



SUPREME COURT OF CANADA

CITATION: R. v. Hay, 2023 SCC 15

APPEAL HEARD: May 19, 2023
JUDGMENT RENDERED: May 19,
2023
DOCKET: 40316

BETWEEN:

Jason Donald Hay
Appellant

and

His Majesty The King
Respondent

CORAM: Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

UNANIMOUS
JUDGMENT READ Wagner C.J.
BY:
(paras. 1 to 2)

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Jason Donald Hay

Appellant

v.

His Majesty The King

Respondent

Indexed as: R. v. Hay

2023 SCC 15

File No.: 40316.

2023: May 19.

Present: Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Criminal law — Sexual assault — Defences — Honest but mistaken belief in communicated consent — Air of reality — Evidence — Admissibility — Prior sexual activity — Trial judge acquitting accused of one count of sexual assault — Court of Appeal setting aside acquittal and entering conviction on basis that trial judge erred in law both by admitting evidence of previous sexual conduct and by finding there was

*air of reality to defence of honest but mistaken belief in communicated consent —
Conviction upheld.*

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 686(4)(b)(ii).

APPEAL from a judgment of the Alberta Court of Appeal (Pentelechuk, Feehan and Ho JJ.A.), [2022 ABCA 246](#), 482 D.L.R. (4th) 3, [2022] 12 W.W.R. 226, 49 Alta. L.R. (7th) 264, [2022] A.J. No. 888 (QL), 2022 CarswellAlta 1799 (WL), setting aside the acquittal entered by Pepper Prov. Ct. J., 2021 ABPC 93, [2021] A.J. No. 639 (QL), 2021 CarswellAlta 1158 (WL), and entering a conviction for sexual assault. Appeal dismissed.

Balfour Q. H. Der, K.C., James F. McLeod and David A. S. Roper, for the appellant.

Christine Rideout, K.C., for the respondent.

The judgment of the Court was delivered orally by

[1] THE CHIEF JUSTICE — Mr. Hay appeals from the unanimous decision of the Court of Appeal of Alberta setting aside an acquittal and substituting a conviction,

pursuant to s. 686(4)(b)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, on one count of sexual assault.

[2] We are all of the view that the appeal should be dismissed, substantially for the reasons of the Court of Appeal. Mr. Hay's defence of honest but mistaken belief in communicated consent had no air of reality, and the evidence of prior sexual activity was inadmissible. In the circumstances, the Court of Appeal properly substituted a conviction. Therefore, the appeal is dismissed.

Judgment accordingly.

Solicitors for the appellant: Der Barristers, Calgary.

*Solicitor for the respondent: Alberta Crown Prosecution Service —
Appeals and Specialized Prosecutions Office, Calgary.*