

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* James, 2014 SCC 5, [2014] 1 S.C.R. 80 | **Date:** 20140117**Docket:** 35373 |

**Between:**

**Garry Howard James**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**(paras. 1 to 6) | Moldaver J. (LeBel, Rothstein, Karakatsanis and Wagner JJ. concurring) |

R. *v*. James, 2014 SCC 5, [2014] 1 S.C.R. 80

Garry Howard James Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.*** James

2014 SCC 5

File No.:  35373.

2014:  January 17.

Present: LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for british columbia

 *Criminal law — Offences — Sexual assault — Evidence — Consent — Accused stating to police that complainant consented to sexual relations — Statement not admitted into evidence and accused maintaining that he had virtually no recollection of events — Accused acquitted but new trial subsequently ordered — In assessing consent, trial judge could not rely on police statement not forming part of record and should have taken into account other circumstantial evidence.*

 APPEAL from a judgment of the British Columbia Court of Appeal (Ryan, Smith and Hinkson JJ.A.), 2013 BCCA 159, 336 B.C.A.C. 207, 574 W.A.C. 207, 297 C.C.C. (3d) 106, [2013] B.C.J. No. 677 (QL), 2013 CarswellBC 856, setting aside the acquittal entered by Romilly J., 2011 BCSC 612, 86 C.R. (6th) 107, [2011] B.C.J. No. 879 (QL), 2011 CarswellBC 1129, and ordering a new trial. Appeal dismissed.

 Christopher Darnay and Michelle Poulsen, for the appellant.

 Margaret A. Mereigh, for the respondent.

 The judgment of the Court was delivered orally by

[1] Moldaver J. — We agree with the majority of the British Columbia Court of Appeal that there must be a new trial in this matter.

[2] In assessing the crucial issue of consent, the trial judge found that the complainant was suffering from some sort of memory loss at the time the appellant claimsthat “she gave him her consent for sexual relations” (2011 BCSC 612, 86 C.R. (6th) 107, at para. 45).

[3] With respect, the appellant gave no such evidence of consent. Only in his statement to the police did he claim that the complainant consented. But that statement was not admitted into evidence and formed no part of the record. At trial, the appellant maintained that he had virtually no recollection of the events on that evening due to alcohol and drug consumption. He did not testify that the complainant consented to sexual relations.

[4] In our view, the trial judge’s reliance on evidence that did not form part of the record may have coloured his thinking on the issue of consent, particularly in assessing whether the complainant may have consented to sexual relations but forgot that she had done so due to memory blackout, or, as she claimed, that she was unconscious at all material times and never consented to sexual relations.

[5] In addition to this error, in assessing the issue of consent, the trial judge failed to take into account the several occasions throughout the evening when the complainant made it known to the appellant that she was not interested in having sexual relations with him. Her evidence in this regard was confirmed in part by an independent witness found by the trial judge to be credible. Similarly, the trial judge failed to consider the complainant’s distraught condition a short time after the event when she reported the alleged sexual assault to the police.

[6] For these reasons, we agree with the majority of the Court of Appeal that a new trial must be ordered. Accordingly, we would dismiss the appeal.

 *Judgment accordingly.*

 Solicitors for the appellant: Christopher Darnay, Vancouver; Michelle Poulsen, Vancouver.

 Solicitor for the respondent: Attorney General of British Columbia, Vancouver.