inconsistent with her trial testimony that, while she was awake, despite her physical and verbal resistance, he forcefully removed K.S-T's shorts, turned her over onto her stomach and penetrated her from behind. Faced with Ms. Johnston's evidence of K.S-T's prior inconsistent statements, he says, it was incumbent upon the judge to consider their implications for her credibility and reliability, both of which they potentially compromised. However, he says, she did not take these inconsistent statements into account in assessing K.S-T's credibility and reliability.
- [63] In support of this submission, Mr. Smith argues that Ms. Johnston was not challenged on the reliability of her memory or on her credibility regarding K.S-T's statement that she awakened to find him "inside of me". He also emphasizes Ms. Johnston's testimony that she clearly remembered the statement being made and the fact that K.S-T. vacillated between denying that she made the statement and claiming she did not remember doing so. Mr. Smith submits that, in addition to its relevance for the purpose of impugning her credibility, K.S-T's vacillation on whether she made the statement was relevant to her reliability. This is so, he says, because K.S-T's inability to recall what she said to Ms. Johnston called into question her reliability in describing events that took place eight years before.
- [64] Second, Mr. Smith submits that the judge failed to rule on the admissibility of the voir dire evidence, which the Crown characterized as evidence of a prior consistent statement admissible to rebut the defence allegation of recent fabrication. Further, and importantly, he says, even if K.S-T's statement to Ms. Johnston could be interpreted as consistent with her trial testimony, the judge impermissibly relied on its content, rather than on the fact that it was made, in finding "[K.S-T.] is clear on what happened when she spoke to her friend right after the event" (at para. 242). In support of this submission, Mr. Smith relies on *R. v. Ay* (1994), 59 B.C.A.C. 161, where Justice Wood stated that the content of a complainant's prior complaint cannot be used as the basis for "an inference of truthfulness in respect of the complainant's evidence at trial by reason of its apparent consistency with what was previously said" (at para. 52).
- [65] I do not accept Mr. Smith's submissions on either prong of this ground of appeal.
- [66] A witness's credibility and reliability may be impeached by proof of an oral statement inconsistent with the witness's present testimony. However, as a matter of fairness, before extrinsic proof of a witness's prior inconsistent statement may be given, the witness should

be given as much detail as possible of the alleged statement and should be asked to admit that it was made: Canada Evidence Act, R.S.C. 1985, c. C-5, s. 11. In *R. v. Pargelen* (1996), 31 O.R. (3d) 504 (C.A.), Justice Rosenberg explained the rationale for these requirements, namely, to save time, to avoid unfair surprise to the opposing party and to prevent unfairness to the witness by providing an opportunity to explain or deny an apparent inconsistency. He also noted that, in the case of an oral statement, there is a risk that an impeaching witness may have misunderstood, misheard or forgotten crucial aspects of the statement and, therefore, it is particularly important that the witness be given as much detail as possible of the prior allegedly inconsistent statement in question: at 520-21, 523-24.

- [67] As I have explained, in my view the judge did not interpret the evidence of K.S-T.'s statement to Ms. Johnston regarding whether what happened was rape as being inconsistent with K.S-T.'s trial testimony. As I have also explained, in my view her interpretation was available and it is unassailable on appeal. However, I accept that Ms. Johnston's testimony that, in the elevator, K.S-T. said, "I woke up and he was inside of me" arguably amounted to evidence of a prior inconsistent oral statement, albeit a statement that described a form of sexual assault different from that which K.S-T. described in her trial testimony. Given that the alleged statement was adequately drawn to K.S-T.'s attention on cross-examination, that Ms. Johnston testified K.S-T. made it and that it could be considered inconsistent with K.S-T.'s trial testimony, particularly if viewed in isolation, I accept that it was open to the judge to treat Ms. Johnston's evidence on this point as a prior inconsistent statement. Nevertheless, I do not accept that she failed to consider that evidence or to give it any effect in assessing K.S-T.'s credibility and reliability simply because she did not specifically refer to it in her reasons for judgment.
- [68] The judge was required to consider and sift through a large body of evidence in assessing K.S-T.'s credibility and reliability, including the compelling evidence of her "frantic" and shocked post-event demeanour. However, as I have noted, the judge was not required to discuss all of the evidence led on every point. In my view, Ms. Johnston's testimony regarding her recollection of K.S-T.'s exact words in the elevator eight years earlier was not highly significant or compelling evidence in the overall context of the case and the fact that judge did not specifically mention it does not mean that she ignored it. Nor was she required to accept as reliable Ms. Johnston's recollection of the exact words K.S-T. spoke when she made the alleged statement in the elevator. On the contrary, as with all witnesses, the judge was entitled to accept some, all or none of Ms. Johnston's evidence.
- [69] Notably, the judge did mention K.S-T.'s evidence that she made a remark to Ms. Johnston and Mr. Ismirnioglou in the elevator as they left the apartment but that she did not remember describing the details of the attack to them (at para. 44). She also mentioned Mr. Ismirnioglou's evidence that K.S-T. was obviously very upset at the time and that she may have used the word "rape" when they were in the elevator (at para. 41). In my view, it is apparent from her reasons, read as a whole, that the judge did not attribute significant weight to Ms. Johnston's testimony regarding her own recollection of the exact words K.S-T.

spoke in the elevator in her overall assessment of K.S-T's credibility and reliability. This is unsurprising. As Justice Rosenberg emphasized in Pargelen, prior oral statements that are allegedly inconsistent with a witness's trial testimony are prone to inherent limits in their evidentiary value: at 523-24. This is especially true where, as here, they were made eight years before.

- [70] The judge's assessment regarding K.S-T's credibility is entitled to a high degree of appellate deference. She was in a privileged position to make the assessment based on the total body of evidence, with all of the nuances of demeanour, expression and implication that were involved. Although the judge could and perhaps should have expressly dealt with Ms. Johnston's testimony regarding her recollection of K.S-T's words in the elevator eight years earlier in her reasons, I would not interfere with her credibility assessment on the basis that she did not do so. In my view, in the overall context of the case, the absence of specific mention of that aspect of the evidence does not call into question the judge's assessment of K.S-T's credibility or the safety of the conviction. I am particularly disinclined to interfere on this basis given that K.S-T's purported oral statement to Ms. Johnston (which could easily have been misheard, misunderstood or misremembered) simply described another form sexual assault (intercourse with an unconscious person) that did not align with either K.S-T's trial testimony or Mr. Smith's trial testimony.
- [71] Nor would I interfere with the judge's assessment of K.S-T's credibility and reliability on the basis that she failed to rule on the admissibility of the voir dire evidence or that she impermissibly relied on the content of K.S-T's prior consistent statement in assessing K.S-T's credibility. In my view, the judge made neither error attributed to her by Mr. Smith.
- [72] In *Ay*, this Court considered the legal use that may be made of evidence admitted under the narrative exception to the common law rule that evidence of a witness's prior consistent statements is presumptively inadmissible. The general rule is based on the premise that such evidence is generally self-serving and lacks probative force: *Ellard* at para. 31. In discussing the admissibility of evidence of a prior complaint of sexual assault in *Ay*, Justice Wood said this:
- [53] To summarize, the fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters relevant and admissible to establish the conduct of the complainant in a criminal case, from which conduct the trier of fact is entitled to draw inferences relative to the credibility of that complainant's evidence. However, the content of any prior statement cannot be used to demonstrate its consistency with, and therefore the probable truthfulness of, the complainant's evidence at trial, and thus such content is inadmissible unless relevant for some other purpose such as providing necessary context for other probative evidence.
- [73] Another exception to the common rule that evidence of a witness's prior consistent statements is presumptively inadmissible is where recent fabrication is alleged. As explained in *Ellard*, in such circumstances "the opposing party can rebut the allegation by

introducing prior statements made before the alleged fabrication arose, that are consistent with the testimony at trial" (emphasis in original). For the exception to apply the allegation need not be express; it is enough if "in light of the circumstances of the case and the conduct of the trial, the apparent position of the opposing party is that there has been a prior contrivance": Ellard at para. 32. In addition, the alleged fabrication need only have been made after the event testified to and it may include being influenced by outside sources: Ellard at para. 33.

[74] With these principles in mind, I turn to Mr. Smith's arguments.

[75] First, counsel agreed at trial that the substance of Ms. Johnston's voir dire evidence was already before the court on the trial proper and, therefore, an immediate ruling on its admissibility as a prior consistent statement was unnecessary. They also made full submissions on the nature and proper use of the evidence, both as potentially prior consistent and inconsistent oral statements. The judge was clearly alert to the fact that Ms. Johnston gave evidence on the voir dire regarding K.S-T.'s prior statements and that the Crown had tendered it to rebut the defence of recent fabrication, as she referred to the voir dire in para. 55 and addressed the issues and arguments in paras. 240-43 and 245-47 of her reasons. In these circumstances, in my view, it was not necessary for her also to state expressly that evidence already uncontroversially before the court for the defence purpose of demonstrating prior inconsistency was admissible as a prior consistent statement.

[76] Second, in my view, the judge did not improperly rely on the K.S-T.'s prior statement to Ms. Johnston for the truth of its content or to bolster her testimonial credibility based on its consistency with her trial evidence, as discussed in Ay. Rather, she declined to draw an adverse inference based on K.S-T.'s delayed reporting and used the evidence of her prior consistent statement to Ms. Johnston in the manner urged by Crown counsel and contemplated in Ellard, namely, to rebut the allegation that K.S-T. delayed reporting because she was unsure of whether she was raped until she saw Mr. Smith's name on the board at the rape crisis centre.

[77] As I have noted, the judge's statement at para. 242 of her reasons that "[K.S-T.] is clear on what happened when she spoke to her friend right after the event" responded to the defence argument that K.S-T. "fabricated" her complaint in 2015 by virtue of her work at the rape crisis centre. As I have also noted, in my view her reference to K.S-T.'s prior consistent statement to Ms. Johnston reflects her acceptance of the Crown argument that this evidence rebutted the recent fabrication allegation. In other words, in stating that "[K.S-T.] is clear on what happened when she spoke to her friend right after the event", the judge was giving effect to the evidence of K.S-T.'s prior consistent statement in the manner contemplated by Ellard, not using it to demonstrate the probable truthfulness of K.S-T.'s trial testimony. While it would have been preferable for the judge to have stated expressly that she was using the evidence in this manner, perfection is not the standard. It is reasonably apparent that she did so when the reasons are read in the context of the record and as a whole.

- [78] In addition, in my view, in finding that K.S-T. was "clear on what happened when she spoke to her friend right after the event", the judge both rejected the defence argument that K.S-T. was initially uncertain about whether Mr. Smith had raped her and discounted Ms. Johnston's testimony that, in the elevator, K.S-T. said Mr. Smith was "inside her" when she awakened. In other words, the judge apparently did not accept Ms. Johnston's testimony that she recalled K.S-T. saying that Mr. Smith was already having intercourse with her when she woke up, which alleged statement was not consistent with either K.S-T.'s or Mr. Smith's testimony at trial. On the contrary, as discussed, in their trial testimony both K.S-T. and Mr. Smith gave detailed descriptions of the removal of K.S-T.'s shorts prior to penetration. For her part, K.S-T. described her repeated protests; for his part, Mr. Smith described K.S-T.'s active cooperation.
- [79] Further, in the next section of her reasons headed "Revenge theory", the judge expressly rejected the alternative defence argument that K.S-T. fabricated her allegation immediately after the intercourse because she was angry that Mr. Smith did not complete the intercourse. She did so on the basis that this argument was illogical (at paras. 248-49). In my view, when she stated under the preceding heading, "Recent fabrication", that there was "no dispute" about what occurred except as to whether K.S-T. demonstrated consent, she simply declined to rely on the evidence of K.S-T.'s prior statement to Ms. Johnston on this point and focused instead on K.S-T.'s clear direct and cross-examination, as she was entitled to do (at paras. 246-47).
- [80] For all of these reasons, I would not give effect to this ground of appeal.

Did the judge commit a palpable and overriding error in finding that there was no dispute about what happened between K.S-T. and Mr. Smith?

- [81] Finally, Mr. Smith contends that the judge committed a palpable and overriding error in finding there was "no real dispute" as to what happened between himself and K.S-T. (at paras. 242, 246). In his submission, she relied on that finding in concluding that K.S-T. was a credible and reliable witness. However, he says, the judge's finding that there was no real dispute was obviously wrong and sufficiently significant to taint her analysis of K.S-T.'s evidence, which, in turn, vitiated her conclusion regarding K.S-T.'s credibility and reliability.
- [82] In support of this submission, Mr. Smith emphasizes K.S-T.'s testimony that she did not consent to the sexual activity, which she claimed involved physical and verbal resistance on her part and forceful conduct on his part. In sharp contrast, he notes, he testified that the sexual activity was cooperative and consensual, and denied that K.S-T. resisted or that he used force. In other words, Mr. Smith submits that, contrary to the judge's finding, there was clearly a dispute between the two versions of the sexual encounter. He also submits it is impossible for this Court to discern the outcome of an error-free credibility analysis and, therefore, we should order a new trial.

[83] I do not accept Mr. Smith's characterization of the judge's impugned factual finding. In my view, it takes passages within particular paragraphs out of context and disregards other passages in the same paragraph, as well as elsewhere in the reasons, where the competing accounts are fully described. While the passages to which Mr. Smith refers are rather awkwardly expressed, when they are read in their full context it is clear that the judge did not find there was no dispute between Mr. Smith and K.S-T. on anything that happened between them. Rather, she found there was no dispute on the material aspects of their accounts except on matters relating to the existence and demonstration of consent.

[84] To repeat, in paras. 242 and 246 of her reasons the judge said this:

[242] I reject that position. [K.S-T.'s] not reporting in 2010 is not to be considered as an adverse inference. She is clear on what happened when she spoke to her friend right after the event. There is no real dispute about what happened with Mr. Smith. The dispute is whether she consented to it or willingly participated in it.

[246] I find that K.S-T.'s direct examination and cross-examination was clear. In fact, there is no dispute about what occurred between her and Mr. Smith. The difference is his theory about the impossibility of the position and whether she demonstrated consent. She says she said no three or four times. Mr. Smith did not hear her say anything. He certainly did not hear her say yes.

[Emphasis added.]

[85] I see no error in the judge's finding that the only material differences between the two competing accounts concerned the existence and demonstration of consent. For example, as she noted, Mr. Smith and K.S-T. both testified that Mr. Smith penetrated K.S-T. from behind, that there was no conversation between them before or during the intercourse and that the intercourse was brief (at paras. 222, 230, 234). As the judge stated, the material differences between their accounts relate to whether K.S-T. consented to the sexual activity and whether any such consent was demonstrated. For example, K.S-T.'s testimony that she said "No" repeatedly, struggled to keep her shorts up and laid on her stomach while Mr. Smith held her arms over her head and penetrated her from behind all relates to the issue of consent. The same is true of Mr. Smith's testimony that K.S-T. kicked off her shorts, leaned into him and did not say "No" at any point.

[86] I would not give effect to this ground of appeal.

Conclusion

[87] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [88] I regret that I am unable to agree with my colleague's reasons dismissing Mr. Smith's appeal in this case. Since Madam Justice Dickson has helpfully described the facts of the case, the parties' respective positions at trial, and the trial judge's reasons, my reasons may be given in brief compass.
- [89] I begin by acknowledging that the circumstances in which appellate intervention is justified on the basis of misapprehension of evidence in a criminal case are severely restricted. In particular, where such an error on a trial judge's part is said to have occurred, the appellant must show that it relates to "the substance of material parts of the evidence" and that the errors played "an essential part in the reasoning process resulting in a conviction." (*R. v. Morrissey* 1995 (97 C.C.C.) (3rd) 193 at para. 93). In *R. v. Mahmood* 2011 ONCA 693, Mr. Justice Watt provided the following helpful summary:
- [46] A misapprehension of evidence may involve a failure to take into account an item or items of evidence relevant to a material issue, or it may have to do with a mistake about the substance of the evidence. A misapprehension of evidence may also reflect a failure to give proper effect to evidence: *R. v. Morrissey* .
- [47] Every misapprehension of evidence does not render a trial unfair or result in a miscarriage of justice. An appellate court must determine the nature and extent of an alleged misapprehension and its significance to the decision under review, whether a determination of admissibility or a final conclusion about guilt. Rulings on admissibility and final verdicts must be based exclusively on evidence adduced at trial: *Morrissey*, at p. 541 O.R.
- [48] The standard applied where an appellant advances misapprehension of evidence as a ground of appeal is stringent. The misapprehension of evidence, when advanced as a ground to impeach a final verdict, must be material, not merely peripheral to the reasoning of the trial judge, in other words, the reasons must play an essential part in the reasoning process resulting in a conviction, not just in the narrative of the judgment: *R. v. Lohrer*, [2004] 3 S.C.R. 732, [2004] S.C.J. No. 76, 2004 SCC 80, at para. 2. [At paras. 46-8.]
- [90] In my respectful view, the trial judge's comments (at paras. 242 and 246) that there was "no real dispute" about what occurred between the appellant and complainant were misstatements that should not be discounted only as an interpretation of the evidence that differed from the interpretation suggested by the defence. I regard these statements as representing errors in an essential part of the reasoning process that resulted in the conviction, which must of course be based on the evidence as a whole. The judge's failure to recognize and specifically address certain inconsistencies also constituted a misapprehension of evidence in the sense described in *Morrissey*. Alternatively, the reasons were in my view insufficient to respond to the central issue of the complainant's credibility: see *R. v. Dinardo* 2008 SCC 788 at paras. 26-7.

Analysis

[91] Until the early morning hours of June 13, 2010, the complainant and the appellant were in bed together. The complainant described some kissing going on for "a minute or two". According to her testimony she kissed back, although not enthusiastically. Eventually, the complainant turned over and went to sleep. She testified that early in the morning, she:

woke up to Mr. Smith trying to pull off her shorts and tights. It was early in the morning and the light was coming in the windows. She says that as Mr. Smith was trying to pull off her shorts and tights, she was trying to pull them up. She was on her back and Mr. Smith was above her. K.S-T. says that she said "no" in an audible voice, but she was not yelling. She grabbed her shorts, as Mr. Smith continued to try to pull them down, along with her tights. K.S-T. says she did not know how he got them down or how he turned her over on her stomach, but he did. She was flat on the bed on her stomach. Her shorts and tights were down around her knees and she says Mr. Smith then raped her from behind.

He held her arms above her head, so that she could not move her arms or struggle more. K.S-T. says her elbows were out and her hands were above her head, and he held her by her forearms. She says that she said "no" three times once she was on her stomach, again in an audible voice, but she was not yelling. Once Mr. Smith held her by her arms, she just lay there and stopped struggling. [At paras. 31-32.]

[92] In the voir dire, however, the complainant's friend Ms. Johnston testified that when they were hurriedly leaving Mr. Smith's apartment, K.S-T. told her "I woke up and he was inside of me". K.S-T. said the same thing again, Ms. Johnston testified, when the two were having coffee in the morning: see para. 18. Ms. Johnston also testified in cross-examination in both the voir dire and the trial proper that in response to Ms. Johnston's telling her that she, K.S-T., had been raped, K.S-T. "was like 'well I don't know if he did, like it was only a few minutes.'"

[93] As my colleague notes, when defence counsel put to the complainant in cross-examination that she had been unsure of whether she had been raped, K.S-T. adamantly disagreed and said she had known "right away" it had been rape. She said she did not remember telling Ms. Johnston she was not sure. She also said she had not told Ms. Johnston that she had awoken to find "he was inside of me"; nor did she remember saying that. (See para. 52.)

[94] The Crown sought to have Ms. Johnston's evidence of K.S-T.'s statements admitted on the basis they were prior consistent statements that would rebut "a notion of recent fabrication". (See para. 55.) For its part, the defence sought to have the statements to Ms. Johnston admitted as prior inconsistent statements for the purpose of impugning her credibility. In addition, the defence contended that sexual intercourse between the two in the manner described by K.S-T. would have been physically impossible; that K.S-T.'s memory had been affected by her later work at a rape crisis centre; and that K.S-T. was motivated by anger at the fact the intercourse had not lasted long -- the "revenge theory". The judge rejected the latter three arguments at paras. 240-250 of her reasons and I need say no more about them.

[95] However, the trial judge did not rule on the admissibility of the evidence following the voir dire; nor did she comment on whether it was consistent or inconsistent with the complainant's evidence at trial. The judge said at para. 55 of her reasons that she would not "refer to that evidence" in the factual portion of her judgment. In the analysis portion, she made the following findings:

At para. 240:

K.S-T. did not wish to report the incident to police and did not in 2010. She did so after she saw Mr. Smith's name on a board at the rape crisis centre where she worked in 2015. She says that her perception in 2015 was the same as 2010. She did not have to think about whether rape had occurred, nor was she unsure about whether it was rape. She did not determine it was rape after working at the rape crisis centre. [Emphasis added.]

and at para. 242:

Her [the complainant's] not reporting in 2010 is not to be considered as an adverse inference. She is clear on what happened when she spoke to her friend right after the event. There is no real dispute about what happened with Mr. Smith. The dispute is whether she consented to it or willingly participated in it. [At para. 242; emphasis added.]

and at para. 246:

I find that K.S-T.'s direct examination and cross-examination was clear. In fact, there is no dispute about what occurred between her and Mr. Smith. The difference is his theory about the impossibility of the position and whether she demonstrated consent. [Emphasis added.]

In the end, it appears she simply disbelieved Mr. Smith's evidence that the intercourse had been consensual and said she was not left in doubt by his evidence: see para. 250. The judge did not mention Ms. Johnston's evidence in her analysis.

[96] As mentioned earlier, I am unable to agree that merely because the trial judge was of the view that K.S-T. was "clear [presumably at the time of trial] on what happened", she was not required to address the admissibility and/or implications of Ms. Johnston's evidence in assessing the complainant's credibility. Given that the case was one of sexual assault that seemed to boil down to a "she said/he said" contest, this was material evidence. Contrary to the trial judge's view that there was "no real dispute" about what had occurred, there were conflicts that had to be addressed and resolved in the interests of the fairness of the trial.

[97] With the greatest of respect to the trial judge, it is my conclusion that her failure to rule on the admissibility of Ms. Johnston's evidence and, if admitted, to consider whether it cast doubt on the evidence of K.S-T. constituted a misapprehension that was material and played an essential part in her reasoning process. As it was, she erred in failing to recognize the conflict between the two 'versions' of the facts.

[98] Accordingly, I would allow the appeal and order a new trial.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

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