



SUPREME COURT OF CANADA

CITATION: R. v. G.F., 2021 SCC
20

APPEAL HEARD: October 14,
2020

JUDGMENT RENDERED: May
14, 2021

DOCKET: 38801

BETWEEN:

Her Majesty The Queen
Appellant

and

G.F. and R.B.
Respondents

- and -

Criminal Lawyers' Association of Ontario
Intervener

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 104)

Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Martin
and Kasirer JJ. concurring)

JOINT CONCURRING REASONS:
(paras. 105 to 124)

Brown and Rowe JJ.

DISSENTING REASONS: Côté J.
(paras. 125 to 148)

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R. v. G.F.

Her Majesty The Queen

Appellant

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G.F. and R.B.

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Indexed as: R. v. G.F.

2021 SCC 20

File No.: 38801.

2020: October 14; 2021: May 14.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Sexual assault — Consent — Capacity to consent — Complainant testifying to incapacity to consent due to intoxication and to having expressed non-consent to sexual activity — Accused convicted of sexual assault at trial but Court of Appeal ordering new trial — Whether trial judge required to address consent and capacity to consent separately when both at issue — Whether trial judge's reasons sufficient — Criminal Code, R.S.C. 1985, c. C-46, ss. 265(3), 273.1.

F and B were charged with sexually assaulting the 16-year-old complainant during a camping trip. The issue at trial was whether the complainant, who had consumed alcohol, had consented to the sexual activity with F and B. The complainant and F both testified and presented diametrically opposed versions of events; B did not testify. The Crown argued that the complainant's evidence clearly established incapacity due to intoxication, and also that the complainant had not agreed to the sexual activity. F and B submitted that the complainant was not credible and that she had not been as intoxicated as she claimed, and that she had agreed to engage in the sexual activity. The trial judge accepted the complainant's evidence and convicted F and B of sexual assault.

F and B appealed. The Court of Appeal rejected the argument that the verdict was unreasonable, concluding that the complainant's evidence was not demonstrably incompatible with incapacity to consent. However, the Court of Appeal found that the trial judge failed to identify the relevant factors to consider when assessing whether intoxication deprived the complainant of her capacity to consent, and

failed to consider the issue of consent first and separately from the issue of capacity. As a result, the Court of Appeal concluded that a new trial was necessary for both F and B.

Held (Côté J. dissenting): The appeal should be allowed and the convictions restored.

Per Wagner C.J. and Abella, Moldaver, **Karakatsanis**, Martin and Kasirer JJ.: Consent is the foundational principle upon which Canada's sexual assault laws are based. Consent and the capacity to give consent are inextricably joined, as subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent. Trial judges are under no obligation to evaluate consent and capacity separately or in any particular order. In the present case, it was open to the trial judge to find both that the complainant was incapable of consenting and did not agree to the sexual activity in question, and he did not err in addressing these issues together in his reasons.

Where a complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent. This is distinct from circumstances where a person may provide subjective consent that is not legally effective due to, for example, duress or fraud. Thus, when a trial engages both the issues of whether a complainant was capable of consenting and whether they did agree to the sexual activity in question,

the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity.

There are two aspects to the overarching concept of consent. The first is subjective consent, which relates to the factual findings about whether the complainant subjectively and voluntarily agreed to the sexual activity in question, and the second requires that subjective consent also be effective as a matter of law. The *Criminal Code* sets out a series of factors that will vitiate subjective consent in ss. 265(3) and 273.1(2). However, these factors do not prevent subjective consent, but recognize that even if a complainant has permitted the sexual activity in question, there are circumstances in which subjective consent will be deemed of no force or effect. The distinction between preventing subjective consent and rendering it ineffective is important, and the proposition that incapacity vitiates rather than prevents subjective consent must be rejected for three reasons. First, subjective consent requires a complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question, and it follows, as a matter of logic, that the complainant must be capable of forming such an agreement. Second, incapacity as a vitiating factor would be inconsistent with the structure of the *Criminal Code*, as incapacity under s. 273.1(2)(b) deprives the complainant of the ability to formulate a subjective agreement. Third, capacity as a precondition to subjective consent provides certainty because it is inextricably linked to what subjective consent requires: contemporaneous voluntary agreement to the sexual activity in question.

As capacity is a precondition to subjective consent, the requirements for capacity are tied to the requirements for subjective consent. Capacity to consent requires that the complainant have an operating mind capable of understanding the physical act, its sexual nature, and the specific identity of their partner, and that they have a choice of whether or not to engage in the sexual activity in question.

The trial judge did not err in his treatment of consent. Both the complainant's capacity to consent and agreement to the sexual activity were at issue. It was open to the trial judge to accept the evidence of incapacity and the evidence that the complainant did not agree to the sexual activity. Both findings went to a lack of subjective consent and did not need to be reconciled with each other, nor approached in any particular order.

The trial judge's reasons were also sufficient. Trial reasons must be both factually and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why. Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal. The task for appellate courts is not to finely parse the trial judge's reasons in a search for error, but rather to assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review.

Despite clear guidance in the 19 years since *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, appellate courts continue to scrutinize the text of trial reasons in

a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. To succeed on appeal, an appellant's burden is to demonstrate either error or the frustration of appellate review, and neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error, as it is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated.

A trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little evidence beyond the testimony of the complainant and the accused, and articulating reasons for findings of credibility can be more challenging. Such findings must be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between credibility and reliability. Appellate courts should consider not whether the trial judge specifically used the words "credibility" and "reliability" but whether the trial judge turned their mind to the relevant factors that go to the believability of the

evidence in the factual context of the case, including truthfulness and accuracy concerns.

In the present case, the Court of Appeal did not conduct a functional and contextual reading of the trial judge's reasons, but rather assessed those reasons removed from the context of the live issues at trial. The trial judge's reasons should not be read as equating any degree of intoxication with incapacity, as what was at issue was the extreme degree of intoxication to which the complainant testified. Similarly, the trial judge's blending of consent and capacity reveals neither an error in law nor insufficient reasons. Capacity was not the only issue at trial, and the trial judge's reasons can be read as finding both that the complainant was incapable of consenting and that she did not agree to the sexual activity. These findings are not legally contradictory and both were available on the evidence.

Per Brown and Rowe JJ.: There is agreement with the majority that capacity to consent should be understood as a precondition to consent under s. 273.1 of the *Criminal Code*, and that it is possible to find that a complainant lacked capacity to consent while being capable of withholding consent. There is also agreement with much of the majority's recounting of the law regarding appellate review for sufficiency of reasons, but disagreement as to the sufficiency of the trial judge's reasons in this case with respect to the complainant's capacity to consent. However, the evidence that the complainant did not consent is overwhelming and the curative proviso should apply.

While a trial judge's reasons need not be letter-perfect, scrutiny of a trial judge's reasons is not inconsistent with the guidance in *Sheppard*. An appellate reviewer's role is not discharged by giving trial reasons for judgment a once-over-lightly perusal, but by reading and considering a trial judgment in order to assess whether, in light of the evidence and arguments at trial, it shows that the trial judge discerned and decided the live issues so as to explain the verdict to the accused, provide public accountability, and permit meaningful appellate review. It is inaccurate to say that reasons are sufficient even where ambiguities therein leave open the possibility that the judge may or might have erred, and the presumption that trial judges know the law does not negate the appellate reviewer's duty to insist upon reasons for judgment that, read together with the record, show that the law was correctly applied in a particular case.

In this case, the trial judge's reasons make clear that he convicted on the basis of incapacity alone, but they do not disclose what standard he applied in deciding that the complainant was incapable of consenting. While a finding of incapacity was available on the evidence, the evidence could also support the conclusion that the complainant had the cognitive capacity to consent throughout the interaction, and it was crucial that the trial judge satisfy himself that the complainant was intoxicated to the point that she could not provide consent in order to convict F and B on that basis. However, in light of the overwhelming evidence that the complainant did not consent, no other verdict was possible.

Per Côté J. (dissenting): There is agreement with Brown and Rowe JJ. on the law regarding appellate review for sufficiency of reasons, and that the trial judge erred in convicting F and B on the basis of the complainant's incapacity to consent without explaining both the standard by which he decided incapacity as well as its application to the complainant's evidence. However, given that credibility was the central issue at trial and the Crown's case is not otherwise staggering, this is not an appropriate case in which to apply the curative proviso. The appeal should therefore be dismissed, and the Court of Appeal's order for a new trial upheld.

Section 273.1(2)(b) of the *Criminal Code* plainly shows that incapacity is a circumstance that may vitiate a complainant's apparent consent. While the proper framework for analyzing consent to sexual activity was succinctly set out in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, it is the *Criminal Code* which establishes the requirement of a two-step analysis of consent to sexual activity. The first step in the statutory framework is to determine whether the complainant voluntarily agreed to the sexual activity in question (s. 273.1(1)), or whether a reasonable doubt is raised in this regard. If so, the court should then turn to the second step and consider whether this agreement was obtained in circumstances vitiating consent (ss. 265(3) and 273.1(2)). In the instant case, the trial judge did not do so, which is an error of law.

While trial judges are presumed to know the basic legal principles with which they engage on a regular basis, there must be an intelligible foundation for their

verdicts. The trial judge's statement in the present case that s. 273.1(2)(b) applies in instances where a complainant is intoxicated suggests that his view was that any level of intoxication is sufficient to vitiate consent, and it is not clear that this belief did not constitute the basis for his conclusion that there was no consent. Although findings of incapacity or non-consent are not tainted by error simply because of the order in which they are made, the absence of analysis to substantiate the trial judge's conclusory statement does not provide the basis for meaningful appellate review. Furthermore, the trial judge's error cannot be said to be so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial that any reasonable judge could not possibly have rendered a different verdict if the error had not been made. The complainant's incapacity was a live issue at trial, and acceptance of her evidence as credible is insufficient to ground a conviction. Accordingly, the curative proviso should not be applied.

Cases Cited

By Karakatsanis J.

Explained: *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; **considered:** *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; **referred to:** *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Barton*, 2019 SCC 33; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Goldfinch*, 2019 SCC 38; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Lutoslawski*, 2010 ONCA 207, 260 O.A.C. 161; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Paice*,

2005 SCC 22, [2005] 1 S.C.R. 339; *Saint-Laurent v. Héту*, [1994] R.J.Q. 69; *R. v. G.C.*, 2010 ONCA 451, 266 O.A.C. 299; *R. v. Snelgrove*, 2019 SCC 16, [2019] 2 S.C.R. 98; *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237; *R. v. Daigle* (1997), 127 C.C.C. (3d) 130, aff'd [1998] 1 S.C.R. 1220; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Chung*, 2020 SCC 8; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. McMaster*, [1996] 1 S.C.R. 740; *R. v. Langan*, 2020 SCC 33, rev'g 2019 BCCA 467, 383 C.C.C. (3d) 516; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5; *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *R. v. Kishayinew*, 2020 SCC 34, rev'g 2019 SKCA 127, 382 C.C.C. (3d) 560; *R. v. Slatter*, 2020 SCC 36, rev'g 2019 ONCA 807, 148 O.R. (3d) 81; *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. Mehari*, 2020 SCC 40; *R. v. Howe* (2005), 192 C.C.C. (3d) 480; *R. v. Kiss*, 2018 ONCA 184; *R. v. Wanihadie*, 2019 ABCA 402, 99 Alta. L.R. (6th) 56; *R. v. J.M.S.*, 2020 NSCA 71; *R. v. C.A.M.*, 2017 MBCA 70, 354 C.C.C. (3d) 100; *R. v. K.P.*, 2019 NLCA 37, 376 C.C.C. (3d) 460; *R. v. Aird (A.)*, 2013 ONCA 447, 307 O.A.C. 183; *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111; *R. v. Willis*, 2019 NSCA 64, 379 C.C.C. (3d) 30; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107.

By Brown and Rowe JJ.

Referred to: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

By Côté J. (dissenting)

R. v. L.K.W. (1999), 126 O.A.C. 39; *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Perkins (T.)*, 2016 ONCA 588, 352 O.A.C. 149; *R. v. Raghunauth (G.)* (2005), 203 O.A.C. 54.

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APPEAL from a judgment of the Ontario Court of Appeal (Watt, Pardu and Nordheimer JJ.A.), 2019 ONCA 493, 146 O.R. (3d) 289, 378 C.C.C. (3d) 518, 55 C.R. (7th) 437, [2019] O.J. No. 3106 (QL), 2019 CarswellOnt 9555 (WL Can.), setting aside the convictions for sexual assault entered by Koke J., 2016 ONSC 3465, [2016] O.J. No. 4256 (QL), 2016 CarswellOnt 12943 (WL Can.), and ordering a new trial. Appeal allowed, Côté J. dissenting.

Philippe Cowle, for the appellant.

Alison Craig and *Riaz Sayani*, for the respondents.

Peter Sankoff, for the intervener.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

KARAKATSANIS J. —

[1] Consent is the foundational principle upon which Canada's sexual assault laws are based. For decades, this Court has recognized that "control over who touches one's body, and how, lies at the core of human dignity and autonomy": *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28. As such, the contours of consent are carefully delineated and jealously guarded. It is now indisputable that consent is a subjective state of mind, entirely personal to the complainant. There is no room for implied consent in Canada, and the range of mistaken beliefs an accused may lawfully hold about the complainant's consent are tightly restricted by the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] This appeal provides the Court with an opportunity to clarify the relationship between consent and the capacity to give consent. In my view, capacity and consent are inextricably joined. Subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent.

[3] The respondents take a different view, and argue that incapacity is a vitiating factor that renders subjective consent of no force or effect. Accordingly, they argue that the trial judge erred by blending his assessments of consent and capacity and by failing to assess subjective consent first and separately from the capacity to consent.

[4] I do not agree. Only if subjective consent exists, or if there is a reasonable doubt as to subjective consent, does a trier of fact need to go further and ask whether that consent is otherwise vitiated. Vitiating was not at issue in this case; the only live issue was whether the complainant subjectively consented. The Crown argued that

subjective consent was absent for two reasons: the complainant was incapable of consenting and she did not agree to the sexual activity in question. The trial judge was under no obligation to evaluate these two issues separately or in any particular order.

[5] Nor did the trial judge err by failing to review the jurisprudence on when intoxication results in incapacity to consent. In the Court of Appeal's view, the trial judge's reasons could be read as equating *any* degree of intoxication with incapacity to consent. Obviously, such an equation would be an error in law. However, in the context of this trial, no such reading was available. Given that the trial judge accepted the complainant's testimony of her extreme intoxication, "any degree of intoxication" was not a live issue. This Court has consistently reiterated the importance of a functional and contextual reading of the trial judge's reasons. The duty of the appellate court is to determine whether the aggrieved party understands what the trial judge decided and why, and whether the reasons permit appellate review. In this case, the trial judge's reasons were sufficient to satisfy this purpose. I would also take this opportunity to discourage the technical search for error and to re-affirm the importance of approaching a trial judge's reasons with sensitivity to the trial judge's role and advantage in making findings of fact and credibility.

[6] I would therefore allow the Crown's appeal and restore the convictions.

I. Background

[7] The complainant, 16 years old at the time, went on a camping trip for the 2013 Canada Day weekend with her family and her mother's co-workers. Two of those co-workers were G.F. and R.B., common-law spouses and the respondents in this case.

[8] On the final night of the camping trip, the respondents engaged in sexual activity with the complainant. The issue at trial was whether this sexual activity was consensual. The complainant and G.F. both testified and presented diametrically opposed versions of events. R.B. did not testify.

[9] The complainant testified that she drank heavily throughout the night, consuming between 8 and 10 shots in total. Almost all of this alcohol was provided by G.F. She testified that G.F. gave her alcohol while the group was sitting around a campfire. She felt nauseous and went to lay down in the respondents' trailer, where G.F. continued to give her more alcohol. She vomited repeatedly and the last thing she remembered before the assault was playing with her phone until she eventually passed out or fell asleep. She was woken up when she felt her pants and underwear being pulled down. She heard G.F. tell R.B. to perform cunnilingus on her, which R.B. did while G.F. held her down. G.F. then inserted his penis into the complainant's vagina and directed the complainant to perform cunnilingus on R.B., which she did not do. The complainant testified that she felt dizzy, intoxicated, scared, and repeatedly told the respondents to stop. G.F. told her to "be quiet". She did not call for help because she was sick, confused, and felt out of control. She testified that she did not feel able to make a choice of whether or not to participate. She tried to push away for a bit but

got tired and then “just went along with it”. Eventually, she passed out again. She disclosed the assault to her aunt the next day.

[10] In contrast, G.F. testified that the complainant was not very intoxicated. He said he gave the complainant a beer and two half-ounce shots of alcohol by the fire but nothing in the trailer. He agreed that the complainant vomited but said that she told him she felt “fine” afterwards. He went fishing and then returned later that night to find the complainant lying in bed naked next to R.B. He asked the complainant to leave but the complainant said she wanted to stay. He testified that the complainant and R.B. began to kiss and that the complainant allowed him to rub her thigh. The three of them then participated in consensual oral and vaginal intercourse. G.F. testified that he asked for and received assurances, at least seven times, that the complainant was consenting to the sexual activity.

[11] In sum, the complainant’s testimony portrayed an extremely intoxicated 16-year-old who awoke to sexual acts being performed on her, who resisted but then acquiesced, thinking she did not have any choice in the matter. G.F. described the complainant as a sober, active, and enthusiastic participant.

A. *Trial Decision, 2016 ONSC 3465 (per Koke J.)*

[12] The trial Crown invited the trial judge to treat this as a case of credibility. He argued that the trial judge did not need to “delve into degrees of intoxication versus sobriety” because he was presented with a stark choice: accept the complainant’s

evidence, which would clearly establish incapacity, or accept G.F.'s evidence, which would clearly establish capacity. He also argued that the complainant did not agree to the sexual activity.

[13] The respondents argued that the complainant was not credible. They submitted that the complainant was not as intoxicated as she claimed and certainly not so intoxicated as to be incapable of consenting. Most of their submissions, however, focused on the argument that the complainant agreed to engage in the sexual activity.

[14] The trial judge accepted the complainant's evidence and convicted the respondents, finding that the complainant "did not consent to the sexual activity": para. 52 (CanLII). He found the complainant's evidence to be internally consistent and corroborated by other evidence. In contrast, he found that G.F.'s evidence was "riddled with inconsistencies": para. 54. After explaining these inconsistencies and rejecting other defence arguments, the trial judge concluded his decision, at paras. 71-73:

[R.B.] did not testify. I find [G.F.'s] evidence to be unbelievable. It does not leave me with reasonable doubt as to his or [R.B.'s] guilt and in my view, the balance of the evidence at trial convincingly supports the conclusion that [G.F.] and [R.B.] forced [the complainant] into having non-consensual sex.

Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

Accordingly, I find the two accused guilty of sexual assault as charged.

B. *Appeal Decision, 2019 ONCA 493, 146 O.R. (3d) 289 (per Pardu J.A., Watt and Nordheimer J.J.A. concurring)*

[15] G.F. and R.B. appealed to the Court of Appeal for Ontario. G.F.'s factum argued that the verdict was unreasonable because the complainant's awareness and memory of the sexual activity demonstrated that she was capable of consenting. R.B.'s factum raised further grounds of appeal: that the trial judge erred in not declaring a mistrial; and that the trial judge unevenly scrutinized the evidence.

[16] The Court of Appeal rejected G.F.'s argument that the verdict was unreasonable, concluding that the complainant's awareness and memory were not "demonstrably incompatible with incapacity to consent" (para. 25) and that the trial judge properly considered this evidence. However, it found that a new trial was required for related reasons.

[17] The Court of Appeal found two related errors in the trial judge's reasons. First, he failed to identify the relevant factors to consider when assessing whether intoxication deprived the complainant of her capacity to consent. As such, his reasons "may be read as equating any degree of impairment by alcohol with incapacity": para. 2. Second, the trial judge failed to consider the issue of consent first and separately from the issue of capacity.

[18] The Court of Appeal held that when both consent and incapacity to consent are at issue, the trial judge should first consider whether the complainant did not

provide consent. Only if the complainant did consent or if there is a reasonable doubt about the lack of consent is the trial judge required to ask whether that consent was vitiated by incapacity. The Court of Appeal viewed this Court's decision in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, as mandating this two-step process.

[19] The Court of Appeal found that the trial judge failed to follow this two-step process and that it was unclear whether he considered the issue of consent separately from the issue of capacity at all. As a result, the Court of Appeal concluded that a new trial was necessary for both G.F. and R.B. The Court did not address R.B.'s other grounds of appeal.

II. Analysis

[20] This appeal raises four issues:

1. Did the trial judge err in his assessment of consent and capacity?
2. Were the trial judge's reasons sufficient?
3. Did the Court of Appeal breach the rules of natural justice?
4. Do R.B.'s other arguments demonstrate any error?

A. *Did the Trial Judge Err in his Assessment of Consent and Capacity?*

[21] The first and primary issue in this case concerns the relationship between consent and capacity and whether it was an error for the trial judge to address these concepts together throughout his reasons.

[22] At issue at trial was whether the complainant consented to the sexual activity. The trial Crown argued that consent was absent because the complainant both did not consent and was incapable of consenting. Acceptance of either argument would establish the absence of consent and therefore the *actus reus* of sexual assault. Before this Court, the Crown submits that the trial judge did not, therefore, err by addressing consent and capacity together throughout his reasons.

[23] The respondents, however, argue that incapacity *vitiates* the complainant's voluntary agreement to the sexual activity in question. As such, the trial judge needed to engage in the two-step process set out by *Hutchinson*, first determining if the complainant actually consented, and only then proceeding to consider whether that consent was vitiated by incapacity. The respondents argue that, by blending his assessments of consent and capacity throughout his reasons, the trial judge erred in failing to follow this two-step process.

[24] I cannot agree. In my view, where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary — but not sufficient — precondition to the complainant's subjective consent. As I shall explain, this is distinct from circumstances where a person may provide subjective

consent that is not legally effective, due to, for example, duress or fraud. Thus, when a trial engages both the issues of whether the complainant was capable of consenting and whether the complainant did agree to the sexual activity in question, the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant's subjective consent to sexual activity.

(1) The Role of Consent in the Offence of Sexual Assault

[25] The *actus reus* of sexual assault requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent: *Ewanchuk*, at para. 25; *R. v. Chase*, [1987] 2 S.C.R. 293. The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant's internal state of mind towards the touching: *Ewanchuk*, at paras. 25-26. At the *mens rea* stage, the Crown must show that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent: *Ewanchuk*, at para. 42. The accused's perception of consent is examined as part of the *mens rea*, including the defence of honest but mistaken belief in communicated consent: *R. v. Barton*, 2019 SCC 33, at para. 90.

[26] This appeal concerns the third element of the *actus reus*, requiring the absence of consent.

[27] Parliament has provided a broad definition of consent for the purposes of sexual assault, sexual assault with a weapon or causing bodily harm, and aggravated sexual assault in s. 273.1(1) of the *Criminal Code*:

Meaning of consent

273.1 (1) Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[28] This definition is subject to two other provisions in the *Criminal Code*, ss. 273.1(2) and 265(3):

No consent obtained

273.1 (2) For the purpose of subsection (1), no consent is obtained if

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (a.1) the complainant is unconscious;
- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Consent

265 (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

[29] Turning first to s. 273.1(1), consent is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question”. This Court’s jurisprudence establishes that whether or not the complainant consented is a purely subjective analysis, determined by reference to the complainant’s internal state of mind at the time of the touching: *Ewanchuk*, at paras. 26-27; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at paras. 34 and 43-44. At the *actus reus* stage, consent means that the complainant, in their mind, agreed to the sexual touching taking place: *Ewanchuk*, at para. 48; *J.A.*, at para. 23; *R. v. Park*, [1995] 2 S.C.R. 836, at para. 16, per L’Heureux-Dubé J.; *Barton*, at para. 89; *R. v. Goldfinch*, 2019 SCC 38, at para. 44. Consent requires “the conscious agreement of the complainant to engage in every sexual act in a particular encounter”: *J.A.*, at para. 31; see also para. 34. Furthermore, consent is not considered in the abstract but rather must be linked to the sexual activity in question. In *Hutchinson*, the Court explained that “the sexual activity in question” involves only the physical act, its sexual nature, and the specific identity of the complainant’s partner or partners: paras. 54-57. To provide consent, therefore, the complainant must subjectively agree to the act, its sexual nature, and the specific identity of their partner or partners: *Barton*, at para. 88.

[30] This Court’s jurisprudence is replete with a variety of terms to refer to different aspects of consent. While the *Criminal Code* simply speaks of “consent” (ss. 265 and 273.1(1)), this Court has variously talked about “meaningful consent” (*J.A.*, at para. 36), “true consent” (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 127),

“apparent consent” (*Ewanchuk*, at para. 36; *Hutchinson*, at para. 4), and “subjective consent” (*Hutchinson*, at para. 37).

[31] As I will explain, there are two aspects to the overarching concept of consent, the absence of which is an essential element of the offence of sexual assault. The first is what this Court has called “apparent consent” or “subjective consent”: see *Hutchinson*, at paras. 4 and 37. That aspect relates to the factual findings of the trier of fact about whether the complainant subjectively and voluntarily agreed to the sexual activity in question. If the trier of fact finds that there was no such agreement, the *actus reus* of sexual assault will be established.

[32] While this Court has previously used “subjective consent” and “apparent consent” seemingly interchangeably, the term “apparent consent” is not consonant with the fact that consent is a subjective assessment of the complainant’s personal state of mind. Considerations of what may be “apparent” are not relevant, coming dangerously close to reinjecting into our sexual assault law the long rejected concept of implied consent. I prefer the term “subjective consent” which more accurately conveys what is required by the *Criminal Code* and our jurisprudence for a complainant, in their own mind, to provide “voluntary agreement . . . [to] the sexual activity in question”.

[33] If the complainant did not subjectively consent (for whatever reason) then the *actus reus* is established. However, the presence of subjective consent, or a reasonable doubt as to subjective consent, does not necessarily end the matter and result in an acquittal. There is a second aspect to “consent” for the purposes of the *actus reus*

of sexual assault — subjective consent must also be effective “as a matter of law”: *Ewanchuk*, at paras. 36-40; see also *R. v. Lutoslawski*, 2010 ONCA 207, 260 O.A.C. 161, at para. 15. Another way of framing that question is to ask whether the subjective consent has been vitiated.

[34] Whether subjective consent will not be legally effective is ultimately a matter of policy. The law steps in to say that despite the complainant’s subjective agreement, it will not be given legal effect. Sometimes, the policy that vitiates consent comes from the common law.¹ Other times, the policy is codified. In the context of sexual assault, the *Criminal Code* sets out a series of factors that will vitiate subjective consent in ss. 265(3) and 273.1(2).

[35] Section 265(3) sets out four factors that will vitiate subjective consent to sexual activity. Subjective consent will not be given legal effect where it is the product of force, threats or fear of force, certain types of fraud, or the exercise of authority: s. 265(3)(a) to (d). Section 273.1(2)(c) also vitiates subjective consent where the complainant is induced into sexual activity by the accused abusing a position of trust, power, or authority: *Hutchinson*, at para. 4. When subjective consent is the product of these factors, the complainant has been deprived of control over who touches their

¹ In *R. v. Jobidon*, [1991] 2 S.C.R. 714, for example, this Court explained that the common law vitiates subjective consent to a fist-fight where bodily harm is both intended and caused: see also *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339.

body, and how, and there is no consent in law: *Ewanchuk*, at paras. 28 and 37-39; *Saint-Laurent v. Héту*, [1994] R.J.Q. 69 (C.A.), per Fish J.A.

[36] However, these factors do not *prevent* subjective consent. Rather, they recognize that even if the complainant has permitted the sexual activity in question, there are circumstances in which that subjective consent will be vitiated — deemed of no force or effect. The distinction between preventing subjective consent and rendering it ineffective may be subtle, but it is important. A factor that prevents subjective consent must logically be linked to what subjective consent requires. Conversely, a factor that vitiates subjective consent is not tethered to the conditions of subjective consent and must find footing and justification in broader policy considerations.

[37] The example of fraud demonstrates this distinction. Depending on the type, fraud can do one of three things: it can prevent subjective consent, it can vitiate subjective consent, or it can simply not relate to the legal analysis of consent at all.

[38] Fraud that prevents subjective consent must be inherently linked to the conditions of subjective consent. For example, subjective consent requires agreement to the act being done by the specific person the complainant thinks is doing it: *Hutchinson*, at para. 57. If, as a result of fraud, the complainant engages in sexual activity with someone other than the person they think they are with, then there is no subjective consent because the conditions for subjective consent are not met: *Hutchinson*, at paras. 57-63. However, at the *actus reus* stage, a simple mistake has the same effect. A complainant does not consent “to the sexual activity in question” when

the complainant mistakenly engages in sexual activity with the wrong person: see, e.g., *R. v. G.C.*, 2010 ONCA 451, 266 O.A.C. 299, at paras. 20-24.

[39] Fraud that is not tied to the conditions for subjective consent cannot logically prevent subjective consent from forming but can vitiate subjective consent. Thus s. 265(3)(c) captures fraud that relates to something other than the “sexual activity in question”: *Hutchinson*, at para. 55. As a matter of criminal policy though, fraud that vitiates consent is held to a far higher standard than fraud that prevents consent. While fraud preventing consent is interchangeable with a mistake, fraud will only vitiate consent where it entails the “reprehensible character of criminal acts”: *Cuerrier*, at para. 133; see also *Hutchinson*, at para. 42.

[40] If a fraud is not linked to the conditions for subjective consent *and* does not entail the reprehensible character of criminal acts, then it will not affect the legal analysis of consent in any way. That is why lying about matters such as one’s profession or net worth may be immoral, but it is not criminal: *Cuerrier*, at paras. 133-35.

[41] Fraud thus demonstrates the distinction between factors that prevent subjective consent, factors that vitiate it, and factors that do not relate to the legal analysis of consent. To prevent subjective consent, the factor must prevent a condition of subjective consent from being satisfied. If it does not then it can only vitiate consent, which entails questions of broad criminal law policy untethered from the conditions of subjective consent. If the answers to those questions do not justify the heavy hand of the criminal law then the factor does not relate to the legal analysis of consent.

[42] The respondents, with the support of the intervener, argue that incapacity vitiates rather than prevents subjective consent. I reject this proposition for three reasons.

[43] First, capacity must be understood as a precondition to subjective consent as a matter of logic. Subjective consent requires the complainant to formulate a conscious agreement in their own mind to engage in the sexual activity in question: *J.A.*, at paras. 31, 36 and 45; *Barton*, at para. 88. It naturally follows that the complainant must be *capable* of forming such an agreement.

[44] Second, incapacity as a vitiating factor would be inconsistent with the structure of the *Criminal Code*. The definition of consent for the purposes of sexual assault in s. 273.1(1) is “[s]ubject to” ss. 265(3) and 273.1(2), which set out circumstances where “no consent is obtained”. Section 265(3) is a purely vitiating provision, whereas s. 273.1(2) is multi-faceted, primarily serving to clarify the broad definition of “consent” in s. 273.1(1): *J.A.*, at para. 29. Only s. 273.1(2)(c) vitiates consent, where the complainant’s induced agreement by reason of an abuse of power, trust, or authority is deemed ineffective in law: *Hutchinson*, at para. 4; *R. v. Snelgrove*, 2019 SCC 16, [2019] 2 S.C.R. 98, at paras. 3-4. The other factors in s. 273.1(2) appear to clarify what subjective consent requires. It cannot be said that a complainant who expresses a lack of agreement has subjectively consented: s. 273.1(2)(d) and (e). Similarly, there can be no subjective consent to vitiate if the agreement comes from a third-party rather than the complainant: s. 273.1(2)(a). In *J.A.*, this Court, in

determining that the agreement must be contemporaneous to the touching, rejected the suggestion that unconsciousness, under what is now s. 273.1(2)(a.1), vitiates consent: para. 33. In my view, incapacity under s. 273.1(2)(b) is another clarifying provision. Like unconsciousness, incapacity deprives the complainant of the ability to formulate a subjective agreement: *J.A.*, at para. 33. An incapacitated complainant cannot provide voluntary agreement to the sexual activity in question and therefore cannot provide subjective consent.

[45] The third and final reason comes from the need for certainty in the criminal law. Capacity as a precondition to subjective consent provides certainty because it is inextricably linked to what subjective consent requires: contemporaneous voluntary agreement to the sexual activity in question. Capacity to consent requires that the complainant be capable of understanding what is required for subjective consent — no more, no less.

[46] Conversely, incapacity as a vitiating factor would bring with it a host of uncertainties. Untethered from the conditions for consent, an incapacity assessment would need to say that even though the complainant voluntarily agreed to the sexual activity in question, at some undefined point their decision-making process was so impaired that subjective consent was no longer effective. This would inject significant uncertainty into the task of establishing the *actus reus* of sexual assault; the blunt tool of the criminal law is poorly suited to such a delicate task as determining at what point a complainant has made an impaired but free and voluntary choice. Further difficulties

and uncertainty would arise at the *mens rea* stage where the accused's awareness of the complainant's impaired decision-making process would need to be assessed.

[47] For these reasons, it must be that the capacity to consent is a precondition to subjective consent. It is not a matter of vitiating. If the Crown proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, or did not agree to the sexual activity in question, then the Crown has proven a lack of subjective consent and the *actus reus* is established.

[48] Despite these reasons why capacity to consent must be understood as a precondition to subjective consent, the Court of Appeal, like the respondents and the intervener, understood incapacity to be a vitiating factor. As such, they relied on *Hutchinson* for the proposition that a trial judge must consider whether the complainant provided subjective consent first and separately from the issue of the complainant's capacity to consent. Specifically, they read para. 4 of *Hutchinson* as setting out a "two-step process" that the trial judge must follow.

[49] Paragraph 4 of *Hutchinson* does not relate to incapacity in any way. That paragraph reads as follows:

The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3)

defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).

[50] This introductory paragraph does not contain any novel or controversial propositions of law. The sequential operation of subjective consent (“apparent consent”, in the language of *Hutchinson*) and whether that subjective consent is effective in law has always formed the common law of assault and is continued by the *Criminal Code: R. v. Jobidon*, [1991] 2 S.C.R. 714, at pp. 731-32. Paragraph 4 of *Hutchinson* is merely summarizing the process that “[t]he *Criminal Code* sets out”. It is nothing more than a concise description of the two aspects of consent when both subjective consent and effective consent are at issue. *Hutchinson* dealt with whether fraud by sabotaging a condom related to the “sexual activity in question” such that there was no subjective consent — or whether it vitiated consent. It has nothing to do with incapacity, does not engage in the issue, and does not suggest that incapacity to consent must be viewed as a vitiating factor.

[51] Further, *Hutchinson* does not mandate that the different aspects of subjective consent be considered in any rigid order. While a complainant logically must be capable of consenting before there can be a factual finding that they did consent, a trial judge may be faced with evidence that the complainant was incapable of consenting and also did not agree to the sexual activity in question, and a finding of either will establish a lack of subjective consent. While in some cases it may be more

respectful of a complainant's dignity to first address whether the complainant agreed to the sexual activity in question (see J. Benedet and I. Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007), 52 *McGill L.J.* 243, at p. 270), there is no strict requirement for a trial judge to consider one before or after the other.

[52] Similarly, *Hutchinson* should not be read as imposing a strict order-of-operations upon triers of fact when considering both subjective consent and whether that consent is effective in law. While it may usually make analytical sense to consider subjective consent first and legal effectiveness second, a trial judge will not necessarily err if they do not follow this order. There may be clear evidence that any subjective consent is vitiated. For example, if a complainant is forced into sexual activity by threats of violence, it would hardly be reversible error for a trial judge to find that there could not be effective consent in law, even if there was subjective consent.

[53] In sum, a finding of subjective consent requires both that the complainant was capable of consenting and did agree to the sexual activity. Finding that a complainant was either incapable of consenting or did not agree to the sexual activity in question will establish a lack of subjective consent. These two aspects of subjective consent do not need to be considered in any rigid order. Only if subjective consent exists, or if there is a reasonable doubt as to subjective consent, does a trier of fact need to go on and ask whether that consent was vitiated.

[54] The question of whether a complainant had the capacity to consent will not always be at issue; nor will the question of whether subjective consent was vitiated always be at issue. Such questions are driven by the facts and context of each individual case.

(2) The Four Requirements for Capacity

[55] As capacity is a precondition to subjective consent, the requirements for capacity are tied to the requirements for subjective consent itself. Since subjective consent must be linked to the sexual activity in question, the capacity to consent requires that the complainant have an operating mind capable of understanding each element of the sexual activity in question: the physical act, its sexual nature, and the specific identity of their partner: *Barton*, at para. 88; *Hutchinson*, at paras. 54-57.

[56] There is one further requirement. Because subjective consent requires a “voluntary agreement”, the complainant must be capable of understanding that they have a choice of whether or not to engage in the sexual activity in question: *Criminal Code*, s. 273.1(1). At the very least, a voluntary agreement would require that the complainant exercise a choice to engage in the sexual activity in question. In this narrow sense, in order to voluntarily agree to the sexual activity in question, the complainant must understand that saying “No” is an option. In *J.A.*, this Court held that consent requires that the complainant have “an operating mind” at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it: paras. 36 and 43-44. Thus, an unconscious complainant could not provide

contemporaneous consent. It follows that where the complainant is *incapable* of understanding that they have this choice to engage or refuse to engage, they are incapable of consenting. Accordingly, a complainant who is unable to say no, or who believes they have no choice in the matter, is not capable of formulating subjective consent: see *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at para. 60, citing *R. v. Daigle* (1997), 127 C.C.C. (3d) 130 (Que. C.A.), aff'd [1998] 1 S.C.R. 1220.

[57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant's partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.

[58] The complainant will only be capable of providing subjective consent if they are capable of understanding all four factors. If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of subjective consent and the absence of consent is established at the *actus reus* stage. There would be no need to consider whether any consent was effective in law because there would be no subjective consent to vitiate.

(3) Application

[59] Based on their view that incapacity is a vitiating factor and their understanding of *Hutchinson*, the respondents submit that the trial judge erred in failing to consider consent and capacity separately and sequentially. As I have explained, I do not accept either of these propositions. Nor do I accept that the trial judge erred in his treatment of consent in this case.

[60] Both the complainant's capacity to consent and agreement to the sexual activity were at issue here. The trial judge was faced with evidence of incapacity to consent. Most significantly, the complainant testified that she drank heavily throughout the night, was passed out when the sexual activity began and, while she struggled briefly, she gave up as she thought she had no choice in the matter. The trial judge was also faced with evidence that the complainant did not agree to the sexual activity as the complainant testified that she tried to push away from the respondents and repeatedly told them to stop. It was open to the trial judge to accept the evidence of incapacity and the evidence that the complainant did not agree to the sexual activity. *Hutchinson* did not require these to be addressed separately or in any particular order.

[61] The respondents argued here, as they argued below, that the trial judge's error went beyond blending his consent and capacity assessments — they argue that he could not find both that the complainant was incapable of consenting and that she did not agree to the sexual activity. They argue that these findings are “mutually exclusive” and a complainant who is incapable of consenting is not capable of withholding agreement to sexual activity. I do not agree for two reasons.

[62] First, I am not convinced that these findings are mutually exclusive at the theoretical level. In my view, the capacity to consent requires a higher level of understanding than the capacity to withhold consent. As discussed, the capacity to consent is a cumulative assessment, requiring the degree of understanding necessary to appreciate *all* the conditions of subjective consent. If a complainant is incapable of understanding any one of those conditions, then they are incapable of consenting. Conversely, the capacity to withhold consent inherently requires a lesser degree of understanding because that capacity is established by a complainant's capacity to understand *any* of the necessary factors. For example, if a complainant is incapable of understanding the sexual nature of proposed touching but knows they do not want to be touched, then they are capable of withholding consent despite being incapable of consenting.

[63] Second, the continuous nature of consent provides a further reason why the respondents' argument must fail at a practical level. Consent must be specifically directed to each sexual act: *J.A.*, at para. 34; *Criminal Code*, s. 273.1(2)(e). There is no reason why the entire course of sexual activity must be blanketed with a single finding of consent, non-consent, or incapacity. This case provides an example. On the trial judge's findings, the sexual activity began when the complainant was passed out — evidence of incapacity. As it continued, the complainant struggled and told the respondents to stop — evidence that she expressly refused to engage in the sexual activity. When those struggles and demands were ignored by the respondents, the

complainant, in her confused and intoxicated state, acquiesced, believing she had no choice in the matter — again, evidence of incapacity.

[64] Accordingly, it was open to the trial judge to find both that the complainant was incapable of consenting and did not agree to the sexual activity in question. In the context of this case, the trial judge did not err in addressing these issues together in his reasons. Both findings went to a lack of subjective consent, thus establishing the final element of the *actus reus*. They did not need to be reconciled with each other, nor approached in any particular order.

[65] As a final note, I reject the respondents' argument that the complainant's claim of incapacity was belied by her thorough recollection of the sexual activity. Whether the complainant has a memory of events or not does not answer the incapacity question one way or another. The ultimate question of capacity must remain rooted in the subjective nature of consent. The question is not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question is whether the complainant understood the sexual activity in question and that she could refuse to participate.

B. *Were the Trial Judge's Reasons Sufficient?*

[66] The Court of Appeal identified two concerns with the sufficiency of the trial judge's reasons. First, the trial judge's reasons "may be read as equating any

degree of impairment by alcohol with incapacity”. Second, it was unclear if the trial judge found that the complainant did not consent, regardless of capacity.

[67] As I explain below, I disagree. In the context of this case, the trial judge’s reasons were sufficient. The trial judge’s reasons should not be held to an abstract standard that is foreign to the realities of the case before him. All parties agreed at trial that the complainant’s evidence, if accepted, established incapacity. The trial judge accepted that evidence, and incapacity was clearly established. Similarly, all parties recognized that factual consent was at issue. The complainant testified that she did not consent, repeatedly told the respondents to stop, and was told to be quiet. The trial judge accepted that evidence, and the absence of agreement to sexual activity was clearly established.

(1) Appellate Review of Trial Reasons

[68] The importance of trial reasons should not be understated. It is through reasoned decisions that judges are held accountable to the public, ensuring transparency in the adjudicative process and satisfying both the public and the parties that justice has been done in a particular case: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15, 42 and 55; R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 134. However, this Court in *Sheppard* emphasized that, for the purposes of appellate review, “the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability”: para. 42. On appeal, the issue is

whether there is reversible error. What is required are reasons that are sufficient in the context of the case for which they were given.

[69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient: *Sheppard*, at paras. 28-33 and 53; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 19; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 101; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at paras. 10, 15 and 19; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 15; *R. v. Chung*, 2020 SCC 8, at paras. 13 and 33. Appellate courts must not finely parse the trial judge's reasons in a search for error: *Chung*, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.

[70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.

[71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.

[72] *Sheppard* itself was such a case. The trial judge's reasons for conviction read, in their entirety:

Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged. [paras. 2 and 10]

[73] This Court found that these reasons were factually insufficient because the pathway the trial judge took to the result was unintelligible: *Sheppard*, at para. 60. It

was simply not possible for the parties, counsel, or the courts to determine why the trial judge found as he did: paras. 2 and 61-62.

[74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application — the presumption that “the trial judge understands the basic principles of criminal law at issue in the trial”: *R.E.M.*, at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, “Trial judges are presumed to know the law with which they work day in and day out”: see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.

[75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge’s chain of reasoning: *Sheppard*, at para. 40, citing *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27. While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory.

However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.

[76] Despite this Court's clear guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged.

[77] In three recent appeals as of right, this Court reinstated sexual assault convictions that were set aside on appeal, endorsing the reasons of a dissenting justice.

[78] In *R. v. Langan*, 2020 SCC 33, rev'g 2019 BCCA 467, 383 C.C.C. (3d) 516, this Court adopted the dissenting reasons of Bauman C.J.B.C. that held that the trial judge's ambiguous use of certain text messages did not demonstrate error on a functional and contextual reading. Bauman C.J.B.C. concluded that since there was a permissible basis on which to admit the text messages, "we should not speculate that the properly admitted evidence was improperly used, without clear indications to the contrary": *Langan* (C.A.), at para. 103; see also para. 140.

[79] To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review: *Sheppard*, at para. 54. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be

said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at pp. 523-25. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated: *Sheppard*, at para. 46. An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity.

[80] In *R. v. Kishayinew*, 2020 SCC 34, rev'g 2019 SKCA 127, 382 C.C.C. (3d) 560, and *R. v. Slatter*, 2020 SCC 36, rev'g 2019 ONCA 807, 148 O.R. (3d) 81, this Court adopted the reasons of a dissenting judge holding that the trial judge did not err in conflating credibility and reliability. In both cases, the trial judges accepted the complainants' evidence and found them to be credible, even if their reliability findings were not explicit on the face of the reasons.

[81] As *Slatter* demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder

and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt. But, as this Court stated in *Gagnon*, at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.

[82] Credibility findings must also be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between reliability and credibility. The jurisprudence often stresses the distinction between reliability and credibility, equating reliability with the witness' ability to observe, recall, and recount events accurately, and referring to credibility as the witness' sincerity or honesty: see, e.g., *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, at para. 41. However, under a functional and contextual reading of trial reasons, appellate courts should consider not whether the trial judge specifically used the words "credibility" and "reliability" but whether the trial judge turned their mind to the relevant factors

that go to the believability of the evidence in the factual context of the case, including truthfulness and accuracy concerns. A trial judge’s determination to accept or believe inculpatory witness evidence includes an implicit assessment of truthfulness or sincerity and accuracy or reliability: *Vuradin*, at para. 16. Often, the term “credibility” is used in this broader sense to mean the believability of the evidence and it necessarily includes both truthfulness and accuracy: *McWilliams’ Canadian Criminal Evidence* (5th ed. (loose-leaf)), vol. 3, at pp. 30-1 and 30-2. For example, *Black’s Law Dictionary* (11th ed. 2019), at p. 463, defines credibility as “[t]he quality that makes something (as a witness or some evidence) worthy of belief” and model jury instructions include both truthfulness and accuracy within “credibility” assessments: G. A. Ferguson and M. R. Dambrot, *CRIMJI: Canadian Criminal Jury Instructions* (4th ed. (loose-leaf)). Provided trial judges turn their mind to these considerations, there is no requirement that they utter the word “reliable”.

(2) Application

[83] In my view, the Court of Appeal in the present case did not conduct a functional and contextual reading of the trial judge’s reasons, but rather assessed those reasons removed from the context of the live issues at trial.

[84] The Court of Appeal found that the trial judge’s reasons “may be read as equating any degree of impairment by alcohol with incapacity”. The respondents also urge this reading. Obviously, equating *any* degree of intoxication with incapacity would

be wrong in law. In my view, however, no such reading is appropriate here, on a functional, contextual approach.

[85] The trial judge made two references to intoxication as rendering the complainant incapable. When setting out his task, at para. 51, he framed one of the questions as whether the complainant “was unable to provide her consent to this sexual activity because she was impaired by alcohol consumption”. When concluding his judgment, at para. 72, he wrote that “no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.”

[86] The trial judge’s references to intoxication must be read in light of the live issues at trial. He recognized that intoxication could lead to incapacity. But “any degree of impairment” was not at issue — what was at issue was the *extreme* degree of intoxication to which the complainant testified. The complainant did not testify about some mild or abstract level of intoxication. Her evidence was that she was so intoxicated that she vomited repeatedly, passed out, felt “out of control” during the sexual activity, felt that she had no choice in the matter, and could not do anything to stop it. All parties recognized at trial that this evidence, if accepted, established incapacity to consent. It is that degree of extreme intoxication that the trial judge was referring to when discussing whether the complainant was so intoxicated as to be incapable of consenting. In the context of this trial, the trial judge’s reasons should not be read as equating *any* degree of intoxication with incapacity.

[87] Similarly, the trial judge's blending of consent and capacity reveals neither an error in law nor insufficient reasons. It would have been preferable for the trial judge to clearly identify what aspect of consent he was referring to in concluding that there was no consent. However, failing to do so did not amount to error.

[88] Capacity was not the only issue at trial. While a finding of incapacity would establish the *actus reus*, the trial judge also considered whether, if the complainant was capable, she did agree to the sexual activity.

[89] The trial judge's reasons can be read as finding both that the complainant was incapable of consenting and that she did not agree to the sexual activity. As explained earlier, these findings are not legally contradictory and both were available to him. Indeed, having chosen to accept and believe her evidence, both findings are obvious.

[90] The respondents, in their arguments before the Court of Appeal and before this Court, stressed that the trial Crown did not "invite" the trial judge to convict on the basis that the complainant did not agree to the sexual activity. While the trial Crown certainly focused on incapacity, it is not fair to say that he disavowed this theory. The charge was not particularized and the Crown adduced evidence that the complainant both was incapable of consenting and did not consent. The trial Crown's written and oral submissions both highlighted the complainant's evidence that she did not consent, such as her evidence that she told the respondents to stop and tried to push R.B. away. Whether the complainant agreed to the sexual activity was a live issue. Indeed, the

defence urged the trial judge to find that the complainant provided such an agreement. It was open to the trial judge to find that the complainant was incapable and that she expressly refused to engage in the sexual activity — either way, he found that the respondents sexually assaulted the complainant.

[91] The respondents received a fair trial. They were presumed innocent and held the Crown to its burden to prove their guilt beyond a reasonable doubt. They thoroughly cross-examined the complainant and mounted a multi-faceted defence against the charge. But fairness does not require perfection: *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45, per McLachlin J. The trial judge accepted the evidence of the complainant that sexual activity began when she was unconscious and continued despite her pleas for the respondents to stop. His reasons revealed no error on a proper appellate reading. The respondents' convictions should not have been overturned simply because the trial judge expressed himself poorly.

C. *Did the Court of Appeal Breach the Rules of Natural Justice in Deciding the Appeal for Reasons Not Raised by the Parties?*

[92] After rejecting G.F.'s unreasonable verdict argument, the Court of Appeal did not proceed to examine the grounds of appeal raised by R.B.'s arguments but rather found that the trial judge had committed the errors it identified. The Court of Appeal recognized that it was not addressing "the precise argument advanced" by G.F. and R.B. but proceeded because "issues related to consent and capacity were central to the arguments made on appeal" by all parties: para. 29. The Crown argues that the Court

of Appeal should not have decided the appeal on the basis of its concerns in the trial judge's reasons without providing the parties an express opportunity to respond. It argues that this was a breach of natural justice, in contravention of this Court's decision in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689.

[93] While this point is moot as I have determined that the Court of Appeal erred in reaching its conclusion, I do not agree that *Mian* was breached. *Mian* sought to strike a balance between the adversarial process and the appellate court's duty to ensure that justice is done. In pursuit of that duty, sometimes the appellate court will need to raise a new issue that suggests error in the decision below that goes beyond the arguments set forth by the parties. If the appellate court raises a new issue, fairness to the adversarial process requires the court to provide the parties with notice and an opportunity to respond to it: *Mian*, at para. 30. However, where the appellate court raises an issue that is not "new" but rather is rooted in or forms a component of the issues raised by the parties, *Mian* gives appellate courts a discretion to determine whether notice and submissions are warranted: para. 33.

[94] Here, this Court would have no basis upon which to interfere with the Court of Appeal's exercise of discretion. While the respondents' unreasonable verdict argument did not directly engage the framework for assessing consent and capacity or the sufficiency of the trial judge's reasons, the Court of Appeal reasonably exercised its discretion to address these issues, noting that they were not "new" because "issues related to consent and capacity were central to the arguments made on appeal by both

the [respondents] and the Crown”: para. 29. The respondents focused their argument on whether the complainant’s evidence, even if accepted, could establish incapacity. However, they also argued that the trial judge’s reasons were insufficient insofar as they concerned the issue of factual non-consent free from incapacity. The Crown argued below that the trial judge’s reasons on consent and incapacity were free of error. Notably, the Crown argued that the trial judge’s blending of these issues was not an error. This was not a case where natural justice demanded that the Court of Appeal provide the parties with notice or invite further submissions.

D. *Other Issues*

[95] The respondents raise three further issues that were not addressed by the Court of Appeal. The respondents argue that the trial judge erred in failing to declare a mistrial, erred in not considering whether the respondents harboured honest but mistaken beliefs that the complainant communicated consent, and unevenly scrutinized the evidence of the complainant and G.F. In my view, there is no merit to any of these arguments.

[96] First, the trial judge did not err in refusing to declare a mistrial. R.B. states she wanted to testify and her right to do so was usurped by her counsel. She claims that there was an agreement in place with her counsel that he would not close the defence case without first consulting her about whether she wanted to testify. Defence counsel, she submits, did not honour this agreement. As the Crown aptly notes though, R.B. made these submissions before the trial judge, who found that there was no such

agreement. Therefore, on the findings of the trial judge, there is no factual foundation for this ground of appeal.

[97] Similarly, there is no factual foundation for the argument that the trial judge erred in not considering whether the respondents had an honest but mistaken belief in communicated consent. This argument is predicated on G.F.'s testimony that he asked for and received repeated assurances of consent from the complainant. The trial judge rejected that evidence and accepted the complainant's evidence that she was unconscious when the sexual activity began, told the respondents to stop, and was told by G.F. to "be quiet". There could be no air of reality to an honest but mistaken belief in communicated consent.

[98] Finally, there is no merit to the claim that the trial judge applied a stricter level of scrutiny to G.F.'s evidence than to the complainant's evidence. The respondents take issue with each of the 10 reasons why the trial judge found the complainant to be a credible witness and each of the 12 reasons why the trial judge found G.F.'s evidence to be inconsistent. I agree with the Crown that this argument is simply a veiled attempt to re-litigate the trial judge's factual findings.

[99] This Court has never ruled on whether "uneven scrutiny" of Crown and defence evidence is an independent ground of appeal: *R. v. Mehari*, 2020 SCC 40. It was described by the Court of Appeal for Ontario in *R. v. Howe* (2005), 192 C.C.C. (3d) 480, at para. 59, as a common argument "on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of

the accused and the result turns on the trial judge’s credibility assessments”. In the last decade, provincial appellate courts have dealt with uneven scrutiny extensively and stressed that it is a notoriously difficult argument to prove: *Howe*, at para. 59; *R. v. Kiss*, 2018 ONCA 184, at para. 83 (CanLII); *R. v. Wanihadie*, 2019 ABCA 402, 99 Alta. L.R. (6th) 56, at para. 34; see also *R. v. J.M.S.*, 2020 NSCA 71; *R. v. C.A.M.*, 2017 MBCA 70, 354 C.C.C. (3d) 100, at para. 54; *R. v. K.P.*, 2019 NLCA 37, 376 C.C.C. (3d) 460. Credibility findings are the province of the trial judge and attract significant deference on appeal: *R. v. Aird (A.)*, 2013 ONCA 447, 307 O.A.C. 183, at para. 39; *Gagnon*, at para. 20. As explained by Doherty J.A.:

It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

(*Howe*, at para. 59)

[100] I have serious reservations about whether “uneven scrutiny” is a helpful analytical tool to demonstrate error in credibility findings. As reflected in the submissions here, it appears to focus on methodology and presumes that the testimony of different witnesses necessarily deserves parallel or symmetrical analysis. In my view, the focus must always be on whether there is reversible error in the trial judge’s credibility findings. Even in *Howe*, Doherty J.A. ultimately chose to frame the uneven

scrutiny argument slightly differently: para. 64. Rather than say that the appellant had demonstrated uneven scrutiny of the evidence, Doherty J.A. explained that the essential problem in the trial judge's reasons was that he had "failed to factor into his assessment of [the complainant's] credibility his finding that she deliberately lied on important matters in the course of testifying in reply": para. 64. In appellate cases that have accepted an uneven scrutiny argument, there was some specific error in the credibility assessments: see, e.g., *Kiss*, at paras. 88-106; *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111, at paras. 37-43; *R. v. Willis*, 2019 NSCA 64, 379 C.C.C. (3d) 30, at paras. 55-62; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107, at para. 54. As shown in *Howe*, uneven scrutiny easily overlaps with other arguments for why a trial judge's credibility findings are problematic. It is therefore unsurprising to see uneven scrutiny tacked on to arguments like insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict.

[101] Nevertheless, without full submissions, I would not comment further on whether uneven scrutiny is a helpful or independent ground of appeal. In this case, it is clear that the respondents have neither demonstrated that the trial judge unevenly scrutinized the evidence in the course of his credibility assessments nor that any alleged error in reasoning figured in his ultimate conclusion as to the respondents' guilt: see, e.g., *Gravesande*, at paras. 18-19 and 43; *Howe*, at para. 65. While the respondents have pointed to 22 reasons why they disagree with the trial judge's findings, there is no suggestion that he treated similar inconsistencies, or similar positive evidence, differently when making credibility findings for each side: see, e.g., *Kiss*, at

paras. 93-97. The respondents simply invite this Court to reassess the trial judge's credibility determinations. Even based on the law of uneven scrutiny as it exists in appellate courts today, there is no basis for this Court to do so: *Aird (A.)*, at para. 39.

III. Conclusion

[102] The trial judge's reasons were not perfect. They did not have to be. The trial judge did not err in addressing consent and capacity together throughout his reasons. Capacity is a precondition to consent, and as such there was no need for the trial judge to consider capacity separately from or after the issue of factual consent. It was open to the trial judge to find that the complainant was both incapable of consenting and factually did not consent and convict the respondents on either or both routes.

[103] Nor did the trial judge equate *any* degree of intoxication with incapacity. The trial judge explained what he found and why, and what he found was that the respondents committed a sexual assault upon the extremely intoxicated complainant, who was passed out when the assault commenced. Their convictions were safe and the trial judge made no error.

[104] For these reasons, I would allow the Crown's appeal, set aside the order of the Court of Appeal, and restore the respondents' convictions.

The following are the reasons delivered by

BROWN AND ROWE JJ. —

[105] There is much in the reasons of our colleague Justice Karakatsanis to endorse, including the result (at which we also arrive, but via a different path). We agree, for example, that capacity to consent should be understood as a precondition to consent under s. 273.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. We also agree that it is possible to find that a complainant lacked capacity to consent *while* being capable of withholding consent (see J. Benedet and I. Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007), 52 *McGill L.J.* 243, at p. 270).

[106] Subject to the observations we make below, we also accept much of our colleague’s recounting of the law regarding appellate review for sufficiency of reasons. What divides us, above all, is its application to the trial judge’s reasons in this case. In convicting the respondents on the basis of the complainant’s incapacity to consent, he explained neither the standard by which he decided incapacity, nor its application to these circumstances in which, significantly, the complainant’s evidence was not determinative of the issue. This was, in our respectful view, an error.

[107] That said, the evidence that the complainant did not consent is overwhelming. We would therefore apply the curative proviso, allow the appeal and restore the respondents’ convictions.

I. Sufficiency of Reasons

[108] It is by now well established that a trial judge's reasons in a criminal case, read as a whole in the context of the evidence and the arguments at trial, must be sufficient to explain the verdict to the accused, to provide public accountability and to permit effective appellate review (*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 15-16; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 12; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 24-25 and 52). Where an appellate court cannot discern the basis for the verdict such that meaningful appellate review is impossible, this constitutes an error of law (*Sheppard*, at paras. 28 and 46; *R.E.M.*, at para. 17). This is a highly context-specific inquiry. Whether an appellate court can be said to have appropriately reviewed or inappropriately “parsed” a trial judge's reasons in a search for error will depend entirely on the reasons and record in each case.

[109] As our colleague Karakatsanis J. generally recounts, in the criminal justice system the mandate of an appellate court is to review trial decisions, and trial judges must provide reasons sufficient for this purpose. She cautions that appellate reviewers must not “finely parse” the judge's reasons in a search for error, and laments “appellate court decisions that scrutinize the text of trial reasons” on “the basis of parsing imperfect or summary expression on the part of the trial judge” (paras. 69 and 76 (emphasis added)). It remains, however, the case — and we do not take our colleague as disagreeing — that an appellate reviewer's role is not discharged by giving trial

reasons for judgment a once-over-lightly perusal, but by *reading* and *considering* the trial judgment in order to assess whether, in light of the evidence and arguments at trial, it shows that the trial judge discerned and decided the live issues so as to permit meaningful appellate review (*Sheppard*, at para. 28; *R.E.M.*, at para. 57). Seen in that light, abstract warnings about “parsing” and “scrutinizing” are not, in our respectful view, particularly helpful as concrete guidance to appellate reviewers. Rather, the degree of scrutiny that appellate courts should bring to bear follows from the purposes of that scrutiny, which is to ensure that the trial judge’s reasons are (as noted above) sufficient to explain the verdict to the accused, to provide public accountability and to permit effective appellate review.

[110] A further problem is presented by our colleague’s statement that, despite this Court’s guidance in *Sheppard*, “we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error” where “safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge” (para. 76). Of course, safe convictions free from legal error should not be overturned. But, and with respect, this is an unhelpful observation, since it is not possible to conclude that convictions are “safe” or that trials were “fair” where the reasons are insufficient to permit appellate review. Our colleague’s critique assumes the conclusion. While a trial judge’s reasons need not be letter-perfect, we do not consider scrutiny of a trial judge’s reasons to be inconsistent with this Court’s guidance in *Sheppard*. To the contrary, appellate courts are tasked with reviewing a trial judge’s reasons on appeal, and an

appellant from a conviction has a statutorily granted right to have the trial verdict “properly scrutinized” (*Sheppard*, at para. 46 (emphasis in original)).

[111] Similarly, while we accept that trial judges are presumed to know the law with which they regularly work and that they are not required to “expound on features of criminal law that are not controversial in the case before them” (Karakatsanis J.’s reasons, at para. 74), this does not obviate the importance of the appellate reviewer properly and carefully discharging its role. As this Court has noted, the presumption cited by our colleague “is of limited relevance”, since “it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court” (*Sheppard*, at para. 55, point 9). Meaning, the presumption that trial judges know the law does not negate the appellate reviewer’s duty to insist upon trial reasons for judgment that, read together with the record, show that the law was correctly applied in a particular case (*Sheppard*, at para. 55, points 2 and 9; *R.E.M.*, at para. 47).

[112] That said, our central point of departure arises from our colleague’s statement:

Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. [para. 79]

Respectfully, this statement departs from settled precedent.

[113] Accused persons and their lawyers have to make informed decisions about whether to appeal and on what grounds (*R.E.M.*, at para. 11, point 3; *Sheppard*, at para. 24). They are, therefore, entitled to know not only *that* the trial judge was left with no reasonable doubt, but also *why* this was so (*Dinardo*, at para. 35, citing *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 21; *R.E.M.*, at para. 17). As McLachlin C.J. said in *R.E.M.*, at para. 37:

The question is whether, viewing the reasons in their entire context, the foundations for the trial judge’s conclusions — the “why” for the verdict — are discernable.

[114] Since the “why” for the verdict matters, it follows that, where a trial judge’s reasons remain obscure or uncertain when read in light of the record, the reasons are insufficient. For this reason, “where the appeal court considers itself unable to determine whether the decision is vitiated by error”, this Court’s answer in *Sheppard* was *not* to give the reasons a pass, but instead to hold them to be insufficient (para. 28). Significantly, in *Sheppard* this included circumstances where “there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error” (para. 46). Our colleague does not account for this.

[115] It is therefore inaccurate to say, as our colleague says, that reasons are sufficient even where ambiguities therein leave open the possibility that the judge “may or might have erred”. Insufficiency arises precisely where an appellate court finds itself unable to determine whether a judge’s reasoning is tainted by error. Nor do we accept

that the presumption that trial judges know the law can be used as a tool for holding reasons to be sufficient when the reasons are obscure or uncertain. Not only does this fail to fulfill the proper role of the appellate reviewer; it effectively leaves accused persons ignorant of the reasons for their conviction.

[116] In this case, the trial judge's reasons make clear that he convicted on the basis of incapacity alone. His reasons conclude as follows:

Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

Accordingly, I find the two accused guilty of sexual assault as charged. [Emphasis added.]

(2016 ONSC 3465, at paras. 72-73 (CanLII))

He confirmed this sole basis for convicting the respondents on two further occasions: in his decision on the mistrial application and in his reasons for sentence. In the former, he reiterated that “[t]he court accepted the Crown’s evidence that [the complainant] was impaired due to excessive alcohol consumption and was unable to provide the requisite consents”. In sentencing the respondents, he repeated: “The Crown satisfied the court beyond a reasonable doubt that [the complainant] was impaired due to excessive alcohol consumption and was unable to provide the required consent” (2017 ONSC 5203, at para. 1 (CanLII)).

[117] The difficulty is that, while it is clear that the trial judge convicted on the basis of the complainant's incapacity to consent, his reasons do not disclose *what standard* he applied in deciding that the complainant *was* incapable of consenting. This was a critical omission, since the complainant's evidence was unclear as to capacity, and certainly did not lead unavoidably to a finding of incapacity. She did not testify, for example, that she was unable to understand the physical act, that the act was sexual in nature, the specific identity of the accused, or that she had the choice to refuse to participate in the sexual activity. Nor did she testify to unconsciousness during the sexual acts, such that a finding of incapacity necessarily followed. Rather, her testimony was that she was very intoxicated, and that her ability to resist the accused was correspondingly impaired.

[118] We do not dispute that a finding of incapacity was certainly available on this evidence. The problem is that this evidence could also support the conclusion that the complainant had the cognitive capacity to consent throughout the interaction, notwithstanding her intoxication, *and* that the trial judge's reasons are ambiguous as to the threshold he applied in determining that the complainant lacked capacity. Without any reference to the threshold for a finding of incapacity, or findings of fact that demonstrate an appreciation of that threshold, it remains possible — and, indeed, from his reasons it is difficult to conclude otherwise — that the trial judge simply accepted that the complainant was intoxicated and ended his analysis at that point, without considering the further question of whether that intoxication was such as to result in incapacity. While our colleague emphasizes (at paras. 86-89) that the trial judge

believed the complainant's evidence that she was intoxicated and did not consent, this is not dispositive. Not every instance of intoxication will result in incapacity. In order to convict the respondents, as he did, on the basis that the complainant was incapable of consenting, it was crucial that the trial judge satisfy himself that the complainant was intoxicated to the point that she could not provide consent.

[119] Our colleague says “[a]ll parties agreed at trial that the complainant’s evidence, if accepted, established incapacity” (para. 67). This is not accurate. The respondents did not concede that a finding of incapacity would inevitably flow from a finding that the complainant was credible. More fundamentally, the issue of incapacity cannot be resolved by an appellate reviewer simply having regard as our colleague does to the trial judge’s credibility finding. The absence of consent is an element of the *actus reus* of sexual assault (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 25). To say that the trial judge believed the complainant does not resolve the issue of whether the trial judge applied the proper yardstick in determining capacity to consent.

II. The Curative Proviso

[120] Notwithstanding the insufficiency of the trial judge’s reasons, we would uphold the convictions via the curative proviso. In light of the overwhelming evidence that the complainant did not consent, no other verdict was possible. The trial judge, having accepted that the complainant was credible, could not plausibly have believed her to be lying about her subjective state of mind at the material time. And in that regard, her evidence of non-consent (irrespective of incapacity) was categorical: the

sexual activity was not consensual, and she wanted it to stop. Indeed, she testified that she went so far as to communicate this to the respondents by saying stop and by trying to push them away.

[121] Conversely, the trial judge disbelieved G.F., whose evidence was that he repeatedly asked the complainant whether she consented to engaging in sex with him and R.B. and that she did consent. R.B. did not testify. This left no evidence available to raise a reasonable doubt about whether the complainant consented.

[122] The respondents resist application of the curative proviso, saying, first, that the complainant's evidence relating to her lack of capacity conflicted with her evidence that she did not consent, and, secondly, that the trial judge should have analyzed each issue separately in order to reconcile those (alleged) conflicts. Specifically, the respondents point to the following:

- a) On the one hand, the complainant said she was unable to say stop or scream for help. On the other hand, she testified that she did say stop multiple times and was able to scream if she wanted to, but did not do so out of fear.

- b) On the one hand, the complainant said she was physically incapable of pushing or pulling away because of her intoxication. On the other hand, she testified that she did push or pull away on several occasions during the sexual activity.

c) On the one hand, the complainant said that G.F. was dragging her by the hips and manipulating her body into various positions for intercourse (effectively implying that her body was limp). On the other hand, she testified that she herself got onto her hands and knees and bent over R.B.'s body as G.F. penetrated her because she was going along with it and did not know what else to do.

[123] When the record is reviewed as a whole, none of this reveals inconsistencies in the complainant's evidence. She estimated that the sexual activity lasted between half an hour and an hour, during which time she "kept blacking out and going in and out of it". In the circumstances of someone experiencing varying degrees of awareness, there is nothing inconsistent about feeling unable to say stop or physically resist at some moments of the encounter, and being able to do these things at other moments.

III. Conclusion

[124] The trial judge's reasons are insufficient to allow appellate review of his finding that the complainant did not have the capacity to consent. In view of the overwhelming evidence that the complainant did not consent to the sexual activity in question, however, no verdict other than guilt was possible. We would allow the appeal and restore the convictions.

The following are the reasons delivered by

CÔTÉ J. —

[125] I agree with the position taken by my colleagues Justices Brown and Rowe on the law regarding appellate review for sufficiency of reasons. Moreover, my colleagues would find that the trial judge erred in convicting the respondents on the basis of the complainant's incapacity to consent without explaining both the standard by which he decided incapacity as well as its application to the complainant's evidence. I agree, and I outline below a further error with respect to the trial judge's conflation of consent and capacity.

[126] However, I must depart from my colleagues with respect to their view that "a finding of incapacity was certainly available on th[e] evidence" (Brown and Rowe JJ.'s reasons, at para. 118) and that the convictions can therefore be saved by the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. In my view, the trial judge's errors were not harmless or trivial, nor do I think that the evidence is so overwhelming that the trier of fact would inevitably convict. Given that credibility was the central issue at trial and that I do not find the Crown's case to be otherwise "staggering" (*R. v. L.K.W.* (1999), 126 O.A.C. 39, at para. 101), I do not believe that this is an appropriate case in which to apply the curative proviso. Therefore, I would dismiss the appeal and uphold the Court of Appeal's order for a new trial.

I. Sufficiency of Reasons

[127] In her reasons, my colleague Justice Karakatsanis acknowledges that “[o]bviously, equating *any* degree of intoxication with incapacity would be wrong in law” (para. 84 (emphasis in original)), but states that no such reading of the trial judge’s reasons is appropriate in the instant case. With respect, my colleague supplants the trial judge’s clear statements with an interpretation that is not supported by the record.

[128] The sole paragraph in the trial judge’s reasons that shows any reasoning whatsoever on this point is as follows: “Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated” (2016 ONSC 3465, at para. 72 (CanLII)).

[129] I agree with Brown and Rowe JJ. that “while it is clear that the trial judge convicted on the basis of the complainant’s incapacity to consent, his reasons do not disclose *what standard* he applied in deciding that the complainant *was* incapable of consenting. This was a critical omission, since the complainant’s evidence was unclear as to capacity, and certainly did not lead unavoidably to a finding of incapacity” (para. 117 (emphasis in original)). I am also in agreement that “[i]n order to convict the respondents, as he did, on the basis that the complainant was incapable of consenting, it was crucial that the trial judge satisfy himself that the complainant was intoxicated to the point that she could not provide consent” (para. 118).

[130] I would add the following. The record shows that the trial judge was led to the conclusion that incapacity is automatically established if the complainant was

intoxicated. The Crown explicitly stated in its closing submissions that any level of intoxication amounts to incapacity:

[THE CROWN]:

. . . So your Honour doesn't really have to, in the Crown's submission, delve into degrees of intoxication versus sobriety, at least, insofar as, as it applies to applying 273.1. Rather, in the Crown's submission, you're presented with a starker choice, of either accepting [the complainant's] evidence, which was that she was quite intoxicated – in the Crown's submission, if you accept her evidence, it's, it's pretty much a given that 273.1 will apply on the basis that she was incapable. On the other hand, the other stark choice you've been given is [G.F.] telling the court that she was as sober as when she appeared here in court. So by that assessment of things, if you do conclude that that's the case, then 273.1 would have no application whatsoever. So I just thought I'd mention that, Your Honour, in terms of framing the legal analysis in this case.

THE COURT:

So you're saying it's more an issue of credibility?

[THE CROWN]:

Very much so, as, as opposed to assessing degree of how drunk or not drunk she was.

(A.R., vol. VII, at p. 51)

The trial judge applied this flawed reasoning and found incapacity without assessing the complainant's level of intoxication.

[131] While trial judges are presumed to know the basic legal principles with which they engage on a regular basis (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664), there must be an intelligible foundation for their verdicts. In the instant case, it cannot be presumed that the trial judge both knew and applied the law based solely on one

conclusory statement. I strongly echo the Court of Appeal's concern that the trial judge's statement that s. 273.1(2)(b) "applies in instances where a complainant is intoxicated" suggests that his view was that any level of intoxication is sufficient to vitiate consent, and it is not clear that this belief did not constitute the basis for his statement that there was no consent. Therefore, the presumption of correct application is not relevant.

[132] With the greatest of respect, it is simply conjecture for the majority to say that the trial judge was referring to a degree of extreme intoxication when discussing whether the complainant was so intoxicated as to be incapable of consenting. The record indicates that the trial judge was erroneously told not to delve into degrees of intoxication, and he did not do so. The only reasonable conclusion from the trial judge's reasons is that so long as the complainant was intoxicated, as she claimed, then she was incapable of consenting. This is a clear error in law.

[133] The trial judge's credibility-centred analysis led him to equate consent and capacity; therefore, his decision rests on a legally incorrect presumption. The majority is of the view that when both factual consent and capacity are at issue, the trial judge is not necessarily required to address them separately or in any particular order. With respect, I disagree.

[134] In my view, the proper framework for analyzing consent to sexual activity was succinctly set out in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 4:

The Criminal Code sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no “voluntary agreement of the complainant to engage in the sexual activity in question” under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant’s ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)). [Emphasis added.]

[135] While I acknowledge that this Court in *Hutchinson* did not specifically address consent vitiated by incapacity and was instead focused on resolving the challenges created by the intersection of misinformation on the part of the complainant (including as a result of fraud or mistake) and consent, in my view, it is not *Hutchinson*, but the *Criminal Code*, which establishes the requirement of a two-step analysis of consent to sexual activity.

[136] The first step in the statutory framework is to determine whether the complainant voluntarily agreed to the “sexual activity in question” (s. 273.1(1)). If the complainant voluntarily agreed to the sexual activity within the meaning of s. 273.1(1) (or a reasonable doubt is raised in this regard), the court should then turn to the second step and consider whether this agreement was obtained in circumstances vitiating consent (ss. 265(3) and 273.1(2)). As noted in *Hutchinson* (at para. 25), “[t]he scheme of the provisions — a basic definition of ‘consent’ in s. 273.1(1), coupled with circumstances vitiating such agreement in s. 265(3) and s. 273.1(2) — also supports a

narrow interpretation of ‘voluntary agreement . . . to . . . the sexual activity in question’”.

[137] Section 273.1(2)(b) of the *Criminal Code* plainly shows that incapacity is a circumstance that may vitiate a complainant’s apparent consent. Contrary to the majority’s view, s. 273.1(2) does not distinguish between para. (c) (“the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority”), as a vitiating factor, and the other factors set out in that section, including incapacity, which the majority contends simply clarify what subjective consent requires. I echo the concern of the Criminal Lawyers’ Association of Ontario that the approach affirmed by the majority would shift all non-fraud concerns into an assessment of whether consent has been established, thereby undermining the balancing act described in *Hutchinson*. Rather than accepting the steps of the analysis as outlined in the *Criminal Code*, the majority adopts an understanding of the relationship between consent and capacity that renders the incapacity provision in s. 273.1(2)(b) redundant in many cases, which is “contrary to the principle that every word and provision in a statute has a meaning and a function” (*Hutchinson*, at para. 26).

[138] The trial judge’s blending of the issues is apparent in his reasons for judgment (at paras. 51-52 and 71-73):

The main issue in this case is one of credibility. The parties agree that Mr. G.F. and Ms. R.B. engaged in sexual relations with [the] 16 year old [complainant]. If I find, beyond a reasonable doubt, that [the complainant] was unable to provide her consent to this sexual activity because she was impaired by alcohol consumption, and that Mr. G.F. and Ms. R.B. knew or

should have known that she was unable to give her consent, then they are guilty of the charges against them. If I find that [the complainant]’s ability to give consent was not impaired by alcohol consumption and that she freely gave her consent, then the two accused persons are not guilty.

I have considered the evidence and the submissions of counsel, and after doing so I have concluded that [the complainant] did not consent to the sexual activity, and that Mr. G.F. and Ms. R.B. are guilty of the offence of Sexual Assault. . . .

. . .

Ms. R.B. did not testify. I find Mr. G.F.’s evidence to be unbelievable. It does not leave me with reasonable doubt as to his or Ms. R.B.’s guilt and in my view, the balance of the evidence at trial convincingly supports the conclusion that Mr. G.F. and Ms. R.B. forced [the complainant] into having non-consensual sex.

Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained where the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

Accordingly, I find the two accused guilty of sexual assault as charged.

[139] In my view, in accordance with the *Criminal Code*’s provisions, the trial judge was first required to determine whether the evidence established that there was no consent and then, if the complainant did consent or her conduct raised a reasonable doubt in this regard, whether her apparent consent was vitiated by incapacity. The trial judge did not do so, which is an error of law. His statement that “the balance of the evidence at trial convincingly supports the conclusion that Mr. G.F. and Ms. R.B. forced [the complainant] into having non-consensual sex” is unclear as to whether the conviction could be sustained on the basis that the complainant did not consent, regardless of her capacity.

[140] While findings of incapacity or non-consent are not tainted by error simply because of the order in which they are made, the absence of analysis to substantiate the trial judge's conclusory statement does not provide the basis for meaningful appellate review.

II. Curative Proviso

[141] The conclusion that the trial judge committed an error is not immediately dispositive of the appeal. The curative proviso set out in s. 686(1)(b)(iii) permits an appellate court to dismiss an appeal from conviction where there is "no substantial wrong or miscarriage of justice" despite an error of law. As outlined in *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34, "The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error." In *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, this Court held that applying the curative proviso is appropriate in two circumstances: (i) where the error is so harmless or trivial that it could not have had any impact on the verdict; or (ii) where the evidence is so overwhelming that the trier of fact would inevitably convict (paras. 29-31).

[142] Consideration as to the seriousness of any error and, related to the issue of trial fairness, an assessment as to the potential impact of that error are required. In my opinion, such an examination leads to the conclusion that this is not an appropriate case in which to apply the curative proviso.

[143] The trial judge's error cannot be said to be so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial that any reasonable judge could not possibly have rendered a different verdict if the error had not been made (*Van*, at para. 35). The complainant's incapacity was a live issue at trial, and acceptance of her evidence as credible is insufficient to ground a conviction. I agree with the Court of Appeal that "the trier of fact must consider all the evidence to make the factual determination of the complainant's capacity at the relevant time" (2019 ONCA 493, 146 O.R. (3d) 289, at para. 38 (emphasis added)).

[144] Had the trial judge considered all of the evidence of the complainant's capacity at the relevant time, I find that there is a reasonable possibility that he would have concluded that she was capable of consenting. This is particularly so given the toxicology evidence indicating that no alcohol was detected in the complainant's blood or urine approximately 24 hours after the sexual activity, thus increasing the likelihood that alcohol absorption did not occur. Read fully, the complainant's evidence cut both ways on incapacity. She was able to recall the events in question in considerable detail, including that she said "stop" several times; that she was able to physically push and pull the respondents; and that she understood G.F.'s direction to perform cunnilingus on R.B. but refused to do so.

[145] This case turned on credibility. As noted in *R. v. Perkins (T.)*, 2016 ONCA 588, 352 O.A.C. 149, at para. 32, "while there is no rule excluding the *proviso* in cases turning upon credibility, . . . the hurdle is a difficult one and caution should be

exercised prior to its application” (see also *R. v. Raghunauth (G.)* (2005), 203 O.A.C. 54, at para. 9; *L.K.W.*, at para. 97). Where credibility is the central issue at trial, the curative proviso has been applied where the Crown’s case is otherwise “staggering” (see *L.K.W.*, at para. 101).

[146] Applying these principles here, I do not believe that this is an appropriate case in which to apply the curative proviso. The trial judge’s errors were not harmless or trivial, nor do I think that the evidence is so overwhelming that the trier of fact would inevitably convict. It is not possible to precisely gauge the impact of the error of law committed by the trial judge. His reasons are unclear as to whether he considered the issue of consent separately from the issue of capacity, and whether his incorrect view that any level of intoxication was sufficient to vitiate consent constituted the basis for his statement that there was no consent. In my view, the convictions cannot be upheld based on the simple statement, prior to his analysis of the case, that “[the complainant] did not consent to the sexual activity” and on a general conclusion that “the balance of the evidence at trial convincingly supports the conclusion that Mr. G.F. and Ms. R.B. forced [the complainant] into having non-consensual sex”. Not only did the trial Crown not invite the trial judge to convict on this basis, but these two statements do not make it clear that the trial judge convicted the respondents on the basis of non-consent irrespective of incapacity.

[147] Given that the Crown’s case against the respondents depended largely on the credibility of the complainant’s evidence, I cannot say that the Crown’s case is otherwise “staggering”. This difficult hurdle has not been cleared.

III. Conclusion

[148] Accordingly, I would dismiss the appeal and uphold the Court of Appeal’s order for a new trial.

Appeal allowed, CÔTÉ J. dissenting.

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