NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Dim*, 2017 NSCA 80

Date: 20171020
Docket: CAC 456111
Registry: Halifax

Between:

Chukwunonso Sinclair Dim

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 *Criminal Code*

Judges:	Fichaud, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	April 20, 2017, in Halifax, Nova Scotia
Held:	Leave granted, appeal dismissed, per reasons for judgment of Van den Eynden, J.A.; Fichaud and Bourgeois, JJ.A. concurring
Counsel:	Brian H. Greenspan and Naomi M. Lutes, for the appellant Mark Scott, Q.C., 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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] The appellant, Mr. Dim, was convicted of sexual assault. Pursuant to a joint recommendation accepted by the trial judge, he was sentenced to three years' imprisonment. He appeals against conviction only.

[2] At the time of the offence, both Mr. Dim and the complainant were university students. They met at a social event where alcohol was served. As the evening progressed, alcohol was consumed and eventually the two ended up engaging in sexual activity.

[3] The trial judge found their sexual activity was consensual, up to a point. He found there was no consent to sexual intercourse. Mr. Dim acknowledged that he understood the complainant had not consented to sexual intercourse. Mr. Dim said unequivocally that sexual intercourse did not occur. The complainant said it did. Thus, as far as sexual intercourse was concerned, this was not a case of mistaken belief in consent. During the trial, credibility, of both the complainant and Mr. Dim, was a central issue.

[4] The trial judge, relying in part on expert evidence, found that sexual intercourse did occur and the complainant did not consent to this activity. The grounds of appeal deal primarily with complaints about the trial judge's treatment of evidence. The Crown argues the complaints are simply not borne out by the evidence, and they reflect a dissatisfaction with the result and an effort to relitigate credibility findings.

[5] I would dismiss the appeal. The determinative factual findings made by the trial judge were available to him based on the evidence and his assessment of credibility. I see no reversible error. I now turn to setting out the issues raised on appeal and my reasons for dismissal.

Issues

[6] The appellant argues the trial judge erred by:

1. Applying markedly different standards of scrutiny to the evidence presented by the Crown and defence;
2. Materially misapprehending text message evidence;
3. Failing to appreciate the disinhibiting effects of alcohol;
4. Improperly conflating capacity to consent with consent;
5. Making an adverse credibility finding against the appellant due to a violation of the rule in *Browne v. Dunn*;
6. Providing insufficient reasons respecting why the appellant's evidence was rejected and how he arrived at credibility and reliability findings; and
7. Improperly qualifying an expert witness and then further erring by relying on such expert evidence.

[7] Respecting grounds of appeal not involving a pure question of law, Mr. Dim seeks leave pursuant to s. 675 (1) (a) (ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. I would grant leave.

Background

[8] In April 2014, Mr. Dim was charged with sexual assault contrary to s. 271 of the *Criminal Code*. The assault was alleged to have occurred on September 28, 2013. Mr. Dim elected trial by judge alone in the Nova Scotia Supreme Court. Justice Felix A. Cacchione heard the trial over four days in December 2015. He reserved and delivered an oral decision on April 5, 2016. He found Mr. Dim guilty as charged. Mr. Dim was sentenced in October 2016.

[9] Given the grounds of appeal focus heavily on how the trial judge treated certain evidence, it is helpful to review the evidence and factual findings in some detail.

[10] The complainant and Mr. Dim both attended the same university. They met at a university social event the night of September 27. Their physical encounter, which flowed into the early morning hours of September 28, was their first and last.

[11] Alcohol was served at the social event. The complainant consumed several beers at the event. Reportedly, Mr. Dim did not consume any alcohol prior to or during the event. Exactly how much alcohol the complainant consumed and her level of impairment were issues before the trial judge.

[12] At the social event, Mr. Dim and the complainant spent a lot of time getting to know each other. Their interactions were said to be flirtatious. The complainant had a boyfriend at the time. In fact, the two lived together. Her boyfriend was not at the social event. The complainant said she made it clear to Mr. Dim she had a boyfriend. Mr. Dim said he had no idea she had a boyfriend.

[13] The social event ended around midnight; however, Mr. Dim and the complainant were together until approximately 5:00 a.m. the following morning. After leaving the event, most of their time together was spent in the apartment of Mr. Dim's male friend. I refer to him as DK.

[14] Mr. Dim, the complainant, DK, together with two other female friends, who I refer to as CG and JM, left the social event together. DK, CG and JM were also students at the university. The group of five had all been at the event and interacted to varying degrees throughout the evening. The group discussed going out to a bar, but they decided to first go to DK's apartment. Everyone piled into Mr. Dim's car, and he drove everyone to DK's apartment.

[15] The complainant sent a text message to her boyfriend around the time the social event at the university wrapped up. She told him she was going out. After arriving at DK's apartment shortly after midnight, the complainant sent another text to her boyfriend. This message was to the effect that: she would be home later; she was not drunk; he should not worry and go to sleep. The two also spoke briefly on the phone and a similar message was conveyed.

[16] More alcohol (wine and vodka) was consumed at DK's apartment. There was conflicting evidence as to who consumed what alcohol and how much. However, it was clear that Mr. Dim and the complainant consumed alcohol. Mr. Dim said he drank one glass of wine and one to three mixed vodka drinks. At the apartment, the two remained in close contact. They talked, sat close together and engaged in what was described as sexually suggestive dancing (Mr. Dim's crotch area grinding against parts of the complainant's body).

[17] There was no dispute that JM (one of the three females at the apartment) was highly intoxicated. Nor was there a dispute that CG and DK were sexually

attracted to each other. Mr. Dim described them as wanting to "hook up". It was a one bedroom apartment, so Mr. Dim, the complainant and JM decided to leave the apartment, at least for a time, so CG and DK could pursue their mutual interests in private.

[18] It appears at least Mr. Dim had a plan to return to the apartment. Although the three left the apartment together, JM got separated from Mr. Dim and the complainant. Both JM, Mr. Dim and the complainant had differing versions on exactly how they got split up when leaving the apartment unit. However, it is clear Mr. Dim and the complainant became separated from JM, and they never reunited.

[19] Mr. Dim testified that before leaving the apartment building, he went back to the apartment unit to retrieve DK's keys so he could later re-enter the building and apartment. He said the complainant came with him and it was during this process they became separated from JM. The complainant held the impression that Mr. Dim was trying to separate her from JM.

[20] After exiting the building, Mr. Dim and the complainant then got into his car and drove to a bank where Mr. Dim took out some money. The two then went back to the apartment. Although Mr. Dim and the complainant spotted JM on their travels they did not retrieve her. Intoxicated, she walked home.

[21] Mr. Dim claimed he and the complainant discussed returning to the apartment together. He thought they were going to "hook up" but said his use of this term meant they would kiss and touch. He said he was not sure if they would have sex because they would both have to decide that. When they arrived back at the parking lot, Mr. Dim and the complainant waited in Mr. Dim's car for a bit, so that the couple left in the apartment would have had sufficient private time together.

[22] Mr. Dim estimated he and the complainant left the apartment somewhere around 2:00 a.m. and were away from the apartment for approximately thirty minutes. Upon their return to the apartment they ended up engaging in sexual activity. The other couple, DK and CG, were in the bedroom, with the door closed. Both DK and CG were witnesses during the trial; however, neither heard nor saw anything between the complainant and Mr. Dim. Both DK and CG testified that they were intoxicated.

[23] The respective evidence of the complainant and Mr. Dim presented markedly different versions of their encounter and whether their sexual activity

was consensual. The complainant said all sexual activity that occurred after their return to the apartment was without consent. Mr. Dim claimed the opposite. Whether the sexual activity progressed to intercourse was a material fact in dispute. The complainant claimed Mr. Dim penetrated her. He flatly denies doing so.

[24] The complainant's version of what sexual activity occurred, or that which she could recall, is summarized as follows.

[25] She acknowledged Mr. Dim touched her at the social event when they were talking. She said she did not respond in kind. She did not recall dancing with Mr. Dim at the apartment, nor kissing him when they left the apartment to get a bottle of vodka from his car. Nor did she recall later kissing him in his car after returning from the bank and before going back up to the apartment.

[26] After they returned to the apartment she did recall being naked and kissing Mr. Dim. She remembered Mr. Dim having contact with her chest and genital area. She denied unzipping Mr. Dim's pants, touching his penis or performing oral sex on him.

[27] When his face was near her vagina, she claimed that she used her hand to attempt to physically block Mr. Dim. She said she loudly reminded him she had a boyfriend and repeatedly told him to stop. She claimed Mr. Dim responded by saying she did not have a boyfriend and was only using this as an excuse. At this time, she was reclined on the couch and Mr. Dim was on top of her.

[28] The next sexual activity she recalled was Mr. Dim pushing his penis into her vagina. She said she pushed his chest and told him to stop. She could not recall if he used a condom, but did recall Mr. Dim telling her it was OK, he had one. She claims she told him it did not matter as she did not want to do this. She did not know if he ejaculated. She said the intercourse ended after a few minutes when she told him she was going to be sick and threw up in her hand.

[29] Mr. Dim's version of what happened is starkly different. He claimed their sexual encounter started with them flirting and touching at the social event. While talking, he touched her waist and shoulders with no objection. After the group arrived at the apartment they briefly left to retrieve the vodka he had in his car. They kissed in the elevator. She told him she wanted to do that all night.

[30] They danced suggestively in the apartment and otherwise remained physically close and interested in each other. When they returned to the apartment parking lot after going out for awhile to give CG and DK their privacy, they kissed in his car. He said things started to intensify so they went back up to the apartment.

[31] Once in the apartment, they sat on the couch and resumed kissing. Mr. Dim claimed the complainant touched his crotch area and removed her own shirt. He kissed her breasts. He said she undid his belt buckle and zipper and began to perform oral sex. He touched her breasts and body while she did so. After oral sex concluded, he removed the complainant's pants and underwear. She was lying down and raised herself up to assist. He then performed oral sex on her. After he concluded, they kissed some more.

[32] He said the complainant next asked if he had a condom. He said he did not. To which she said something to the effect that, well then "you're going to have blue balls tonight." Mr. Dim explained he understood this to mean there was to be no sexual intercourse. He said none occurred. He said at this point the sexual activity simply ended. As far as their sexual activity up to this point, he claimed she never told him to stop or tried to stop him in any way. Mr. Dim said the complainant was in full control of her actions and he never forced her to do anything she did not want to do. He claimed she had consented throughout and was an active, voluntary participant, if not the aggressor at times.

[33] He denied she threw up. He says after their sexual encounter stopped short of intercourse, she got up to go to the bathroom, returned to the living room, put on her clothes, and laid beside him on the sofa. About 15 minutes later, he drove her home. She only lived a few blocks away. Mr. Dim said she hugged him before departing and asked him to let her know when he got home. He sent her a text saying "home" at about 5:15 a.m. They had exchanged numbers earlier in the evening. Later that morning, around 11:30 a.m., Mr. Dim sent another text message to the complainant. He asked her, "Hey how are you feeling."

[34] When the complainant got into her apartment, she went into the bedroom and made some disclosures to her boyfriend. I refer to him as TC. He said she told him that her night was "pretty terrible" and "I hate guys who force their dicks on you." Before she fell asleep, TC asked if anyone hurt her. She indicated the appellant had. TC further testified that when she awoke a bit later she was

somewhat incoherent, became incontinent and was emotional. Further disclosures were made which led TC to call the complainant's sister. I refer to her as JR.

[35] JR testified that when she arrived at the complainant's apartment, sometime after 9:00 a.m., the complainant was coherent, but emotionally distraught. Because of disclosures the complainant made to her sister JR, the police were contacted. This led to the complainant being transported to the hospital for a sexual assault examination.

[36] Jane Collins was a member of a two-nurse team that conducted the examination. Ms. Collins was qualified as an expert witness entitled to give opinion evidence regarding the identification of sexual assault injuries and the identification and collection of related forensic evidence.

[37] She reported the complainant was crying and vomiting when she entered the examination room. During her examination, she found several red abrasions on the complainant's labia majora together with tenderness in her perineal area (the area between her vagina and rectum). She equated the abrasions with blunt force trauma. She opined that tenderness in the perineal area is not common. Ms. Collins was not able to perform a speculum examination as the complainant's genital area was very sore. The complainant also had several bruises on her legs and arms which she said were not there before last evening. Ms. Collins was not able to date bruises. The examination lasted approximately three hours. Ms. Collins said that the examination was much longer than normal because the complainant was vomiting so much.

[38] Ms. Collins testified to the effect that the injuries she observed were consistent with the complainant's narrative and consistent with a sexual assault having occurred. The complainant also testified that these injuries were not present prior to her encounter with Mr. Dim.

[39] Lori Campbell was qualified as an expert witness. Within the scope of her qualification she gave forensic opinion evidence respecting the complainant's blood alcohol concentrations (BAC), rates of absorption and elimination in her body and the impact alcohol had on her sensory and cognitive functions at various points during her encounter with Mr. Dim. She analyzed blood and urine samples which were taken from the complainant when she was at the hospital on September 28.

[40] She analyzed the complainant's BAC at the time of collection and projected her BAC during the critical time period between 2:00 a.m. and 5:00 a.m. She opined that the complainant's BAC at 2:00 a.m. would have been between 150 and 260 mg percent and between 120 and 200 percent at 5:00 a.m. This was based on the assumption that no alcohol was consumed half-an-hour prior or post 2:00 a.m.

[41] She also opined on the state of impairment for the range of the BAC's. Both in her testimony and expert report, she explained how alcohol, a central nervous system depressant, slows or dulls many of a person's mental, sensory and motor functions in a progressive manner. She explained the higher the BAC, the greater the deterioration of all these faculties and abilities. She explained how alcohol has the effect of reducing inhibitions, increasing self-confidence, causing a reduced attention to the environment and a decreased ability to concentrate and make critical judgments. She explained that the level of impairment (i.e. speech, motor coordination, memory and mental functioning) would be impacted by various factors such as whether the person was an inexperienced drinker with low tolerance to alcohol.

[42] DNA evidence was also tendered by the Crown. This evidence established that saliva was present on the front panel of the complainant's underwear and Mr. Dim's DNA profile could not be excluded as the source. No semen was found on her underwear or on the vaginal swab taken during the sexual assault examination.

[43] In his oral decision, the trial judge set out his findings of credibility and fact. The following are some key findings:

1. The complainant was found to be a credible witness. Although she acknowledged having a patchy memory about certain things that occurred that evening, the trial judge found she did not appear to be filling in any memory blanks by making evidence up or with things others had told her. He found she displayed no signs of being vindictive.

2. The complainant was not in the habit of getting drunk (which impacted her tolerance levels); however, she drank more than she recalled that evening/early morning and she was, in fact, intoxicated. He found she consumed four bottles of beer at the social event between 9:00 p.m. and 12:00 a.m. She had not consumed any drugs or alcohol before the event. She consumed two glasses of wine at the

apartment. One DK poured for her; the second she poured herself. The exact amount of wine contained in each glass was unknown.

3. Mr. Dim and the complainant left the apartment and went to Mr. Dim's vehicle to retrieve a bottle of vodka. Although the complainant said she did not consume any vodka, the trial judge was satisfied that the toxicological evidence confirmed she had.

4. At the time the assault occurred the complainant was intoxicated. Her BAC was such that her: inhibitions were reduced; her judgment was affected; her sensory and cognitive abilities were impaired; and her impaired mental faculties caused reduced attention to her environment and a decreased ability to concentrate and to make critical judgments. These findings were supported by the evidence of the expert toxicologist. Based on the accepted evidence of the toxicologist expert, the complainant's BAC was in the mid- to high-end of the 150 to 260 mg of alcohol range at 2.00 a.m., and 120 to 200 mg of alcohol at 5:00 a.m.

5. Mr. Dim and the complainant flirted together at the social event. When they first arrived at the apartment they danced together, sat close and talked. When the complainant and Mr. Dim came across JM staggering home during their time away from the apartment, (so DK and CG could have private time), he accepted the complainant's testimony that she asked Mr. Dim to drive JM home. He found Mr. Dim refused because he wanted to be alone with the complainant.

6. When Mr. Dim and the complainant returned to the apartment they sat on the couch and began kissing. The kissing and petting was consensual. Even the progression to oral sex Mr. Dim performed on the complainant was initially consensual. However, at some point while Mr. Dim was kissing her genitals, the complainant told him to stop because she had a boyfriend. He found Mr. Dim did not stop. Rather, he told the complainant she was just saying this as an excuse. He found that Mr. Dim proceeded to penetrate the complainant (sexual intercourse) and as he was doing so she vomited into her hand. She then got up and went into the bathroom.

7. He found that the sexual intercourse was without consent. He determined that the physical findings made by Ms. Collins during the sexual assault examination, coupled with her observations regarding the complainant's demeanour before, during, and after the

examination, supported the finding that there was non-consensual intercourse. The trial judge also accepted and relied on the evidence of the complainant's boyfriend and sister respecting the complainant's condition on September 28.

8. The trial judge expressly rejected most of Mr. Dim's exculpatory evidence respecting whether sexual intercourse occurred; including his evidence that the complainant said he would have "blue balls", meaning no sexual intercourse. He found he had his mind set on having a sexual encounter.

9. He rejected Mr. Dim's evidence that the complainant was in full control of her actions that evening, and that he never forced her to do what she did not want to do. He found Mr. Dim attempted to downplay the complainant's level of impairment. He found the evidence of Mr. Dim did not raise a reasonable doubt as to whether sexual intercourse occurred.

[44] Based on the evidence that the trial judge accepted, he found the Crown had proven its case beyond a reasonable doubt.

[45] I will supplement any additional evidence or factual findings as necessary during my analysis of the issues.

Standard of review

[46] I will address the applicable standard of review in my analysis of each issue.

Analysis

Did the trial judge apply markedly different standards of scrutiny to the evidence presented by the Crown and defence?

[47] Mr. Dim argues the trial judge treated the Crown and defence evidence fundamentally different. He claims this uneven treatment or scrutiny led to an unbalanced approach to the evidence which worked to his prejudice. He claims it rendered the guilty verdict unsafe and necessitates appellate intervention.

[48] It is an error of law to apply different standards of scrutiny to the evidence of the defence and Crown. The standard of review is correctness for errors of law. (See *R. v. C.R.*, 2010 ONCA 176 and *R. v. Gravesande*, 2015 ONCA 774.)

[49] It is often recognized that a ground of appeal alleging the application of markedly different standards of scrutiny is a difficult argument to make. In *R. v. Radcliffe*, 2017 ONCA 176, these basic principles were reviewed:

> [23] First, as the appellant recognizes, this is a difficult argument to make successfully. The reasons are twofold. Credibility findings are the province of the trial judge. They attract significant appellate deference. And appellate courts invariably view this argument with skepticism, seeing it as little more and nothing less than a thinly-veneered invitation to re-assess the trial judge's credibility determinations and to re-try the case on an arid, printed record: *R. v. Howe* (2005), 2005 CanLII 253 (ON CA), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 59; *R. v. George*, 2016 ONCA 464 (CanLII), 349 O.A.C. 347, at para. 35.
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> [24] Second, to succeed on an uneven scrutiny argument, an appellant must do more than show that a different trial judge assigned the same task on the same evidence could have assessed credibility differently. Nor is it enough to show that the trial judge failed to say something she or he could have said in assessing credibility or gauging the reliability of evidence: *Howe*, at para. 59.
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> [25] Third, to succeed on the argument advanced here, the appellant must point to something, whether in the reasons of the trial judge or elsewhere in the trial record, that makes it clear that the trial judge actually applied different standards of scrutiny in assessing the evidence of the appellant and complainant: *Howe*, at para. 59; *George*, at para. 36.
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> [26] Fourth, in the absence of palpable and overriding error, there being no claim of unreasonable verdict, we are disentitled to reassess and reweigh evidence: *George*, at para. 35; *R. v. Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 S.C.R. 621, at para. 20.
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> **[. . .]**
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> [28] I begin with the obvious. The mere fact that the trial judge accepted the evidence of the complainant and rejected that of the appellant in concluding that guilt had been established beyond a reasonable doubt does not move the yardsticks on an argument based on uneven scrutiny.

[50] Mr. Dim argues the judge's uneven scrutiny manifested itself in several ways. He says his account of what happened between himself and the complainant was straightforward and unembellished. On the other hand, the complainant had a patchy memory and overall the evidence pointed more to her lack of reliability and credibility, which was evidence the judge failed to properly assess. Mr. Dim argues the judge simply rejected his evidence because it conflicted with her account.

[51] Mr. Dim's proposed examples of uneven treatment include the following:

- The trial judge found that the complainant drank more than she said she did;
- The trial judge accepted that there was dancing at the apartment, including "grinding" type dancing, yet ignored the complainant's sworn testimony that she did not recall dancing;
- The trial judge found that the appellant did not want to drive JM home because he wanted to be alone with the complainant;
- The trial judge failed to address the complainant's persistent diminution of her behaviour, including any flirtatious behaviour, towards the appellant;
- The trial judge used the forensic evidence to confirm that oral sexual activity occurred, based on the presence of saliva on the complainant's underwear. But he failed to address the lack of evidence of semen found on any of the samples in considering the appellant's sworn denial that there had been sexual intercourse;
- The trial judge rejected the appellant's evidence that the complainant did not vomit, with no scrutiny applied to her evidence, considering the evidence that no vomit was seen in the apartment the next morning;
- The trial judge used what is arguably a neutral fact – the appellant's text message asking, "how're you feeling?" which was sent the next day – as evidence to confirm she had vomited;
- The trial judge rejected the appellant's evidence that "hook up" could mean different things in different contexts and the trial judge misapprehended the appellant's evidence about his intention to hook up;
- In the face of the complainant's testimony that she did not consent to any of the activity on the couch, the trial judge found that some sexual activity was consensual. These findings are logically inconsistent;
- The trial judge was quick to diminish evidence favourable to the appellant and to find flaws in his testimony, even where none appeared to exist. The trial judge rejected the appellant's evidence that the complainant was in full control of her actions, despite having found that she had, in fact, consented to some sexual activity.

[52] The Crown asserts this ground is an attempt to relitigate credibility findings properly made by the trial judge. The Crown's position is the decision reflects a

rigorous consideration of all the evidence in resolving factual findings that led to conviction. The Crown says the defence has failed to point to any clear instance of uneven scrutiny. The Crown pointed out, correctly in my view, findings of fact the judge made which were contrary to the evidence of the complainant particularly when other evidence independently or cumulatively merited such a finding.

[53] For example: the fact that the two danced together was confirmed by another witness, and despite the complainant's evidence about how much alcohol she consumed, the toxicology evidence, as well as other evidence, satisfied the trial judge she drank more than she recalled and was in fact intoxicated. As a result, he found her inhibitions were reduced and her judgement and memory were affected. However, he nonetheless found her to be a credible witness. She admitted having a patchy memory about certain things; however, she did not appear to the trial judge to be making things up or otherwise filling in the blanks by what others told her. The trial judge said this at paragraph 18 of his decision:

> [18] There is no requirement that a witness in a criminal trial remember every single irrelevant detail of an event that occurred years ago. In this case over two years ago. The Court does not expect a complainant to be a perfect witness who remembers every minor details of the event in question. Allowances are made for minor errors and inconsistencies in recollection. That is why as the trier of fact in this case the Court can accept all, some, or none of a witness' evidence. …

[54] Respecting whether she vomited in her hand at the apartment, there was evidence of her being ill and continuing to vomit later in the day. Furthermore, the trial judge's interpretation of Mr. Dim's text some hours after he dropped her off at her apartment inquiring how the complainant was feeling was open to him. Just because he interpreted the text differently than the appellant would have liked does not make it wrong.

[55] Regarding the complaint about the judge not referencing the absence of DNA evidence confirming semen, the trial judge had the evidence that the complainant could not recall if Mr. Dim ejaculated before the sexual intercourse was stopped. Thus, on the evidence, it was open to the trial judge to infer that no semen was present.

[56] Respecting the judge's interpretation of Mr. Dim's term "hook up", his use of the term was not consistent. Based on the record and his varying use of the term, it is no surprise how the term was interpreted by the trial judge. Again, Mr.

Dim might be dissatisfied with the interpretation adopted by the judge but that does not make it wrong in the context of this record.

[57] He also accepted some of the appellant's evidence, but rejected other evidence that was contradicted by the complainant and other evidence. Specifically, the trial judge accepted sexual activity up to a point was consensual. That factual finding was open to him on the evidence. Implicit if not explicit in this finding, is that some of Mr. Dim's evidence was accepted. The critical determination then became whether sexual intercourse occurred. The trial judge accepted the evidence of the complainant on this point. He adequately explained why he found her credible and why he rejected Mr. Dim's evidence on this point.

[58] Credibility findings fall squarely within the domain of the trial judge. His findings are subject to significant deference. (See *R. v. Dinardo*, 2008 SCC 24.) Furthermore, and of significance, is the evidence of the sexual assault examiner, Ms. Collins. The trial judge accepted her evidence that the complainant's injuries were consistent with her narrative and a sexual assault. He was entitled to rely on this evidence, in part, to determine whether the Crown met its burden. This was not simply a case of "he said/she said".

[59] After a careful review of the record, I am of the view this ground must fail. With respect, the examples put forth to support a differential standard of scrutiny are not persuasive. The credibility and factual findings made by the trial judge were clearly available to him on the evidence. I see nothing in the record that makes it clear that the trial judge applied different standards in assessing the evidence of the Crown and defence.

Did the trial judge materially misapprehend text message evidence?

[60] The appellant's submissions on this point were brief. In his factum, Mr. Dim described the alleged error as follows:

> 80. At 11:59 p.m., (the complainant) sent a text message to her boyfriend advising that she was going out, presumably to a bar. He called her immediately. She missed the call. At 12:07 a.m., (she) sent a message saying "I'll be home later. Not drunk. Don't worry about it. Go to sleep." In addition, (she) claimed that she telephoned (her boyfriend) and advised him that she was at someone's apartment and that they would be proceeding downtown to go to a bar. However, (he) believed that he had initiated the call and that (she) had advised him that she was still at the (social event). It is submitted that this was evidence consistent with her desire to continue her evening with the Appellant. Moreover, it demonstrated a concerted effort to assuage any anxieties her boyfriend may

> have had about her being out drinking. This evidence was material, as it was probative of (her) state of mind and her intention to continue to spend time with the Appellant rather than go home. It is submitted that the failure to consider this evidence amounted to a material misapprehension.

[61] Mr. Dim argues the text message demonstrated a deliberate course of conduct consistent with consent to sexual activity, and the trial judge's failure to consider and give proper effect to the evidence was a material error and made the trial unfair.

[62] A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. A misapprehension of the evidence must have played an essential part in the reasoning process that led to conviction. It cannot be peripheral. Nor can it be confused with a different interpretation of the evidence than that adopted by the trial judge. (See *R. v. Lohrer*, 2004 SCC 80; *R. v. Morrissey* (1995), 80 O.A.C. 161 (Ont. C.A.); and *R. v. J.P.*, 2014 NSCA 29.)

[63] In his decision, the trial judge makes no mention of these two text messages which were sent several hours before the sexual activity that led to the charge of assault occurred. In my view, on this record, that does not equate to a material misapprehension of the evidence. The trial judge made no mistake or real error in failing to mention them.

[64] The trial judge had indeed found that the sexual activity short of sexual intercourse was consensual. I point out that this finding is consistent with Mr. Dim's purported meaning of the texts. The act that was found to be non-consensual was the penetration/sexual intercourse; something which Mr. Dim flatly denied occurred and, based on his communications with the complainant, he understood they were not going to engage in.

[65] On the point of sexual intercourse, Mr. Dim's defence was not that she consented to it or he had any mistaken belief in consent, rather, it just did not happen. The text messages had no material bearing on this critical issue. I see no merit to this ground of appeal.

Did the trial judge fail to appreciate the disinhibiting effects of alcohol?
Did the trial judge improperly conflate capacity to consent with consent?

[66] Mr. Dim asserts the failure to appreciate the disinhibiting effects of alcohol is yet another example of the trial judge's material misapprehension of the evidence. He also asserts the trial judge got the issues of capacity to consent and whether the complainant consented entangled. If so, this resulted in a legal error reviewable on a standard of correctness.

[67] These grounds were also addressed briefly by the appellant, and I will deal with them together. As I have now stated several times, on appeal the critical issue or dividing line between the appellant and the complainant is whether penetration/sexual intercourse occurred. That is because the other sexual activity was found to be consensual. In my view, for the reasons already explained in paragraphs 64 and 65, these grounds also have no direct bearing on the ultimate finding that non-consensual sexual intercourse occurred. Which I repeat was clearly a finding open to the trial judge on this record. That said, I will briefly address these grounds.

[68] Capacity to consent was not in issue. The Crown acknowledged the complainant had the capacity to consent to the sexual activity notwithstanding her level of impairment. A complainant lacks capacity to consent where she is intoxicated to the point where she could not understand the sexual nature of the acts or realize that she could decline to participate (see *R. v. P.(M.A.)*, 2004 NSCA 27 and *R. v. J.A.*, 2011 SCC 28). This was the not case with this complainant. In issue was whether the complainant had consented. The trial judge correctly outlined the general legal principles respecting consent in his decision and he applied them.

[69] There is nothing express in the record nor anything that could be implied to support any contention that the judge conflated capacity with consent. Nowhere in his decision does the trial judge ever conclude that the complainant lacked the capacity to consent as a result of intoxication/impairment. Nor is there anything in the record that supports the contention the judge did not consider the disinhibiting effects of alcohol. To the contrary, he expressly noted the complainant's BAC level was such that her inhibitions were reduced and her judgment was affected. In my view, these grounds can and should be summarily dismissed.

Did the trial judge err in making an adverse credibility finding against the appellant due to a violation of the rule in Browne v. Dunn?

[70] Under this ground of appeal, Mr. Dim claims the trial judge improperly and unfairly made an adverse credibility finding against him on a purported violation of the rule in *Browne v. Dunn*, (1893) 6 R. 67 (U.K. H.L.) As noted in *R. v. Giroux* (2006), 207 C.C.C. (3d) 512 (Ont. C.A.):

> [42] The so-called rule in *Browne v. Dunn* is designed to provide fairness to witnesses and parties. It requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. But it is not a fixed rule, and the extent of its application is within the discretion of the trial judge, depending upon the circumstances of the case. See *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 (S.C.C.) at 493; *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.) at paras. 21-22 (and authorities cited therein). . . .

[71] Mr. Dim argues there was no violation of the rule and further, if there was, he was denied the opportunity to make submissions on any remedy. To put this complaint in context, during the trial no concern respecting a violation of this rule was raised. It did not surface until the trial judge mentioned it in his decision. Mr. Dim argues more timely notice was required and a failure to do so was a denial of procedural fairness, and, as a result, no deference should be afforded to the trial judge's approach to the perceived breach.

[72] The rule in *Browne v. Dunn* is a rule of trial fairness. Its purpose is to provide fairness to a witness. In its operation, if counsel proposes to challenge the credibility of a witness (in this case the complainant) by calling contradictory evidence, that witness must be provided the opportunity to address the contradictory evidence. The potential effect of the breach will depend upon the circumstances of the case. (See *R. v. Paris* (2000), 138 O.A.C. 287 (Ont. C.A.))

[73] In the case at hand, the trial judge identified the issue as follows:

> [31] [The complainant's] evidence was that Mr. Dim penetrated her. Mr. Dim denied that he did so. His evidence was that [the complainant] asked him if he had a condom, and when he told her that he did not, [the complainant] said, "You're going to have blue balls tonight." It is noteworthy that this alleged comment by [the complainant] was never put to her during cross-examination. The rule in *Browne v. Dunn* requires Counsel who intends to challenge the credibility of a witness by calling contradictory evidence to give the witness a chance to address the contradictory evidence in cross-examination while in the witness box. This rule is grounded in common sense and fairness to the witness. Failure to confront

> the witness may be used to negatively affect the credibility of the contradictory evidence. *R. v. Paris*, Ontario Count of Appeal, leave to appeal to Supreme Court of Canada refused, June 14, 2001. In cross-examination Mr. Dim testified that this phrase meant to him that he and [the complainant] were not going to "hook up" that night. I do not accept Mr. Dim's evidence on this point as to what [the complainant] said.

[74] That was the extent of the trial judge's reference to the breach and what evidence of Mr. Dim he rejected.

[75] Mr. Dim argues the rule is not engaged. He says that because it was clear from her evidence she took the position non-consensual intercourse happened, defence counsel was not obligated to put further details to her about the lack of sex. Put another way, she was not ambushed and defence counsel was not required to put this detail to her.

[76] I do not accept Mr. Dim's argument that the rule was not engaged. The specific "blue balls" comment underpinned Mr. Dim's claim that no intercourse took place. As stated in *Giroux*, this rule is not a fixed rule. When assessing credibility, the extent of its application is within the discretion of the trial judge and the potential significance of any breach will depend on the circumstances of the case (*Paris*).

[77] In my view, the trial judge did not commit any error in the exercise of his discretion. I say that because: these comments were made in the context of his overall assessment of credibility; he accepted other evidence of Mr. Dim and made no sweeping rejection of Mr. Dim's credibility; there was other evidence he relied upon to conclude intercourse happened, particularly the evidence of the expert nurse, Ms. Collins; and finally, adopting the common sense approach of *Browne v. Dunn*, the trial judge was entitled to find that the probative value of the "blue balls" comment, attributed by Mr. Dim to the complainant, suffered because the court did not have the benefit of the complainant's version. I would dismiss this ground.

Did the trial judge fail to provide sufficient reasons?

[78] Under this ground of appeal, Mr. Dim makes broad sweeping statements to the effect that: the trial judge's reasons are no more than a blanket acceptance of the complainant's version of events; there is no meaningful analysis of credibility or reliability; there is no resolution of inconsistencies; and there are no real reasons for dismissing the appellant's position. In short, Mr. Dim contends he has been left

with no understanding of why he was not believed and why his evidence did not raise a reasonable doubt, and he has been deprived of his right to meaningful appellate review. Apart from these conclusory failings, nothing new is offered as to how the trial judge fell short in the appellant's eyes. It is really a repetition of what has been advanced under the previous grounds of appeal. Saying it twice or repackaging the complaints under another label does not make the contention more persuasive.

[79] What the Supreme Court of Canada said in *R. v. R.E.M.*, 2008 SCC 51 about the adequacy of reasons is helpful:

> [35] In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[80] Respecting the sufficiency of reason for credibility findings the Court went on to say:

> [48] . . . The Court tackled this issue in *Gagnon*, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science." They went on to state that it may be 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", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.
>
> **[. . .]**

> [50] What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*,where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility . . . the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.
>
> [51] The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

[81] And finally, the Court said this about the role of appellate courts in assessing the sufficiency of reasons:

> [55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.
>
> [56] If the answers to these questions are affirmative, the reasons are not deficient, notwithstanding lack of detail and notwithstanding the fact that they are less than ideal. The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. For example if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute an error of law; in such a case the conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt. Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14, "[a]n

> appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. . . . Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."
>
> [57] Appellate courts must ask themselves the critical question set out in *Sheppard*: Do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo*), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

[82] The trial judge did not touch on every piece of evidence or deal with every minor inconsistency. However, on balance and reviewing his reasons in the context of the evidence, the submissions of the respective parties and the trial record, I am satisfied his reasons are sufficient.

[83] Contrary to the appellant's assertions and as previously explained, the reasons do address both why the complainant was believed on the critical issue of whether sexual intercourse occurred and why the judge found other sexual activity to be consensual. The reasons are responsive to the live issues before the trial judge. I would dismiss this ground of appeal.

Did the trial judge err in qualifying an expert witness and then further erring by relying on such expert evidence?

[84] Both the Crown and defence referenced the correct legal principles regarding the admissibility of expert opinion (logical relevance, necessity, absence of an exclusionary rule and proper qualifications) and the trial judge's gatekeeping function to balance the potential risks and benefits of admitting the evidence. (See *R. v. Mohan*, [1994] 2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2. S.C.R. 182.) This case was not one of novel or contested science, so the trial judge did not need to consider the reliability of any underlying science.

[85] The admissibility of an expert opinion is a question of law. In *R. v. Dominic*, 2016 ABCA 114 the Court of Appeal summarized the standard of review as follows:

> [17] The admissibility of expert evidence is a question of law reviewable for correctness insofar as the proper articulation and application of the legal test is concerned...However, absent an error in principle, appellate courts generally owe deference to decisions of trial judges to admit or reject expert evidence... This is particularly so given that the cost-benefit analysis inherent in the gatekeeper inquiry involves judicial discretion rather than the application of a bright-line rule..That said, no deference is owed where the trial judge fails to undertake their gate-keeping function in determining the admissibility of expert evidence... (citations omitted)

[86] Mr. Dim contends Ms. Collins was not a neutral and independent witness. He claims she was biased. His argument is based upon the premise that as a sexual assault examiner, she, as a function of her position, would simply default to the narrative of the complainant and therefore could not otherwise form independent opinions. Mr. Dim sees her role as simply to document evidence and send samples to appropriate forensic agencies for testing and not to opine on whether observed injuries are consistent with sexual assault.

[87] In summary, Mr. Dim argues the trial judge made these specific errors: 1) his failure to consider bias was an error of law; 2) he should not have relied on Ms. Collins' evidence because its prejudicial nature outweighed its probative value; and 3) the opinion evidence was speculative, in the absence of any consideration as to whether there was another explanation for the injuries. Specifically, possible recent sex with her boyfriend or as the result of other sexual acts between the appellant and complainant which he found to be consensual. Mr. Dim on appeal suggests perhaps rough oral sex could explain the injuries. However, these alternate theories were not raised by the defence at trial.

[88] I see several other fundamental problems with Mr. Dim's contention that the trial judge erred in admitting and then relying upon the expert opinion evidence of Ms. Collins, most significantly:

1. Bias was never raised by the defence at trial. As noted, in *White v. Abbott*, 2015 SCC 23 at paragraph 48, the burden rests on the opposing party to show a realistic concern for bias at the qualification hearing. Mr. Dim did not do so. It is hard to fault the trial judge on his assessment of qualifications or his gatekeeping function when no concern was raised.
2. At trial, defence counsel questioned Ms. Collins on her qualifications and in his submissions to the trial judge, he did not argue the collection of evidence or her factual observations were inadmissible.
3. Ms. Collins had conducted over 300 sexual assault examinations. She could speak to whether what she observed in this case was common or uncommon injuries, measured against the number of examinations she conducted.
4. The Crown points out that if the appellant's complaints are correct, then no doctor or nurse performing a sexual assault examination would be permitted to draw any link between the injuries observed and their consistency with the history complained of. This suggestion seems contrary to well-established jurisprudence. (See for example: *R. v. S.(J.S.)*, 2016 BCCA 411; *R. v. Quashie* (2005), 198 C.C.C. (3d) 337 (Ont. C.A.); *R. v. Basra*, 2008 BCSC 917, aff'd, 2009 BCCA 520; and *R. v. B.(M.J.)*, 2012 ABCA 119.)

[89] I see nothing in the record to support any imbalance in Ms. Collins' testimony. Her evidence was straightforward, supported by her medical chart and was based on her first-hand observations. In my view, Ms. Collins was a properly qualified expert and deference is owed to the trial judge's decision to admit her evidence. Even if I am wrong on this conclusion, her evidence was probative on the central issue as to whether intercourse occurred. No matter how it was characterized—fact, lay opinion or expert opinion—inferences to be drawn from her evidence were open to the trial judge. I would dismiss this ground of appeal.

Conclusion

[90] In my view, the trial judge committed no reviewable error that warrants intervention. I would dismiss the appeal from conviction.

Van den Eynden, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.