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| cid:image001.jpg@01D72252.19B69DE0  **SUPREME COURT OF CANADA** | | | |
| **Citation:** R. *v.* Smith, 2021 SCC 16, [2021] 1 S.C.R. 530 |  | **Appeal Heard:** April 22, 2021  **Judgment Rendered:** April 22, 2021  **Docket:** 39401 |
| **Between:**  **Her Majesty The Queen**  Appellant  and  **Mark Anthony Smith**  Respondent | | | |

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| **Coram:** Moldaver, Karakatsanis, Brown, Rowe and Kasirer JJ. | | |
| **Unanimous Judgment Read By:**  (paras. 1 to 3) | Brown J. |
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Her Majesty The Queen Appellant

v.

Mark Anthony Smith Respondent

**Indexed as: R. *v.* Smith**

2021 SCC 16

File No.: 39401.

2021: April 22.

Present: Moldaver, Karakatsanis, Brown, Rowe and Kasirer JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Appeals — Misapprehension of evidence — Miscarriage of justice — Accused convicted of sexual assault — Majority of Court of Appeal ordering new trial on basis that trial judge committed errors in essential part of reasoning process and that her failure to recognize and specifically address certain inconsistencies constituted misapprehension of evidence — Dissenting judge concluding that trial judge did not misapprehend evidence and that conviction should be upheld — Conviction restored.*

**Cases Cited**

**Referred to:** *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Saunders and Dickson JJ.A.), 2020 BCCA 271, 393 C.C.C. (3d) 581, 456 D.L.R. (4th) 553, [2020] B.C.J. No. 1582 (QL), 2020 CarswellBC 2493 (WL Can.), affirming the conviction for sexual assault entered by Gropper J., 2018 BCSC 1376, [2018] B.C.J. No. 7269 (QL), 2018 CarswellBC 4138 (WL Can.). Appeal allowed.

*Mila Shah* and *John R. W. Caldwell*, for the appellant.

*Eric Purtzki* and *Garth Barriere*, for the respondent.

The judgment of the Court was delivered orally by

[1] Brown J. — We would allow the appeal, set aside the order for a new trial and restore the respondent’s conviction for sexual assault, substantially for the reasons of Dickson J.A. In particular, we agree with Dickson J.A. that the trial judge’s failure to deal properly with the prior inconsistent statements does not mean that she failed to consider or give effect to them (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 665). Further, and even if the trial judge did not consider the statements in assessing the complainant’s credibility and reliability, that error did not cause a miscarriage of justice.

[2] Determining whether a misapprehension of evidence has caused a miscarriage of justice requires that the appellate court assess the nature and extent of the error and its significance to the verdict (*R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 221). It is a stringent standard, met only where the misapprehension could have affected the outcome (*R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 7). While testimonial inconsistencies may be relevant when assessing a witness’s credibility and reliability, only some are of such significance that failing to consider them will meet this standard.

[3] In this case, we agree with Dickson J.A. that the inconsistencies — assuming they *are* inconsistencies — between the complainant’s statements to her friend shortly after the assault and her trial testimony are not significant. While it may have been preferable for the trial judge to address them, her failure to do so does not cast doubt on her assessment of the complainant’s credibility and reliability or the safety of the conviction. Consequently, the threshold for a miscarriage of justice has not been met.

*Judgment accordingly.*

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

*Solicitors for the respondent: Melville Law Chambers, Vancouver.*