



SUPREME COURT OF CANADA

CITATION: R. v. Kishayinew, 2020
SCC 34

APPEAL HEARD: November 5,
2020

JUDGMENT RENDERED:
November 5, 2020

DOCKET: 38962

BETWEEN:

Her Majesty The Queen
Appellant

and

Monty Shane Kishayinew
Respondent

CORAM: Moldaver, Côté, Rowe, Martin and Kasirer JJ.

JUDGMENT READ

BY: Moldaver J.
(paras. 1 to 3)

MAJORITY: Moldaver, Rowe, Martin and Kasirer JJ.

DISSENT: Côté J.

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R. v. KISHAYINEW

Her Majesty The Queen

Appellant

v.

Monty Shane Kishayinew

Respondent

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Present: Moldaver, Côté, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Sexual assault — Unreasonable verdict — Evidence — Assessment — Reliability — Capacity to consent — Accused convicted of sexual assault — Majority of Court of Appeal holding that trial judge erred by making findings of fact essential to verdict as to complainant’s reliability and capacity to consent that were incompatible with evidence that was

not otherwise contradicted or rejected — Majority setting aside conviction — Dissenting judge finding verdict was reasonable as trial judge reached conclusion on reliability that was reasonably available on evidence and did not make inconsistent findings of fact in relation to consent — Conviction restored.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Jackson, Barrington-Foote and Tholl JJ.A.), 2019 SKCA 127, 382 C.C.C. (3d) 560, 60 C.R. (7th) 51, [2019] S.J. No. 472 (QL), 2019 CarswellSask 613 (WL Can.), setting aside the conviction for sexual assault entered by Turcotte J., 2017 SKQB 177, [2017] S.J. No. 287 (QL), 2017 CarswellSask 339 (WL Can.), and ordering a new trial. Appeal allowed, Côté J. dissenting.

W. Dean Sinclair, Q.C., for the appellant.

Brian Pfefferle and Aleida Oberholzer, for the respondent.

Louis Belleau, as *amicus curiae*.

The judgment of the Court was delivered orally by

[1] MOLDAVER J. — A majority of the Court is of the view that, when read in context, the trial judge's reasons make it clear that he was satisfied, beyond a reasonable doubt, that the complainant did not subjectively consent to any sexual activity with Mr. Kishayinew. On this point, we are in agreement with the reasons of Justice Tholl in dissent, at paras. 52-78 of his judgment. The trial

judge correctly recognized that, as a result of the complainant's memory blackouts, the only evidence available on the issue of subjective consent was the circumstantial evidence — that the complainant was crying and disoriented, that she did not want to go with Mr. Kishayinew, that she did not consent to his attempts to kiss or touch her, that she attempted to leave the house several times, and that, upon recovering from her blackout, she felt frightened, “weird down below”, and wanted to escape. In our view, as the trial judge's reasons at paras. 94, 96 and 97 (2017 SKQB 177 (CanLII)) make apparent, this evidence reasonably permits only one inference: that the complainant did not consent to any touching from Mr. Kishayinew. This finding is sufficient to support the conviction for sexual assault.

[2] Justice Côté, dissenting, would have dismissed the appeal, substantially for the reasons of the majority of the Saskatchewan Court of Appeal.

[3] Accordingly, in the result, we would allow the appeal, restore the conviction for sexual assault, and remand the sentence appeal back to the Court of Appeal.

Judgment accordingly.

Solicitor for the appellant: Attorney General of Saskatchewan, Regina.

Solicitors for the respondent: Pfefferle Law Office, Saskatoon.