NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Howe*, 2015 NSCA 84

Date: 20150904
Docket: CAC 429933
Registry: Halifax

Between:

Lyle Howe

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Section 486 of the Criminal Code of Canada

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judges:	Beveridge, Hamilton and Farrar, JJ.A.
Appeal Heard:	March 25, 2015, in Halifax, Nova Scotia
Held:	**Appeal allowed and a new trial ordered per reasons for judgment of Farrar, J.A.; Beveridge and Hamilton, JJ.A. concurring.**
Counsel:	Brian H. Greenspan, Philip J. Star, Q.C. and Sharon E. Lavine, for the appellant Mark Scott, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

Overview

[1] After an evening of drinking and socializing, R.S. and the appellant, Lyle Howe, went to R.S.'s apartment. There they had sexual relations.

[2] R.S. said that she did not remember anything with respect to having sex with the appellant. After a lengthy investigation, the appellant was charged with sexual assault and administering a stupefying drug with intent to facilitate a sexual assault.

[3] The appellant's trial commenced May 2014 before Chief Justice Joseph P. Kennedy and a jury. On May 31, 2014, the jury convicted the appellant of sexual assault and acquitted him of administering a stupefying drug. On July 30, 2014 he was sentenced to three years imprisonment.

[4] Mr. Howe appeals his conviction arguing that the trial judge erred in failing to leave the issue of honest but mistaken belief in consent with the jury or properly review the evidence related to the position of the defence; and that, having regard to the totality of the evidence, and in particular because of the jury's acquittal in relation to the count alleging the administration of a stupefying drug, the verdict is unreasonable and cannot be supported by the evidence.

[5] For the reasons that follow, I would allow the appeal and order a new trial.

Background

[6] I will begin with a brief summary of the facts and, to the extent necessary, will provide additional factual context when considering the individual grounds of appeal.

[7] On Sunday, March 20, 2011, the appellant and his friend, Jeffery Brown, decided they would try to contact R.S., a young woman who worked at a service station frequented by Mr. Brown.

[8] They visited the service station but R.S. was not there. They were able to obtain her phone number from a co-worker.

[9] Mr. Howe phoned R.S., introduced himself, and talked her into meeting him and Mr. Brown that evening.

[10] At approximately 8:00 p.m. Mr. Howe, Mr. Brown and R.S. met at a restaurant where alcohol was consumed by all three.

[11] The three subsequently moved on to Mr. Howe's law office. There they consumed more alcohol.

[12] Eventually, they decided to go to R.S.'s apartment. R.S. drove to her apartment building with Mr. Brown. Mr. Brown dropped her off and left. Mr. Howe arrived at the apartment building at 10:02 p.m. The appellant waited in his car until R.S. let him in at 10:10 p.m.

[13] Once in the apartment, R.S. put on music and they played pool. While playing pool, sexual touching occurred between Mr. Howe and R.S. R.S. recalled that part way through the pool game Mr. Howe sat on the couch and motioned for her to join him, which she did. While on the couch, she kissed him. Mr. Howe testified the sexual touching continued after that.

[14] They were interrupted by the return of R.S.'s roommate, N. E. at approximately 10:45 p.m.. E., R.S. and Mr. Howe all testified that E. was highly intoxicated when he arrived at the apartment.

[15] R.S. eventually escorted E. to bed. Mr. Howe testified that she returned to the living room where the sexual encounter continued.

[16] At one point, the appellant testified that R.S. asked when Mr. Brown was returning. The appellant called Mr. Brown and asked him to return to R.S.'s apartment.

[17] While awaiting Mr. Brown's return, R.S. and Mr. Howe resumed their sexual activities. The security cameras indicated that Mr. Brown arrived at approximately 11:39 p.m. and Mr. Howe let him in.

[18] Mr. Brown testified that he witnessed Mr. Howe and R.S. engaging in sexual activity. He said R.S. appeared capable of conducting herself and was unconcerned. After the sex, Mr. Brown testified the appellant got dressed and R.S. put on her robe and got a drink.

[19] Shortly thereafter, Mr. Howe left. Mr. Brown remained. Mr. Brown said that he remained at the apartment after Mr. Howe left because he had seen some money and wanted it. He ended up taking $60 from the apartment and was eventually charged with and pleaded guilty to theft under $5,000.

[20] There was a call to R.S.'s phone at approximately 12:47 a.m. on March 21, 2011, which went to voicemail and a return call from R.S. at 12:50 a.m. that was not answered. A minute later, the appellant called R.S. and he testified that they talked about meeting the next day. Although R.S. did not recall the conversation she agreed that she had a conversation with him about possibly meeting up later that day.

[21] Sometime during the early morning hours of Monday, March 21, 2011, R.S. went to Mr. E.'s room and sat on his bed. According to Mr. E. she was mumbling and incomprehensible. As she was naked, he claimed that he placed a sleeping bag over her and they lay down on the floor together until she fell asleep.

[22] The last thing R.S. says that she remembers about her encounter with Mr. Howe that evening was leaning over to kiss him while sitting on her couch. She testified she remembered nothing about having sex after that occurrence.

[23] During the day of March 21, 2011, a number of text messages were sent and received between R.S. and her friends which ultimately led to R.S. deciding to make a complaint to the police. In the meantime, she noticed that money was missing from her bedroom. She contacted Mr. Howe who, in turn, contacted Mr. Brown who ultimately admitted to taking it. Plans were made to meet with the appellant to return the money. The plans eventually morphed into R.S. meeting Mr. Howe on Monday evening, March 21, in his car where he returned the money which had been taken by Mr. Brown.

[24] After leaving the appellant on Monday evening, R.S. went to the hospital arriving there at 9:49 p.m. A sexual assault examination took place.

[25] R.S. called the police the following day to report a sexual assault.

[26] An investigation ensued resulting in both Brown and the appellant being arrested and charged in November, 2011. In December, 2013, Brown pleaded guilty to theft under $5,000 and received a conditional discharge.

[27] The appellant proceeded to trial before a jury with the results as previously noted.

Issues

[28] In his factum the appellant raises three issues:

1. the trial judge erred in refusing to instruct the jury with respect to the issue of honest but mistaken belief in consent;
2. the trial judge erred in failing to properly and adequately review the evidence at trial and to relate the facts to the elements of the offence and to the position of the defence;
3. having regard to the totality of the evidence, and in particular the jury's acquittal in relation to the count alleging the administration of a stupefying drug, the verdict is unreasonable and cannot be supported by the evidence.

[29] I will address the standard of review when dealing with the individual issues.

Analysis

Issue #1 The trial judge erred in refusing to instruct the jury with respect to the issue of honest but mistaken belief in consent.

[30] A trial judge is duty-bound to put all defences that meet the air of reality threshold to the jury. There is no discretion; a failure to do so is an error of law. (**R. v. Cinous**, 2002 SCC 29, ¶51, 55, 82; **R. v. Cairney**, 2013 SCC 55, ¶21; **R. v. Gauthier**, 2013 SCC 32, ¶25 and 30; **R. c. Buzizi**, 2013 SCC 27, ¶15; and **R. v. MacLeod**, 2014 NSCA 63, ¶62, aff'd 2014 SCC 76).

[31] The complainant did not assert that she had not consented; rather, she could not say what had occurred, as she did not remember. The appellant testified that the complainant was an active and engaged partner in the sexual activity. This was also the testimony of Mr. Brown, who was present. In addition to the appellant's primary position that the complainant, by her words and actions, had demonstrated her consent, the appellant's further position was that he believed her to be capable of providing her consent.

[32] In concluding his address to the jury, counsel for the appellant at trial summarized the defence position:

> ...The issue is whether or not there was consent. A lack of recollection, lack of memory does not mean lack of consent. There's just no evidence that she was not capable of consenting to what took place that evening, none at all.
>
> At the very best it might be suggested that she was in a situation where she was not in full control of her faculties which I disagree with but there's an argument. But to Mr. Howe and Mr. Brown she seemed fine.
>
> **And His Lordship will talk to you about something called mistaken – honest but mistaken belief in consent. How you view things, does it look okay to you. And would you have any reason to think someone wasn't consenting.**
>
> **He will give you some further direction on that. Very important.** I would suggest it's not crucial in this case as it might be otherwise because I'm suggesting to you that there was consent.

[Emphasis added]

[33] Following the closing addresses, the trial judge discussed his proposed jury charge with counsel. Counsel for the appellant reminded the trial judge that he had raised honest but mistaken belief in consent. He elaborated, stating:

> MR. TAYLOR: ... And there's evidence that you know Mr. Howe testified quite clearly that as far as he was concerned everything was fine.
>
> The Complainant is saying I don't remember and the evidence put forward by the Crown is – includes an inference they want the jury to draw that she was not capable of consenting.
>
> Well if someone is unable to but by all accounts seems to be fine there's the issue of honest but mistaken belief in consent.
>
> THE COURT: Crown?
>
> MR. MACPHERSON: We have no difficulty with the charge including reference to that principle.
>
> THE COURT: All right. Good. We'll – Friday morning – let me say this and I'll say it now, one of the great pleasures that I get as a judge is watching good lawyers do their job.
>
> And I have to say that I don't know how this case could be better put to the jury either on behalf of the Crown or the Defence than it has been. So that's been my pleasure. Thank you very much for that.

[34] On Friday morning, just before commencing his charge to the jury, the trial judge summarily advised counsel that he would not provide an instruction on honest but mistaken belief, nor would he include the theories for the Crown and defence that had been prepared and provided to him by counsel:

> THE COURT: Thank you, we're back. Just a couple of things counsel I wanted to point out before we start. One, I'm not going to charge on honest but mistaken belief. I thank you for the suggestion. I've taken a look at it. I don't think it's justified on the facts and it would only muddy the water.
>
> So I have considered it and your request is on the record. Secondly, I'm not going to use the theories. I do thank counsel for their effort in producing those theories for the Crown and the Defence.
>
> I've looked at them. I've considered them. I'm not going to use them.

[35] Why then, when both the Crown and defence agreed that the trial judge should charge on honest but mistaken belief would he refuse to do so? And further, why didn't he provide cogent reasons for not doing so?

[36] In my view, the answer lies in the trial judge's misapprehension of the theory of the Crown's case and the evidence presented at trial. Let me explain.

[37] In his charge, the trial judge outlined the seven essential elements of sexual assault. Five of these elements were not in dispute: identity, time and jurisdiction, applying force directly, the appellant intended to apply force, and the assault was of a sexual nature. The other two elements related to the key issue of consent.

[38] The trial judge's instructions with respect to whether the Crown burden of proving beyond a reasonable doubt that R.S. did not consent to the sexual activity suggested that the Crown's theory was that R.S. was unconscious during the sexual activity. He instructed the jury as follows:

> What is consent? Consent for the purposes of a charge of sexual assault is defined at Section 273.1 of the Criminal Code. And I'll give you a copy of that. Two seventy-three point one (1) reads:
>
>> "Consent means for the purposes of Section 271 the voluntary agreement of the Complainant to engage in the sexual activity in question."
>
> And sub (2):
>
>> "No consent is obtained for purposes of Section 271 where…
>
> Sub (b):
>
>> "the Complainant is incapable of consenting to the activity."
>
> Consent involves [R.S.]'s state of mind. It is the voluntary agreement of [R.S.] that Lyle Howe did what he did. The voluntary agreement that Lyle Howe do what he did, what he testified to.

> In the way that he did it and when he did it. In other words, [R.S.] would have wanted Lyle Howe to do what he did. To have the sexual contact with her that he testified to.
>
> She would have wanted that, demonstrated that she wanted that. A voluntary agreement is one made by a person who is free to agree or disagree of her own free will. It involves knowledge of what is going to happen and the voluntary agreement to do it or let it be done.
>
> There cannot be a voluntary agreement unless [R.S.] is capable of agreeing. She must not be so intoxicated or in any other mental state that renders her unable to realize that she has the right to say no at any time.
>
> The definition of consent for sexual assault purposes requires the Complainant, [R.S.] to provide actual active consent, actual active consent throughout every phase of the sexual activity.
>
> Every phase. It is not possible for an unconscious person to satisfy this requirement. Even if she expresses her consent in advance, even if she expresses her consent in advance, it is not possible for an unconscious person to satisfy the requirement of actual active consent throughout every phase of the sexual activity.
>
> Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the Criminal Code. And I'll repeat any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the Criminal Code.
>
> An unconscious person cannot consent. And it doesn't make any difference what the person consented to up to the point of unconsciousness. The Supreme Court of Canada has recently ruled that a woman who agreed to be choked, you can imagine, to be choked as part of a sexual encounter, she agreed to be choked.
>
> When she was choked unconscious and the sexual encounter that she had agreed to continued [sic] it became sexual assault because she was no longer able as an unconscious person to satisfy that requirement of actual active consent throughout every phase of the sexual activity.
>
> [Emphasis added]

[39] The trial judge then went on to outline what he thought the Crown's position was:

> It is the Crown's position in this case that [R.S.] was not conscious. The Crown's position, not conscious when some or all of that sexual activity took place. Use your common sense.
>
> Lyle Howe, if you were to find that Lyle Howe was having sex with an unconscious [R.S.] would he be aware that she was not consenting, was incapable

> of consenting if -- the Crown must prove that Lyle Howe knew [R.S.] was not consenting.

[Emphasis added]

[40] With respect, that was not the position of the Crown nor was it the evidence presented at trial. It appears that the trial judge was mistaken about the Crown's theory and the testimony that took place at trial. He also mischaracterized R.S.'s evidence on consent. Later in the charge he said:

> [R.S.] said that she didn't consent to it. The Crown argues that she could not consent to it, that she was not conscious during the sexual activity. And they say that they have on the totality of the evidence all of the evidence proving that beyond a reasonable doubt, consent.

[41] R.S. did not say that she didn't consent to the sexual activity. But rather, she testified that she could not recall consenting to the activity. It was not the position of the Crown nor was there any direct evidence that R.S. was unconscious during the sexual activity. Her evidence on cross-examination was as follows:

> **Q.** Now, you were asked at the end of the Crown's direct examination whether or not you consented to several things, having sex in different ways, and you said no. And I think I want to make sure I'm clear I think you followed it up with you don't remember, but when you said that you did not consent to these things happening
>
> **A.** Meaning not do [sic] my memory did I consent.
>
> **Q.** Right. So you're not saying you didn't consent. You just don't know.
>
> **A.** Correct.
>
> **Q.** As a matter of fact, you even told the police that you might have, but you just can't say one way or the other.
>
> **A.** Correct, because I blamed myself.

[42] The trial judge continued later in his charge:

> Let's go back to Element 5 and 6, consent and knowledge of there not being consent. Element 5, the requirement that the Crown prove that [R.S.] did not consent. You've had an opportunity to hear in some review of [R.]'s testimony. She testifies she consented to no sexual contact after the kissing on the couch, no consent to oral, anal or vaginal. ...

[43] Again, the trial judge misstated the evidence.

[44] Continuing on in the charge:

> ... The requirement that the Crown has to prove -- if they prove that she did not consent beyond a reasonable doubt, they then have to prove that Lyle Howe had knowledge that she wasn't consenting, was aware of the fact that she wasn't consenting. Remember the definition of "consent" requires actual active consent throughout every phase of the sexual activity <u>and my statement to you that an unconscious person does not provide consent and would not</u> -- and I would suggest an unconscious person would not be seen to be providing. ...
>
> [Emphasis added]

[45] The trial judge was of the view that the evidence put forward by the Crown was intended to establish that R.S. was unconscious during the sexual activity and, if the jury accepted that evidence, then she was not capable of providing consent and Mr. Howe would have known that.

[46] Returning to his comment at the outset of his charge where he said and, I repeat:

> One, I'm not going to charge on honest but mistaken belief. I thank you for the suggestion. I've taken a look at it. I don't think it's justified on the facts and it would only muddy the water.

[47] The trial judge was apparently of the view that honest but mistaken belief did not arise on the facts because he was proceeding on the premise that R.S. was unconscious during the sexual activity.

[48] The Crown was clearly concerned with the trial judge's characterization of the Crown's case. Mr. MacPherson, on behalf of the Crown, following the trial judge's charge said the following:

> **MR. MACPHERSON**: And this other one the Crown is really quite concerned, because several times Your Lordship advised the jury that the Crown is arguing that she could not consent and that the Crown was arguing that she was not conscious during sexual activity. And the Crown takes the position that we never argued that she was not conscious during sexual activity.
>
> The Crown acknowledges that it's possible that she was not conscious during some of the sexual activity. However, our position is rather that she was so severely impaired or incapacitated that she was incapable of providing meaningful consent. Now, that ties in with the definition of "consent" that Your Lordship read to the jury from 273.1. So, she lacked the capacity to consent

> because of her severe impairment or incapacitation, which may have included unconsciousness, but it's never been part of our argument.
>
> ...
>
> **MR. MACPHERSON:** In this regard the Crown humbly asks that Your Lordship reconsider reading our theory of the Crown(sic) to the jury because that, we think, puts our position -- our argument most accurately to them.
>
> ...
>
> **MR. MACPHERSON:** So, we weren't saying that she was unconscious, okay?

[49] The trial judge then recalled the jury and read the Crown's theory of the case which was essentially that R.S. was so incapacitated that she could not meaningfully provide consent. However, after being corrected on the Crown's theory of the case, he did not revisit the issue of whether honest but mistaken belief in consent should be put to the jury.

[50] This may explain why the trial judge did not put honest but mistaken belief to the jury. However, it still remains to be determined whether honest but mistaken belief arose on the evidence. The Crown conceded at the appeal hearing that if there was an air of reality to honest but mistaken belief it ought to have been put to the jury and it would be an error for the trial judge not to do so. The result would be a new trial.

[51] I will therefore consider whether, on the evidence, there was an air of reality to honest but mistaken belief.

[52] A defence has an air of reality if there is evidence upon which a properly instructed jury, acting reasonably, could acquit if it believed the evidence to be true. (**MacLeod**, **supra**)

[53] The air of reality test is not intended to assess the likelihood of a defence succeeding at the end of the day. Trial judges must assume the truth of the evidence that tends to support a defence and should resolve any doubt as to whether the air of reality threshold has been met in favour of leaving a defence to the jury. **Cairney, supra**, ¶21; **R. v. Davis**, [1999] 3 S.C.R. 759, ¶82; and **R. v. Fontaine**, 2004 SCC 27, ¶72.

[54] In my view, there was clearly an 'air of reality' to the defence that it was reasonable for the appellant to have believed that the complainant was not so severely intoxicated that she was incapable of consenting to sexual activity. A

consideration of the totality of the evidence dictates that the defence ought to have been put to the jury.

[55] In **R. v. Esau**, [1997] 2 S.C.R. 777, honest but mistaken belief in consent was considered in circumstances remarkably similar to the present case. Major J., writing on behalf of the majority, explained as follows:

> 14 The principal question that arises where the defence of honest but mistaken belief is alleged is whether in all the circumstances of the case there is any reality to it. In *R. v. Park*, [1995] 2 S.C.R. 836, L'Heureux-Dubé J. wrote, at para. 20:
>
> > Although there is not, strictly speaking, a requirement that the evidence be corroborated, that evidence must amount to something more than a bare assertion. There must be some support for it in the circumstances. The search for support in the whole body of evidence or circumstances can complement any insufficiency in legal terms of the accused's testimony. The presence of "independent" evidence supporting the accused's testimony will only have the effect of improving the chances of the defence.
>
> In *R. v. Osolin*, [1993] 4 S.C.R. 595, McLachlin J. stated at pp. 648-49:
>
> > . . . before any defence can be put to the jury, the evidence must provide a basis for that defence. This requirement is sometimes described by saying that there must be an "air of reality" to the defence. To put a defence to the jury where this "air of reality" is lacking on the evidence would be to risk confusing the jury and to invite verdicts not supported by the evidence.
> >
> > ...
> >
> > In order to give an "air of reality" to the defence of honest but mistaken belief, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting.
> >
> > The evidence of lack of consent in most cases is supplied by the complainant's testimony. To prove honest but mistaken belief, on the other hand, the accused typically testifies that he honestly believed that the complainant consented. Theoretically, such a belief could be asserted in every case, even where it is totally at odds with the evidence as to what happened. So it has been held that the bare assertion of the accused that he believed in consent is not enough to raise the defence of honest but mistaken belief; the assertion must be "supported to some degree by other evidence or circumstances": *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 790. The support may come from the accused or from other sources....

> ...
>
> [T]he accused's mere assertion of his belief is not evidence of its honesty. The requirement that the belief be honestly held is not equivalent to an objective test of what the reasonable person would have believed. But nevertheless it does require some support arising from the circumstances. A belief which is totally unsupported is not an honestly held belief. A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them. Therefore, for a belief to be honest, there must be some support for it in the circumstances. The level of support need not be so great as would permit the belief to be characterized as a reasonable belief. But some support there must be.

> 15 I conclude from the foregoing that before a court should consider honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence. Here, the plausible evidence comes from the testimony of the complainant and the respondent and the surrounding circumstances of the alleged sexual assault. The respondent's evidence amounted to more than a bare assertion of belief in consent. He described specific words and actions on the part of the complainant that led him to believe that she was consenting. This alone may be enough to raise the defence. However, there was more. The complainant's evidence did not contradict that of the respondent, as she cannot remember what occurred after she went to her bedroom. In addition there was no evidence of violence, no evidence of a struggle and no evidence of force.
>
> [Emphasis added]

[56] As in **Esau**, here there is much more than simply an assertion by the appellant that he believed she was consenting.

[57] The appellant's testimony as to the complainant's demeanour and activity throughout the time that he was at her apartment is consistent with a person who showed no sign of being severely intoxicated, and there was other evidence which could be seen as supporting his belief that R.S. was consenting:

> a) As shown in the apartment security video, when R.S. let the Appellant into her apartment building at about 10:10 p.m., she walked back upstairs to her apartment with her arms folded, navigating the stairs without holding a railing and without any observed difficulty
>
> b) R.S. testified that, after the Appellant joined her in her apartment, she prepared a drink for herself and played pool with the Appellant. The two then sat down on the couch and kissed; she agreed that she was "quite willing to kiss" the Appellant.

c) Mr. Brown arrived at the apartment at 11:39 p.m., and testified that the Appellant and R.S. continued to engage in sexual activity in his presence. Nothing in his testimony suggested severe intoxication on the part of R.S. He described her as an active and willing participant. After the Appellant had left the apartment, Mr. Brown described R.S. as having a "good buzz on", but agreed that she seemed "perfectly capable of conducting herself".

d) R.S., on receiving a call at 12:47 a.m. which went to voice mail, was able to call the Appellant a few minutes later without difficulty. A minute later, when the Appellant returned that call, she answered and spoke to the Appellant for about 16 seconds.

e) The Appellant testified that when he left the apartment at about 12:30 a.m., the vodka bottle was more than half full. Mr. E. testified that when he found the bottle in the morning, it had only "two or three shots" left in it, which he poured down the sink.

f) The parties engaged in protected sex. The appellant testified that R.S. obtained the condoms from her bedroom willingly.

g) There was the absence of any evidence of violence struggle or force.

[58] The appellant's evidence, which is supported by the evidence of Mr. Brown, was such that R.S. did and said things that led him to believe she was consenting.

[59] As in **Esau**, the appellant's evidence of the complainant's participatory actions, if believed, could lead a jury to conclude that he honestly believed she was consenting despite being mistaken about her ability to legally consent because of intoxication. The evidence meets the threshold of an air of reality and should have been put to the jury (**Esau**, ¶ 18).

[60] The Crown, in its factum and oral argument, submits that we should not follow **Esau** for three reasons:

(i) the majority failed to consider the effect of s. 273.2(b) on the applicability or availability of the defence;

(ii) there was evidence in this case to support incapacity due to intoxication that must have been obvious to the Appellant;

(iii) the majority in *Esau* may have been in error in its assessment of the elements of the defence due to the point in the analysis when they considered the evidence of the Appellant;

[61] Section 273.2 provides:

> **273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject- matter of the charge, where …
>
> > *(b)* the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[62] With respect, s. 273.2(b) was in play in **Esau**. The Crown's position essentially asks us to look, assess and weigh the evidence of R.S., Mr. Howe and Mr. Brown and make a determination that, in the circumstances known to the accused at the time, he needed to take steps to ascertain she was consenting. This begs the question as to what were the circumstances known to Mr. Howe at the time. The evidence of Mr. Brown and Mr. Howe was that she was an active and willing participant in the sexual activity. If believed, those were the circumstances known to Mr. Howe at the time. The Crown asks us to look at the evidence and conclude that R.S. must have been so intoxicated at the time of the sexual activity that it would have been apparent to anyone she was incapable of consenting and, therefore, the appellant should have taken steps to ascertain that she was consenting.

[63] That is not our role. Nor was it the position of the majority in the Supreme Court of Canada in **Esau**. They were clearly of the view that the air of reality existed despite the complainant's evidence in that case.

[64] The Crown's other two submissions with respect to **Esau** also must fail. Again, the Crown asks us, in retrospect, to review the evidence and find that the jury must have rejected the evidence of Mr. Howe and Mr. Brown in order to conclude R.S.'s lack of capacity to consent. In its factum, it says the following:

> 60. There is no way that a jury could conclude that the complainant lacked the capacity to consent without a rejection of the accused's and Brown's evidence [as contrasted with a conclusion that the complainant did not *subjectively* consent.] To add, the jury could not have been satisfied beyond a reasonable doubt that the Appellant knew or was reckless to lack of (capacity to) consent without a rejection of his and Brown's evidence on this point.

[65] With respect, this asks us to reach conclusions on what evidence the jury must have accepted or rejected. In essence, to preclude a consideration of honest but mistaken belief in retrospect. I cannot conclude that had the jury been properly instructed on honest but mistaken belief they would have reached the same conclusion.

[66] The failure to instruct the jury with respect to honest but mistaken belief was an error. I would allow this ground of appeal and order a new trial.

Issue #2 The trial judge erred in failing to properly and adequately review the evidence at trial and to relate the facts to the elements of the offence and to the position of the defence.

[67] I agree with the Crown's submission that the standard of review of the adequacy of the instructions to the jury, including the review of evidence and limiting instructions, requires a functional approach based on the evidence at trial, the live issues raised and the submissions of counsel. **R. v. Flores**, 2011 ONCA 155, ¶92.

[68] It should be apparent from my conclusions on the first ground of appeal that I am of the view the trial judge failed to relate the evidence to the position of the defence.

[69] Again, the trial judge's error relates back to his misapprehension of the Crown's theory of the case and the evidence at trial. As noted earlier, R.S.'s evidence was not, as stated by the trial judge, that she did not consent. Her evidence was that she voluntarily and consensually kissed Mr. Howe, and that, as she could not remember any other events, she could not say whether she had consented, or whether she had acted as if she had consented to the rest of the sexual activity. The trial judge told the jury that R.S. expressly testified that she did not consent and it was up to the jury to determine whether they believed this.

[70] Following the charge, both the Crown and counsel for the defence raised objection as to the manner in which the position of the parties had been put to the jury. Counsel for Mr. Howe requested that the jury be expressly instructed that lack of memory did not equate to lack of consent. The trial judge recalled the jury, reversed his earlier decision and read the position of the parties prepared by counsel to the jury. He also explained that the fact that one does not remember something does not mean it did not happen. The trial judge, however, did not relate the evidence to the position of the defence.

[71] The jury requested further instruction on the law of consent on the morning of the second day of its deliberations. In responding to the question, the trial judge repeated his instructions with respect to the elements of consent and knowledge of consent, this time, incorporating a revised version of the theory of the Crown. While the trial judge instructed the jury that the fact a person does not remember

an event does not mean it did not occur, again he did not relate the evidence to the position of the defence on honest but mistaken belief. The reason for this, in retrospect, is obvious. The trial judge did not consider the position of the defence on honest but mistaken belief was available on the facts.

[72] Therefore, I would also allow this ground of appeal.

Issue 3 Having regard to the totality of the evidence, and in particular the jury's acquittal in relation to the count alleging the administration of a stupefying drug, the verdict is unreasonable and cannot be supported by the evidence.

[73] Justice Cromwell provided a recent statement on the law for appellate courts when assessing potentially unreasonable verdicts in **R. v. W.H.**, 2013 SCC 22:

> [27] Appellate review of a jury's verdict of guilt must be conducted within two well-established boundaries. On one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.
>
> [28] On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" (*Biniaris*, at para. 36) and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.
>
> [Emphasis added]

[74] In **R. v. Pittiman**, 2006 SCC 9, Justice Charron provides the following principles and guidance to assess whether verdicts are inconsistent and, therefore, unreasonable (as alleged here):

> 7. The onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence. The jury is entitled to accept or reject some, all or none of any witness's testimony. Indeed, individual members of the jury need not take the same view of the evidence so long as the ultimate verdict is unanimous. Similarly, the jury is not bound by the theories advanced by either the Crown or the defence. The question is whether the verdicts are supportable on any theory of the evidence consistent with the legal instructions given by the trial judge. Martin J.A. aptly described the nature of the inquiry in *R. v. McShannock* (1980), 55 C.C.C. (2d) 53 (Ont. C.A.), at p. 56, as follows:
>
> > Where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered.
>
> 8. The search for a rational or logical basis for the verdicts does not mean that where a narrative of the events is not readily apparent from the jury's findings that the impugned verdict must necessarily be set aside as unreasonable. The jury's task is not to reconstruct what happened. Rather, it is to determine whether the Crown has proven each and every element of the offence beyond a reasonable doubt. Therefore, in the case of a single accused charged with multiple offences, different verdicts may be reconcilable on the basis that the offences are temporally distinct, or are qualitatively different, or dependent on the credibility of different complainants or witnesses. The strength of the evidence relating to each count may not be the same, leaving the jury with a reasonable doubt on one count but not on the other. On the other hand, when the evidence on one count is so wound up with the evidence on the other that it is not logically separable, inconsistent verdicts may be held to be unreasonable: e.g., see *R. v. Tillekaratna* (1998), 124 C.C.C. (3d) 549 (Ont. C.A.).
>
> * * *
>
> 13. […] While an appellate court inevitably compares the basis for acquittals as well as convictions in assessing inconsistent verdicts, the decisive question is not whether the acquittals are reasonable, but whether the conviction was not: *R. v. Bergeron* (1998), 1998 CanLII 12611 (QC CA), 132 C.C.C. (3d) 45 (Que. C.A.), *per* Fish J.A., as he then was. ...

[75] Inconsistent verdicts are often alleged where the essential elements of the offence for which an accused is convicted are very similar to the essential elements of the offence for which an accused is acquitted.

[76] In this case, however, the essential elements of the offence are distinct. With respect to the charge of sexual assault under s. 271 of the **Code**, the essential elements are succinctly described in **R. v. Ewanchuk**, [1999] 1 S.C.R. 330:

> 23. ... The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.
>
> * * *
>
> 25. The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective […]
>
> 26. The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: [citations omitted].

[77] With respect to the charge of administering a stupefying drug pursuant to s. 246(b) of the **Code**, there are two essential elements of the offence: the Crown must prove beyond a reasonable doubt that Mr. Howe caused R.S. to take a stupefying drug and it must prove the act was done with the intent to enable him to commit the indictable offence of sexual assault: see **R. v. Vant**, 2010 ONSC 2474.

[78] The appellant claims that the evidence on the stupefying drug count is so wound up with the evidence on the sexual assault count that they are not logically separable. With respect, I disagree.

[79] First, the trial judge specifically instructed the jury, at defence counsel's request, that it was not required to convict or acquit on both counts but that they should consider the offences separately. Once the trial judge charged the jury, he invited submissions from both counsel with respect to the charge. Defence counsel stated the following:

> Early in your charge you indicated to the jury that they must be unanimous and find either guilty or not guilty and you said "on both counts". Now, I know you later on talked about the constituent elements and being satisfied on these counts, but I hope it's very clear to the jury that they can find guilty or not guilty on each count, not both counts.

[80] The Crown agreed. The trial judge recharged the jury as follows:

> The next thing – I had inadvertently – well, it's not a matter of inadvertence, I knew what I was saying, but the counsel were concerned about whether it was

> clear enough. I had said that in order to find Lyle Howe guilty you would have to find the constituent elements of both offences beyond a reasonable doubt.
>
> I want to clarify that by saying the same thing – that you'd have to find the constituent elements of each offence beyond a reasonable doubt. I think that's clearer. You deal with one offence at a time and you deal with each offence. The idea of both offences, I think counsel were concerned that I might give the impression that you had to find the constituent elements in both offences before you could convict on either offence, for instance.
>
> Now that's not correct. You deal with each offence separate and distinct. Some of the evidence overlaps certainly but the offences are separate and distinct and you will deal with each offence separately. So I hope I've clarified that.

[81] Although the trial judge indicated that the evidence for both offences "overlaps", neither Crown or defence counsel nor the trial judge appear to have turned their minds to the possibility that to instruct the jurors to consider the offences separately would be to invite them to return inconsistent verdicts. Put another way, if defence counsel was concerned enough about this issue to raise it, it suggests that the appellant did not regard the evidence on the sexual assault count to be inseparable with the evidence on the stupefying drug count so that it was logically separable.

[82] Second, to repeat Justice Charron's quote from **Pittiman**:

> 8. ... [I]n the case of a single accused charged with multiple offences, different verdicts may be reconcilable on the basis that the offences are temporally distinct, or are qualitatively different, or dependent on the credibility of different complainants or witnesses. The strength of the evidence relating to each count may not be the same, leaving the jury with a reasonable doubt on one count but not on the other. ...

[83] In this case, I agree with the trial judge that the evidence on both counts overlaps. However, the evidence on both counts was qualitatively different and the strength of evidence relating to each count was not the same.

[84] The case against the appellant on the charge of causing the complainant to take a stupefying drug was entirely circumstantial. Other than trace amounts of codeine and morphine, there was no forensic evidence of any drugs being ingested by the complainant. The experts agreed that the minute quantities of codeine and morphine (a common metabolite by product of codeine) could have been from simple ingestion of one 8mg. tablet of Tylenol. There are other drugs with sedating qualities, such as GHB, that could have been given to the complainant

over 24 hours before urine and blood samples were taken, which would no longer be detectable.

[85] To convict, the jury were asked to draw an inference that because the complainant testified that she could not recall the events, she must have been given a stupefying drug. The jury may not have been satisfied beyond a reasonable doubt that her lack of recall was due to the ingestion of a stupefying drug as opposed to alcohol consumption, or if she had ingested a drug that the appellant was a party to that act.

[86] On the other hand, to convict Mr. Howe of sexual assault, it was not an essential element for the jury to find that it was Mr. Howe that caused R.S.'s incapacitation so that she was incapable of consenting to sex. The jury simply had to make a finding of fact that she was incapable of consenting, triggering the application of s. 273.1(2) of the Code and, together with a conclusion that the appellant knew or was reckless to whether the complainant was consenting, regardless of whether the jury had a doubt that the appellant administered a stupefying drug (or was a party to that act).

[87] In conclusion, I am not satisfied that the verdicts are inconsistent or irreconcilable. I would dismiss this ground of appeal.

Conclusion

[88] The appeal is allowed and a new trial ordered on the sole remaining count of sexual assault.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Hamilton, J.A.