

**SUPREME COURT OF CANADA**

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| **Citation** : R. *v.* Lutoslawski, 2010 SCC 49, [2010] 3 S.C.R. 60 | **Date** : 20101105  **Docket** : 33723 |

Between:

Jaroslaw Lutoslawski

Appellant

and

Her Majesty The Queen

Respondent

**Coram** : Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

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| **Reasons for Judgment** :  (para. 1) | Binnie J. (LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring) |

R. *v.* Lutoslawski, 2010 SCC 49, [2010] 3 S.C.R. 60

Jaroslaw Lutoslawski *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as: R. *v.*** Lutoslawski

2010 SCC  49

File No.: 33723.

2010: November 5.

Present: Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

*Criminal law –– Powers of Court of Appeal –– Trial judge misdirecting himself on question of law –– Court of Appeal did not err in substituting conviction instead of ordering a new trial –– Criminal Code, R.S.C. 1985, c. C-46, s. 686(4)(b)(ii).*

**Cases Cited**

**Applied:** *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Cassidy*, [1989] 2 S.C.R. 345.

**Statutes and Regulations Cited**

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

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Blair and Watt JJ.A.), 2010 ONCA 207, 260 O.A.C. 161, 258 C.C.C. (3d) 1, [2010] O.J. No. 1094 (QL), 2010 CarswellOnt 1544, setting aside the accused’s acquittal on charges of sexual assault and entering a conviction . Appeal dismissed.

Anil K. Kapoor and Senem Ozkin, for the appellant.

Christine Tier, for the respondent.

The judgment of the Court was delivered orally by

1. Binnie J. — The only issue on this appeal is whether the Court of Appeal for Ontario erred in substituting a conviction instead of ordering a new trial on three counts of sexual assault. It was established in *R. v. Chase*, [1987] 2 S.C.R. 293, that “[t]he test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: ‘Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?’” (p. 302). As found by the Court of Appeal, the trial judge misdirected himself on this question of law. Sexual assault does not require proof of an improper or ulterior purpose. The Crown at trial proved beyond a reasonable doubt that the touching of the complainants occurred in circumstances of a sexual nature such as to compromise the sexual integrity of the complainants. Section 686(4)(*b*)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, permits an appellate court on appeal from a judge alone to “enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law”. Here the Crown established that an error of law was committed at trial, and that but for that error the appellant would necessarily have been convicted: *R. v. Cassidy*, [1989] 2 S.C.R. 345. Accordingly, despite the able submissions of Mr. Kapoor, we are all of the view that the Court of Appeal reached the proper conclusion. Accordingly, the appeal is dismissed.

*Judgment accordingly.*

Solicitors for the appellant: Kapoor Barristers, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.