NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Al-Rawi*, 2018 NSCA 10

Date: 20180131
Docket: CAC 461056
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Bassam Al-Rawi

Respondent

-and-

Women's Legal Education and Action Fund Inc. and
Avalon Sexual Assault Centre Society

Intervenors

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judges:	Beveridge, Saunders, Bourgeois, JJ.A.
Appeal Heard:	November 22, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Bourgeois, J.A. concurring; Saunders, J.A. with concurring reasons
Counsel:	Jennifer MacLellan, Q.C., for the appellant Luke Craggs, for the respondent Kelly McMillan and Nasha Nijhawan, for the intervenors

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

INTRODUCTION

[1] There can be little doubt that alcohol and crime are frequent consorts. Intoxicants can fuel criminal behaviour or make individuals vulnerable to the risk of criminal predation. This case involves the latter.

[2] The circumstances of the evening of May 22, 2015 combined to lead the complainant to become severely intoxicated. Pressed for time, she had nothing to eat, and, feeling emotionally vulnerable, she drank too much. Descriptions of what and how much alcohol she consumed varied. She testified that between 8:00 p.m. and around midnight, she had five glasses of beer, two shots of tequila and at least one mixed drink of vodka and cranberry juice.

[3] We do know from objective uncontested evidence a number of things: she was denied re-entry to a bar due to her intoxication; she argued vehemently with friends against having something to eat or getting into a taxi to go home; she stormed off from her friends in a distraught and emotional state; and she exchanged text messages with other friends.

[4] Shortly after her last text exchange, she became a fare in a taxi driven by the respondent. Eleven minutes later, the police came across the taxi in the south-end of Halifax, far from the complainant's home or any address she was familiar with.

[5] The complainant was in the rear seat, naked from the waist down, with her breasts exposed. Her legs were propped over the front seats. She was unconscious.

[6] The respondent was seen turned in his seat, between the complainant's open legs. The police saw him trying to hide the complainant's urine-soaked pants between the console and front seat. He then fumbled with the complainant's shoes on the floor of the driver's compartment. The police described the respondent's zipper as part-way down, as were the back of his pants.

[7] The police had to rouse the complainant. She could tell them her name, her address, but not why she was there, nor what had happened.

[8] The respondent was charged with sexual assault. The trial judge accepted the complainant's evidence that she could recall little of the evening's events from the bar and nothing of her entry into and her time in the taxi.

[9] The complainant's first memory was of speaking with a female police officer, but she could not say if this was at the hospital or in the taxi.

[10] The complainant had never met the respondent before and did not recognize him nor his name, except its presence on her subpoena.

[11] The trial judge repeatedly said he had "no evidence" on the issue of lack of consent by the complainant. The judge found as a fact that the respondent had touched the complainant in a sexual manner when he removed her pants and underwear. He acquitted the respondent on the basis that the Crown had not proven beyond a reasonable doubt the absence of the complainant's consent.

[12] The Crown appeals on the basis that the trial judge erred in law in a variety of ways and seeks an order for a new trial. The respondent says the judge knew the law, and, although he expressed revulsion and disapproval of the respondent's conduct, made no reversible legal error in finding the Crown had not proved its case beyond a reasonable doubt on the issue of consent.

[13] I am satisfied the trial judge erred in law. Absent his legal errors, the result at trial would not necessarily have been the same. I would therefore allow the appeal, quash the acquittal and order a new trial.

ISSUES

[14] The Crown initially advanced six grounds of appeal. Its factum reduced these to four:

1. The Provincial Court Judge erred in law in holding the Crown had adduced no evidence of lack of consent on the part of the complainant.
2. The Provincial Court Judge erred in law by engaging in speculation on the issue of consent.
3. The Provincial Court Judge misdirected himself as to the legal meaning of consent, and erred in law by failing to direct himself on the provisions of s. 273.1 of the *Criminal Code* and on his interpretation and application of the test for capacity to consent.

4. The Provincial Court Judge erred in law by admitting and relying on evidence which was not in accordance with and violated sections 276 and 276.1.

[15] This case raises the sometimes difficult question of what constitutes an error of law. It is a question of vital importance, as the Crown, unlike a person convicted of an indictable offence, is restricted to appeals that raise a question of law alone.

[16] A person convicted can appeal on the basis of an error in law, miscarriage of justice, or that the verdict is unreasonable or not supported by the evidence (s. 686(1)). However, in the absence of legal error, the Crown cannot seek to overturn an unreasonable acquittal (see: *Sunbeam Corp. (Canada) Ltd. v. R.*, [1969] S.C.R. 221; *Lampard v. R.*, [1969] S.C.R. 373; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Morin*, [1992] 3 S.C.R. 286).

[17] The answer is not always clear whether a trial judge erred in law alone, thereby permitting appellant intervention, or simply made a factual determination that a reasonable doubt existed, for which an appellate court, however much it may consider the determination to be unreasonable, cannot intervene (see: *R. v. J.M.H.*, 2011 SCC 45, at paras. 26-27). And where the evidence was circumstantial, a finding of reasonable doubt is not necessarily flawed even in the absence of supporting evidence suggestive of an alternative inference (see: *R. v. Villaroman*, 2016 SCC 33, at paras. 38-43).

[18] Before examining the Crown's complaints of error, it is first useful to be clear about the elements the Crown was required to prove.

THE ELEMENTS OF SEXUAL ASSAULT

[19] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 is the seminal decision on the elements the Crown is required to prove in a sexual assault prosecution. The decision cemented the demise of implied consent and reinforced the necessity of focussing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching.

[20] The *actus reus* of the offence is simply the intentional sexual touching of the complainant and the absence of consent. Justice Major, for the majority, wrote:

> [23] A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. 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.
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> ...
>
> [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. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.
>
> [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: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

[21] This decision brought welcome clarity to the inquiry about consent, but by no means ended the legal debate about the subject of consent. What is meant by consent is a mélange of common law and legislation. There is no need to trace the entire provenance of this infrastructure.

[22] Briefly, consent was usually defined by what negated its existence. For the common law, it was fraud that went to the nature or quality of the act or the identity of the sexual aggressor. Deception about other matters, including disease, was not relevant (*R. v. Clarence* (1888), 22 Q.B.D. 23). This approach was mirrored in the *Criminal Code*.

[23] The offences of rape and indecent assault were abolished in 1982 (S.C. 1980-81-82-83, c. 125) and replaced by the crimes of sexual assault, sexual assault causing bodily harm and aggravated sexual assault. The general assault section was restructured into its present format. It has since been renumbered to be s. 265, but otherwise remains the same.

[24] Parliament directed that the provisions of s. 265 apply to all forms of assault, including sexual assaults. Section 265(3) delineated where consent cannot be found to exist.

[25] Section 265(3) does not refer to what the complainant subjectively thought or believed, but directs the inquiry to be what he or she did or did not do and why. It provides that consent cannot be said to be obtained where the complainant submitted or did not resist by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority. The formal words of s. 265 are as follows:

> 265 (1) A person commits an assault when
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> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
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> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
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> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
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> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.
>
> …

[26] The first legislative definition of consent did not appear until s. 273.1 was enacted (S.C. 1992, c. 38, s. 1). Section 273.1 defined consent to be the "voluntary agreement" to engage in the sexual activity in question. Subsection (2) also outlines where consent is not obtained. The full text is:

> 273.1(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
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> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
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> (b) the complainant is incapable of consenting to the activity;
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> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
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> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
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> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[27] There is no need to discuss the overlap between s. 265(3) and 273.1(2).

[28] In addition, there have always been age restrictions that preclude the existence of a valid consent to engage in sexual activities (presently, s. 150.1).

[29] Despite this legislative initiative, the law still grappled with what is meant by "voluntary agreement to engage in the sexual activity in question". As much as alcohol and crime can be frequent consorts, so can sex and deception. But the Supreme Court has made it clear that deception *per se* is insufficient to vitiate consent.

[30] Fraud by lies or failure to disclose can vitiate consent only if the complainant would not have otherwise engaged in the sexual activity, and in doing so, exposed the complainant to a significant risk of serious bodily harm (*R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Mabior*, 2012 SCC 47; *R. v. Hutchinson*, 2014 SCC 19.

[31] In this case, the Crown suggested at trial that the complainant was incapable of consenting because of her intoxication. Unfortunately, neither the Crown nor the defence provided any guidance to the trial judge as to what the appropriate test is to determine the question of capacity to consent. It is to this issue that I now turn.

[32] A complainant must have the capacity to consent to the sexual activity in question. The exact test or dividing line to determine capacity and incapacity has not yet been authoritatively settled by the Supreme Court of Canada.

[33] Of course, an unconscious complainant lacks the capacity to consent (*R. v. Esau*, [1997] 2 S.C.R. 777; *R v. Humphrey* (2001), 143 O.A.C. 151, at para. 56; *R. v. Ashlee*, 2006 ABCA 244, leave to appeal to S.C.C. ref'd, [2006] S.C.C.A. No. 415).

[34] The Supreme Court in *R. v. J.A.*, 2011 SCC 28 reiterated this axiom—the definition of consent in s. 273.1 requires a complainant to be conscious throughout the sexual activity in question. Any consent given before loss of consciousness is inoperative. But what impairment of cognitive ability short of loss of consciousness voids capacity to consent?

[35] The authorities are not unanimous about the test. For example, in *R. v. Siddiqui*, 2004 BCSC 1717, Justice Bennett (as she then was) explored a number of cases on the test for incapacity. She declined to follow previous decisions of the British Columbia Supreme Court which required the intoxicated complainant to be unconscious or in a state of automatism. Justice Bennett concluded her discussion as follows:

> [55] Therefore, the test is not one of automatism or even one of being unconscious or insensate, although all of those states would result in incapacity. In order to be incapacitated, due to whatever reason, the complainant must be unable to understand the risks and consequences associated with the activity that she or he is engaged in. The complainant must understand the sexual nature of the act and realize that he or she could choose to decline to participate.

[36] Similar language can be found in *R. v. Saadatmandi*, 2008 BCSC 250 at para. 10. These authorities, and others, have led the intervenors to suggest that the test for incapacity should be:

> a. Understanding of the nature of the specific sexual act in question;
>
> b. Ability to assess the risks and consequences associated with the act in the particular circumstances confronting the complainant, including physical risks (such as pregnancy or disease) and social risks (such as public exposure);
>
> c. Understanding that she has a choice as to whether to participate or decline to participate in the act; and
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> d. Capacity to communicate consent.

[37] I fully endorse the thrust of paras. "a" and "c", but, with respect, I am unable to agree that the remainder should be included in the test to determine capacity to consent. I will explain why.

[38] The proposed requirement that a complainant have the cognitive ability to appreciate and assess the risks and consequences of the sexual act in question is contrary to the Supreme Court's rejection in *R. v. Cuerrier*, *R. v. Mabior* and *R. v. Hutchinson* that knowledge of the risks and consequences of the act are necessary components of a valid consent.

[39] Deception about risks and consequences that expose a complainant to serious risk of harm may vitiate consent, but it is not part of the initial analysis about the existence of consent.

[40] As to capacity to communicate a voluntary agreement, the intervenors suggest that courts commonly overlook the communicative nature of consent. Specifically, that the ability to effectively communicate voluntary agreement is required for the existence of capacity to consent. They urge this Court to provide judicial clarification.

[41] The intervenors cite s. 273.1(1) of the *Code*, and a passage by McLachlin J. (as she then was) in *R. v. Esau*, *supra*, as support.

[42] With respect, there is nothing in the words of s. 273.1(1) that suggest the Crown need establish communication of a voluntary agreement to prove the *actus reus* of the offence of sexual assault. The issue of communication, or lack thereof, of a voluntary agreement is highly relevant to the issue of the *mens rea* of the offence—that the accused knew that the complainant did not consent to the activity in question—particularly in light of the statutory requirement in s. 273.2 of the *Code* that an accused took reasonable steps to ascertain the existence of consent.

[43] The comments by Justice McLachlin in *R. v. Esau* do not provide a secure toehold for such a proposition. *R. v. Esau* was a case about whether a trial judge erred by not charging a jury on honest but mistaken belief in consent—that is, the *mens rea* of the offence of sexual assault.

[44] The majority decision by Major J. agreed with the N.W.T. Court of Appeal that there was an air of reality to the issue of honest but mistaken belief in consent and confirmed the order for a new trial. Justices L'Heureux-Dubé and McLachlin dissented.

[45] McLachlin J. was of the view that the only issue raised by the evidence was whether the complainant consented to sexual intercourse with the respondent. She pointed out that there was no air of reality to honest but mistaken belief—an issue

that was only raised on appeal, and in any event, the dictates of s. 273.2 precluded reliance on such a claimed belief.

[46] However, Justice McLachlin expressed, in *obiter*, comments about the common law concept of consent, which mentioned the role of communication. She wrote:

> [64] I turn next to the common law concept of consent. Much of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails. Consent in the context of the crime of sexual assault is a legal concept. At law, it connotes voluntary agreement. It embraces the notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question. *Webster's Third New International Dictionary* (1986), at p. 482, defines consent as "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action".
>
> [65] **Consent for purposes of sexual assault is found in the communication by a person with the requisite capacity by verbal or non-verbal behaviour to another of permission to perform the sexual act. The actual thought pattern in the mind of the complainant cannot be the focus of an inquiry into consent on a sexual assault trial; direct observation of the complainant's mind is impossible and in any event, the inquiry is into the accused's conduct in the circumstances as they presented themselves to him.** When we speak of consent in a sexual assault trial we are talking about the complainant's verbal and non-verbal behaviour and what inferences could be drawn from this behaviour as to her state of mind.
>
> [Emphasis added]

[47] I endorse without hesitation the comments by McLachlin J. set out in para. 64. But, with respect, I am unable to take the same approach on the comments set out in para. 65, which the intervenors rely on as suggestive that communication of consent is part of the *actus reus* of the offence of sexual assault.

[48] The Supreme Court in *R. v. Ewanchuk*[1] clearly rejected the analytical approach set out in para. 65 above. Consent is entirely an inquiry into the subjective state of mind of the complainant, not about what she did or did not communicate. Major J. succinctly summarized this principle. I quoted from his judgment above, but it is convenient to repeat it:

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[1] Major J. wrote for a plurality of five. L'Heureux-Dubé and Gonthier JJ. "generally agreed" with the reasons of Justice Major, and McLachlin J. added a short specific endorsement of Justice Major's reasons.

> [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: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

[49] This is also reinforced by the majority reasons for judgment later written by McLachlin C.J. in 2011 in *R. v. J.A.*, *supra* where she stressed the difference between the *actus reus* and *mens rea* of the offence of sexual assault. The issue of communication of consent is only relevant to the issue of *mens rea*. She explained:

> [37] The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*: *Ewanchuk*, at paras. 48-49. Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the *actus reus* to be established.
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> [Emphasis in original]

[50] This is not to say that evidence tending to demonstrate a complainant's incapacity to communicate consent is irrelevant. Far from it. Incapacity or patent defects in being able to communicate may well be cogent circumstantial evidence of lack of capacity to consent.

[51] There are just two cases from our Court that have involved the issue of capacity to consent to sexual activity. Factually, neither presented the need to wrestle with the test for incapacity to consent.

[52] The first is *R. v. Sarson* (1992), 115 N.S.R. (2d) 445. The complainant was so intoxicated that she fell and hit her head on a coffee table, rendering her unconscious. She was carried into a bedroom "out of it". The accused went into the room and engaged in sexual intercourse with the complainant. Her clothes had been cut off and ripped off, her eyes closed throughout. She woke up twelve hours later, her underwear missing, her pants cut and her vagina sore. She was distraught. Medical examination confirmed intercourse and the presence of the accused's semen. The accused appealed on the basis that the verdict was unreasonable. Chipman J.A., for the Court, disposed of this complaint as follows:

> [18] Judge Anderson found that the complainant was "intoxicated to the extent of insensibility". He accepted the evidence of Marsh whose evidence, coupled with that of the complainant and the doctor who examined her, clearly establish sexual contact between the appellant and the complainant. He concluded that the condition of the complainant was such that she could not consent to contact of a sexual nature. While the appellant takes issue with this finding and says that the verdict is unreasonable and cannot be supported by the evidence, I cannot agree. There was ample evidence to support the conclusion that the complainant, who had no previous friendship or relationship with the appellant, became intoxicated, struck her head and was carried to a bed, "out of it". While she lay on the bed with her eyes closed the appellant got under the covers with her and was later found to be on top of her. Her underwear was cut off, her pantyhose torn and cut and her jeans were cut. She had to be dressed and carried out to the car. She was unconscious when she arrived at her apartment after being driven home. There was no conflict in the testimony relating to these principal facts. There was evidence from Goodridge in conflict with that of the other witnesses with respect to some conversation between the appellant and the complainant on the bed. The learned trial judge found Goodridge's evidence to be less than candid.
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> [19] Having regard to the evidence and the findings of Judge Anderson, I am satisfied that his verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered; *Yebes v. The Queen* (1987), 36 C.C.C. (2d) 417.

[53] Twelve years later, the test was more directly addressed in *R. v. Patriquin*, 2004 NSCA 27. The fourteen-year-old complainant consumed what was described as an incredible amount of alcohol. Before the sexual assault, she had fallen down the stairs. She was "pretty sure" the accused had sex with her. She passed out. One of her friends told her that she had had sex with the accused. She cried. The trial judge found the *actus reus* made out. His finding was described by Chipman J.A. as follows:

> [10] In addressing the *actus reus* the trial judge, in reaching the conclusion that the complainant's lack of consent was established beyond a reasonable doubt, found that she was "plastered, falling down drunk, barely knew where she was, did not know who people were, fell down a flight of stairs". **She did not have, he found, an operating mind to enable her to address the issue of consent. He expressed the view that he did not think the complainant appreciated the difference between right and wrong and the nature, quality and import of what she was doing. She was, he said, in no condition to give consent**. Thus, the ingredients of the *actus reus* were established.
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> [Emphasis added]

[54] Chipman J.A. adopted the test for capacity to consent outlined by Wright J. in *R. v. Dennison* (2002), 208 N.S.R. (2d) 230 (S.C.):

[14] In this case the live issue was whether the complainant was incapable of consenting to the sexual activity. The test for consent in a case of this nature is stated by Wright J. in *R. v. Dennison* (2002), 208 N.S.R. (2d) 230 (S.C.). At para. 15 he posed the question in the following terms:

> [15] The subjective question therefore becomes whether the Crown can establish beyond a reasonable doubt that the complainant's actual state of mind, at the relevant time, amounted to non-consent according to law. The Crown can establish the *actus reus* of non-consent by proving beyond a reasonable doubt either that the complainant did not agree to the sexual contact in question, or by proving beyond a reasonable doubt that any agreement by the complainant was involuntary. That is to say, even where the existence of agreement cannot be disproved beyond a reasonable doubt, there will be no consent unless that agreement is voluntary in nature. As referred to earlier, an agreement will be involuntary where any of the circumstances identified in s. 273.1(2) exist.

[15] Wright J. then reviewed the evidence in the case before him which dealt with an intoxicated complainant and said:

> [50] The main thrust of the Crown's argument in this respect is that A.J.S., from illness and intoxication, was incapable of consenting to the sexual activity that took place. I accept the evidence of A.J.S. that she consumed as many as 5 or 6 beers and some marijuana over the course of the evening. There was no expert evidence called to indicate the degree of intoxication that amount would likely produce, but it is a well known fact that intoxication can impair judgment, causing persons to make decisions they would not otherwise make. The question becomes - is it enough that the intoxication deprives the complainant of the ability to make sound decisions or must it go so far as to prevent the exercise of choice? <u>The answer to that, according to the legal authorities, is that in order to be found to have lacked the capability of consenting, the complainant must have been intoxicated to the point where she could not understand the sexual nature of the act or realize that she could choose to decline to participate (see, for example, *R. v. Jensen*</u> (1997) 106 C.C.C. (3d) 430).
>
> (Emphasis in original)

[55] Despite some difference in the language used by the trial judge to describe the test, the substance was the same. Hence, the trial judge did not err. Chipman J.A. wrote as follows:

> [19] Where the issue is not whether consent was given or withheld but, rather, whether the complainant was capable of consenting to the activity, the trier of fact is required to determine whether incapacity has been established beyond a reasonable doubt.

> [20] During the argument on appeal, counsel for the appellant did not and, indeed, could not dispute that when the trial judge addressed the issue of the complainant's ability to consent in terms of not appreciating the difference between right and wrong and the nature, quality and import of what she was doing, and in terms of not having an operating mind, the trial judge correctly identified the test. **It is abundantly clear to me that the trial judge, while not using the same language as used in the case law to which I have referred, applied in substance the same test and did not err in so doing.**
>
> [Emphasis added]

[56] An oft-quoted case about incapacity to consent is *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.)[2]. The appellant was convicted at trial on the basis that either the complainant had not consented or did not have the capacity to consent. Rosenberg J.A., for the majority, quashed the conviction and ordered a new trial on the grounds that the findings by the trial judge were inconsistent.

[57] Despite the consumption of alcohol and cannabis, there was no evidence that the complainant lacked the capacity to consent. She described in some detail the sexual activities that had occurred and her repeated attempts to stop the assaults. She testified that she "knew what was going on. Like, I was alert. I wasn't so out of it like drunk or stoned that I didn't know what was going on…".

[58] Justice Rosenberg ruled that the trial judge's finding that the complainant lacked capacity was unreasonable. He reasoned as follows (p. 430):

> **On the record in this case, no jury acting judicially could reasonably find that the complainant was so intoxicated by the combination of alcohol and drugs that she lacked the minimal capacity required to consent (or withhold her consent) to the sexual activity**. I do not see this issue as one turning on the trial judge's assessment of credibility so as to require special deference to the findings of credibility. To the contrary, it is the complainant's own evidence that negatives any reasonable basis for a finding of lack of capacity. The complainant made it clear that although she was drunk or "stoned" she was alert and in her own words knew what was going on. The complainant testified to a recollection of the events and even though the trial was some five years after the incident she provided details both as to the actual assault and the surrounding circumstances.
>
> [Emphasis added]

[2] Appeal quashed as not raising question of law alone: [1997] 1 S.C.R. 304

[59] That only a "minimal capacity" suffices is supported by comments by the Supreme Court of Canada that a complainant must have had an "operating mind" in order to be capable of consenting to sexual activity. For example, in *R. v. J.A.*, *supra*, McLachlin C.J., for the majority, wrote:

> [36] Section 273.1(2)(b) provides that no consent is obtained if "the complainant is incapable of consenting to the activity". Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness: see *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 143 O.A.C. 151, at para. 56, per Charron J.A. (as she then was). **It follows that Parliament intended consent to mean the conscious consent of an operating mind.**
>
> [Emphasis added]

[60] This begs the question: what constitutes an operating mind? Comatose, insensate or unconsciousness cannot qualify. Major J., in *R. v Esau*, *supra*, reflected that being unconscious due to intoxication is not the only state capable of removing a complainant's capacity to consent (para. 24). Mere awareness of the activity is also insufficient to ground capacity where the trial judge accepted that the complainant was "out of control" and "not able to say no" due to the involuntary ingestion of drugs (*R. v. Daigle* (1997), 127 C.C.C. (3d) 130 (Que. C.A.), aff'd [1998] 1 S.C.R. 1220).

[61] On the other hand, requiring the cognitive ability necessary to weigh the risks and consequences of agreeing to engage in the sexual activity goes too far.

[62] What then should be the test for capacity to consent? The common law has always recognized that if the complainant were deceived about the nature and quality of the sexual act or the identity of the participant, there is no consent (see: *R. v. Clarence*, *supra* and its progeny; *R. v. Cuerrier*, *supra*. at para. 118; *R. v. Mabior*, *supra*. at para. 39).

[63] The Supreme Court adopted these common law requirements that the complainant understand the nature of the act and identity of the specific partner as informing the inquiry under s. 273.1(1) as to the existence of a "voluntary agreement ... to ... the sexual activity in question" (see: *R. v. Hutchinson*, *supra* at paras. 54-58).

[64] It therefore stands to reason that a complainant must at least possess the capacity to appreciate the nature and quality of the sexual activity in question and the identity of the person.

[65] Numerous cases have, as well, recognized that to have capacity to consent a complainant must also be able to understand that she can agree or decline to participate in the sexual activity in question (see for example *R. v. Jensen*, *supra*; *R. v. Siddiqui*, *supra*; *R. v. Patriquin*, *supra*; *R. v. R.(J.)*, *infra*. at para. 41).

[66] Therefore, a complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity.

[67] In cases where consent and capacity to consent are live issues, the trial judge must determine if it has been established beyond a reasonable doubt that the complainant did not consent, or lacked the capacity to consent. As detailed above, these inquiries are entirely subjective.

[68] In *R. v. Hutchinson*, *supra*, the majority reasons penned by McLachlin C.J. and Cromwell J. helpfully suggest a two step approach. First, determine if the complainant consented, or at least, is there a reasonable doubt that she did not. If there is doubt that she did not consent, determine if her consent was vitiated:

> [4] The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).

[69] Difficulties present where the complainant, due to the ingestion of drugs or alcohol, truly has little or even no memory of the event. Absent direct evidence from a complainant that subjectively she did not consent, the judge or jury frequently must rely on circumstantial evidence to determine the absence of consent (see for example*: R. v. J.W.M.*, [2004] O.J. No. 1295; *R. v. Tariq*, 2016 ONCJ 614; *R. v. Cedeno*, 2005 ONCJ 91; *R. v. Thurairajah*, 2006 CarswellOnt 9699, 2008 ONCA 91; *R. v. Anderson*, 2010 YKSC 32; *R. v. B.S.B.*, 2008 BCSC 917, aff'd 2009 BCCA 520; *R. v. C.P.*, 2017 ONCJ 277; *R. v. J.M.*, [2003] O.J. No. 3493; *R. v. J.R.*, [2006] O.J. No. 2698, aff'd, 2008 ONCA 200, leave to appeal denied, [2008] S.C.C.A. 189/231; *R. v. Kontzamanis*, 2011 BCCA 184; *R. v. Meikle*, 2011 ONSC 650; *R. v. Olotu*, 2016 SKCA 84, aff'd 2017 SCC 11).

[70] Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent (see for example: *R. v. J.R.*, *supra*; *R. v. B.S.B.*, *supra*; *R. v. Olutu*, *supra*; *R. v. Meikle*, *supra* at para. 45; *R. v. Tariq*, *supra* at para. 70; *R. v. Esau*, *supra* at paras. 4 and 91; R. *v. Kontzamanis*, *supra* at para. 31). For unknown reasons, this question was not put to the complainant.

[71] In any event, a trial judge is required to consider all of the evidence adduced at trial and direct his or her mind to making the necessary findings of fact or mixed law and fact presented by the issues to be decided. In doing so, the judge must not start with any presumptions that certain types of witnesses are inherently credible or reliable, nor must the judge employ stereotypical myths or flawed assumptions.

[72] There is, of course, the legal presumption that any accused is innocent of the accusation that he or she faces. This legal presumption can only be displaced by reliable and credible evidence that establishes beyond a reasonable doubt all of the essential elements of the offence or offences charged.

[73] A trier of fact is not to assess each piece of evidence individually on a standard of proof beyond a reasonable doubt (*R. v. Morin*, [1988] 2 S.C.R. 345). Rather, the trier of fact must take into consideration all of the circumstantial evidence relevant to any particular element.

[74] When the evidence is entirely circumstantial, the judge must again consider all of the evidence. If after considering that evidence, existence of the elements is

the only reasonable or rational inference, the trier of fact should draw the inference that the elements, and hence guilt, have been established beyond a reasonable doubt (see *R. v. Villaroman*, *supra* at para. 41). If there are other reasonable or rational explanations inconsistent with guilt, the inference must not be drawn and the accused acquitted.

[75] With this legal background, I turn to the trial judge's reasons and the Crown's complaints of legal error.

THE TRIAL JUDGE'S REASONS

[76] The trial judge delivered an oral decision on March 1, 2017. This was 19 days after completion of evidence and summations. The only evidence heard by the trial judge came from Crown witnesses. The respondent did not testify. No defence witnesses were called.

[77] The trial judge recited the essence of the complainant's evidence. It is evident from his reasons that he accepted her evidence and that of the other Crown witnesses on the essential details of the events of May 22-23, 2015. I take the following details from his reasons, and the uncontested evidence:

- The complainant drank five glasses of beer between 8:00 p.m. and 10:00 p.m.
- The complainant arrived at Boomers, where she drank two tequila shots and at least one vodka and cranberry juice.
- The complainant does not remember being barred from re-entering Boomers, nor the detailed and prolonged argument with her best friend and her best friend's boyfriend between 12:15 a.m. and 12:30 a.m.
- The complainant had no recall of texting with friends, nor of hailing the respondent's taxi on Grafton Street at 1:09 a.m.
- The complainant's first recollection after having drinks at Boomers is speaking with a female police officer in the early morning hours, but she could not say if it was in the ambulance or at the hospital.
- The complainant's usual practice when taking a cab home from downtown is to give her address, sit in the rear passenger side, and to have a $20 bill ready to pay for the fare, including tip.

[78] It was 1:20 a.m. when a police officer approached the respondent's taxi. The engine was running, the rear window had fogged up. The complainant was naked from the waist down. Her head was by the rear passenger door, with her legs propped over each front seat. Her top was pulled up, partially exposing her breasts. She was unconscious.

[79] The respondent was turned facing the rear seat, with the driver's seat partially reclined. He was seen trying to shove the complainant's jeans and underwear between the console and the front seat. They were wet with urine and turned inside out.

[80] The complainant's black wedge sandals were on the floor of the driver's compartment. On the passenger seat was the complainant's purse and jean jacket. Her wallet, cell phone and a $20 bill were on the front passenger side floor.

[81] The trial judge appeared to accept the police observations, including that: the respondent's pants were undone; his zipper down a couple of inches; the rear of his pants down six to eight inches; and the driver's seat partially reclined.

[82] Swabs were done of the respondent's hands, penis and mouth area to determine if the complainant's DNA was present. No expert witness testified about the results. Forensic reports about DNA tests on the swabs were admitted by consent.

[83] The hand swabs revealed mixed DNA profiles that were not suitable for analysis. The penal swab matched the respondent's DNA profile. No other profile was present. The swab taken from around the respondent's mouth contained the respondent's DNA and DNA that matched the complainant's.

[84] The complainant underwent a thorough examination at the QEII Hospital by sexual assault nurse examiners (S.A.N.E.). They found no evidence of injuries that might have been indicative of a sexual assault. Swabs were taken. No semen was identified on the swabs or the complainant's underwear. The forensic reports are silent about other DNA that may have been found on her underwear.

[85] Blood and urine samples were taken from the complainant at 3:30 a.m. on May 23, 2015. Dr. Tracy Cherlet of the RCMP National Forensic Laboratory testified about the test results from those samples. As well, she was qualified as an expert to give opinion evidence on the physiology of alcohol and with respect to the absorption, distribution and elimination of alcohol from the body,

pharmacology of alcohol as it relates to the effects of alcohol on the human body, and the retrograde and anterograde estimates of blood alcohol concentrations.

[86] Dr. Cherlet's December 15, 2015 report was introduced as an exhibit. The complainant's blood sample, taken at 3:30 a.m., revealed a blood alcohol concentration (BAC) of 210 mg of alcohol per 100 ml of blood. It was not contested that the complainant's BAC, when in the respondent's taxi, was between 223 and 244 mg/100 ml. I will provide additional details of Dr. Cherlet's evidence later.

[87] The trial judge said at numerous points in his oral reasons that the evidence caused him "concern", and that he "struggled to determine what all of this evidence proves".

[88] In the end, he concluded that although the complainant was unconscious when the police showed up, he could not determine when that happened. As she had been able to communicate earlier and appeared to make decisions for herself, the Crown had adduced no evidence of lack of consent by the complainant.

NO EVIDENCE OF LACK OF CONSENT

[89] One of the Crown's complaints of reversible error is the trial judge's conclusion that the Crown had failed to produce "any evidence of lack of consent" by the complainant. The judge said this three times. The first was as follows:

> That being said, it is the burden on the Crown to prove in this case that the complainant **could not or had not consented to any sexual activity. The Crown failed to produce any evidence of lack of consent at any time when Mr. Al Rawi was touching the complainant.**
>
> [Emphasis added]

[90] After saying this, the trial judge found that the reason the complainant's sandals were in the driver's compartment was because the respondent took possession of them. He also found that the respondent took the complainant's pants off by pulling them off of the complainant with her underwear, turning them inside out.

[91] As to how the complainant's DNA ended up on the respondent's mouth, the trial judge reasoned:

> I also believe that the complainant's DNA was located on Mr. Al Rawi's upper lip because, in all probability, he wiped his hand or fingers over his lip area, either intentionally or absentmindedly, after handling the urine soaked pants of the complainant. That would explain her DNA being on his upper lip.

[92] He summed up his findings, which again expressed the view that the Crown had adduced "no evidence" the complainant had not consented. He said:

> So this is what I believe. It is logically probable based on the circumstantial evidence placed before me, but I do not know whether Mr. Al Rawi removed the complainant's pants at her consent, at her request, with her consent, without her consent. I don't know. **The Crown marshalled no evidence on this. The Crown had no evidence to present on the issue of consent prior to Constable Thibault arriving on scene.**
>
> [Emphasis added]

[93] The judge mused that if the complainant had consented to the respondent's removal of her clothes, he was under a moral obligation to decline the invitation as the complainant was "clearly drunk". This led to his final reference to the complete lack of evidence on the issue of lack of consent:

> Having said that, with regards to the charge before this Court, at the critical time of when Mr. Al Rawi would have stripped the complainant of her clothes, **the Crown has provided absolutely no evidence on the issue of lack of consent.**
>
> [Emphasis added]

[94] The Crown's complaint is well-founded. Although the complainant was not asked by the Crown "Would you have consented to having your pants removed or otherwise voluntarily engaging in sexual activity with the respondent?", there was ample circumstantial evidence that would permit the inference to be drawn that either the complainant did not voluntarily agree or lacked the capacity to do so. Either would suffice to establish the *actus reus*. That evidence included the following:

1. At 1:20 a.m., police found Mr. Al-Rawi's taxi on Atlantic Street in the south-end of Halifax, with the windows fogged up. This would suggest having been parked there at least some minutes;
2. The complainant was unconscious in the backseat, naked except for her tank-top lifted so that her breasts were exposed;
3. Her naked legs were open, one propped on each of the front seats, with Mr. Al-Rawi between them;

4. When the police approached, Mr. Al-Rawi had the complainant's urine-soaked pants and underwear in his hands. He then attempted to hide them between his seat and the console. He was seen fumbling with her shoes, which were at his feet. These actions could be used as after the fact conduct demonstrating his awareness of the wrongfulness of his criminal conduct and hence guilt;
5. Mr. Al-Rawi's seat was reclined and his pants were partway down with the zipper open;
6. In the console between the front seats was an unused condom;
7. Taxi records established that the complainant had entered Mr. Al-Rawi's cab just eleven minutes earlier on Grafton Street in downtown Halifax;
8. The complainant lived on [address redacted]. The south-end of Halifax is nowhere near that address nor is it part of any route one would take from Grafton Street to that address. Why would the complainant tolerate being driven in the opposite direction of her home address unless she was unconscious or lacked the capacity to be cognizant of where she was?
9. The complainant had no memory of her time in Mr. Al-Rawi's taxi;
10. The complainant remained unconscious throughout the police arrival and interaction with the respondent;
11. The complainant's blood alcohol was between 223 and 244 mg/100 ml;
12. There was expert evidence that the complainant was an average drinker and with a BAC of 223 to 244 would show physical effects of alcohol with signs of intoxication, and given the complainant's loss of consciousness and bladder function, she was severely intoxicated;
13. The complainant drank five draft, two tequila shots and at least one vodka and cranberry, that she could recall;
14. The complainant had been refused re-entry into Boomers Lounge due to her level of intoxication;
15. The complainant's most personal of possessions, her purse, wallet and phone, were on the front passenger's side floor or seat, a position that the judge seemed to accept that she had not occupied. This left open

> the logical inference that the respondent had taken these items from her while she was unconscious. How else would they end up in the hands of a perfect stranger?
>
> 16. After the respondent had been arrested, the complainant had to be shaken awake by police. She awoke very confused and upset.

[95] All of this evidence was uncontested or otherwise accepted by the trial judge. Rather than assess the strength of this evidence in its totality, he concluded that there was "no evidence". This conclusion is not a lapse in an oral judgment nor parsing the trial judge's reasons. He repeatedly said there was simply no evidence to consider on the issue of consent. A finding of "no evidence" is a question of law alone (*R. v. Feeley*, [1953] 1 S.C.R. 59).

[96] But the respondent says that when a trial judge concludes that he or she has a reasonable doubt, an appeal court cannot intervene absent legal error. He relies on *R. v. Haraldson*, 2012 ABCA 147. The facts are sparse. It appears that the accused's police statement had been introduced at trial. In his statement, he said that the complainant, though intoxicated, was an active participant in sexual activity during a planned overnight hotel stay. The trial judge accepted the defence argument that lack of capacity or consent in fact had not been established beyond a reasonable doubt.

[97] The Crown appeal to the Alberta Court of Appeal failed. The Court discussed the issue of consent:

> [6] The central issue at trial was the complainant's capacity to consent. The Crown correctly states that the capacity to consent requires something more than the capacity to "execute base-line physical functions," and that the capability to speak or perform a sexual act does not preclude a determination that the complainant lacked capacity to consent in the circumstances. The Respondent agrees with the test formulated by the Crown, but points out that a drunk complainant may retain the capacity to consent, and that the issue is one of fact or mixed fact and law. The Crown says that the trial judge erred by focusing on the complainant's ability to perform relatively primitive functions (such as providing instructions to the cab driver, getting out of the taxi cab, and participating in the sexual conduct), as opposed to whether the complainant could understand the risks and consequences associated with the sexual activity and the sexual nature of the act, and to realize that she could decline to participate. The competing submission is that there was sufficient evidence to show actual consent based on the Respondent's statement that the complainant was an active and engaged participant, and that there was an absence of evidence to prove incapacity beyond

> a reasonable doubt. The Respondent says that while intoxication is a factor, there was evidence to demonstrate "the cognitive ability [of the complainant] to articulate her desires," and that she was responsive to questions and appeared to be aware of her surroundings.
>
> [7] The *Criminal Code* explicitly provides that there can be no consent if the complainant is incapable of consenting to the activity (s. 273.1). Capacity to consent to sexual activity requires something more than the capacity to execute baseline physical functions. The question is the degree to which intoxication negates comprehension or volition. A drunk complainant may retain the capacity to consent: *R. v. R.(J)* (2006), 40 C.R. (6th) 97 (Ont. S.C.J.) at paras. 17-19, 43. Mere drunkenness is not the equivalent of incapacity: *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.). Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibition or self control: *R. v. Merritt*, [2004] O.J. No. 1295 (Ont. S.C.J.). A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at times. Expert evidence may assist and even be necessary, in some cases (*R. v. Faulkner* (1997), 120 C.C.C. (3d) 377 (Ont. C.A.)), though it is not required as a matter of law: *R. v. Merritt*, *supra*; *R. v. Hernandez*, [1997] A.J. No. 955 (Alta. C.A.), *R. v. Cedeno*, 2005 ONCJ 91, 195 C.C.C. (3d) 468 at para. 18.

[98] That is a far cry from this case. Here, there was no direct evidence of the complainant's consent to sexual activity with the respondent. Of course, the burden is on the Crown to establish that she did not consent or lacked the capacity to do so. However, as detailed above, there was ample circumstantial evidence that would permit a trier of fact to infer that the complainant did not consent or lacked the capacity to do so. In the judge's view, this evidence simply did not exist.

[99] There was also expert opinion evidence from Dr. Cherlet that plainly constituted "some evidence" on the issue of capacity to consent. After being given a long hypothetical that matched the uncontested evidence about the complainant's BAC and observed behaviour, Dr. Cherlet gave a generic description about the impairing/intoxicating effects of alcohol and the signs of "intoxication" one might expect. She then testified that, in her opinion, the complainant was demonstrating "severe intoxication" with attendant "severe mental deficiencies":

> MS. CHERLET: Individuals who are severely intoxicated which correspond to blood alcohol concentrations of 250 milligrams percent or greater exhibit marked muscular incoordination, so an inability to stand or walk. They have decreased sensation to pain. They often vomit. They urinate, so pee their pants. They may lose continence. And they have a – may lose consciousness. So observations that this particular individual urinated herself on possibly numerous occasions may be

> associated with an individual who is severely intoxicated by alcohol. Alcohol also deteriorates memory. And the extent of memory impairment depends on the rate at which the blood alcohol concentration rises. So if we have a rapidly rising blood alcohol concentration, that's more commonly associated with extensive memory impairment and potentially blackouts, which I will explain in a few moments. So certainly an individual within this range is going to have severe mental deficiencies. So to have adverse effects with respect to comprehension, judgement, attention -- we're going attention, information processing. So we're expecting there to be a really great deterioration in the mental and sensory processes.

[100] I accept that the absence of consent or capacity to consent is a question of fact or one of mixed law and fact. Absent a legal error in determining those issues, a finding of reasonable doubt is not susceptible to Crown appeal. However, there are some instances where a trial judge's mishandling of evidence permits appellate intervention.

[101] The scope for review for this genre of error was thoroughly discussed by Cromwell J. in *R. v. J.M.H.*, 2011 SCC 45. He set out four situations that had, to date, been recognized (para. 24). They are:

1. It is an error of law to make a finding of fact for which there is no evidence—however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule;
2. The legal effect of findings of fact or of undisputed facts raises a question of law;
3. An assessment of the evidence based on a wrong legal principle is an error of law;
4. The trial judge's failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law.

[102] Furthermore, a misapprehension of evidence that bears on an essential element and a failure by the trial judge to consider all of the evidence on the issue of a complainant's consent entitles the Crown to appellate relief (see: *R. v. James*, 2014 SCC 5 at paras. 4-5).

[103] Here, the trial judge discounted the substantial body of circumstantial evidence of lack of consent or capacity to consent as "absolutely no evidence". On this ground alone, the Crown is entitled to a new trial.

[104] In addition, the trial judge made findings for which there was no evidence. In doing so, he erred in law.

[105] I earlier set out for context the finding by the trial judge as to how the complainant's DNA ended up on a swab from around the respondent's mouth. For convenience, I repeat it:

> I also believe that the complainant's DNA was located on Mr. Al Rawi's upper lip because, in all probability, he wiped his hand or fingers over his lip area, either intentionally or absentmindedly, after handling the urine soaked pants of the complainant. That would explain her DNA being on his upper lip.

[106] The respondent concedes that there was no evidence to support such a conclusion. In fact, there was evidence that tended to negate such a possibility—the absence of an identifiable DNA profile from the respondent's hands. However, I am not convinced that this error in law would be sufficient to entitle the Crown to a new trial. To obtain appellate relief, the Crown must not just establish legal error, but that the result would not necessarily have been the same. For this legal error, they have not done so.

[107] This is because the issue for the trial judge was not whether there was sexual contact between the complainant and the respondent; he found that there was. The pivotal issue was whether the Crown had established beyond a reasonable doubt the absence of consent in fact or the capacity to consent.

As an aside, the focus at trial was much different than on appeal. Counsel for the respondent told the trial judge that the case wasn't about consent at all, but whether the Crown had proven the respondent had ever intentionally applied force to the complainant.

CAPACITY TO CONSENT

[108] The Crown does not suggest the trial judge necessarily committed reversible error in his articulation of the test for capacity to consent. It was his application of the test that discloses misunderstanding of the legal test for capacity.

[109] The trial judge articulated what was to guide him on the issue of capacity to consent:

> Now, on the element of consent, in order for there to be consent, the person giving **the consent must have an operating mind**, they must be of an age responsible

> enough to agree to sexual conduct, it can be withdrawn at any time, and it can be limited to certain acts and not others.
>
> A person will be incapable of giving consent if she is unconscious or is so intoxicated by alcohol or drug as to be incapable of understanding or perceiving the situation that presents itself.
>
> This does not mean, however, that an intoxicated person cannot give consent to sexual activity. **Clearly, a drunk can consent**.
>
> [Emphasis added]

[110] The Crown criticizes the trial judge for not having referred to the leading cases on consent or the statutory definition. In fairness to the trial judge, neither the Crown nor defence provided assistance to the judge on the applicable principles. Indeed, as mentioned above, the respondent repeatedly said to the judge the case was not even about consent or capacity to consent.

[111] Nonetheless, the Crown does not say the judge was wrong in his description of the general principles of what is meant by capacity to consent.

[112] The trial judge's comment "Clearly, a drunk can consent" received sharp criticism from some quarters. The Crown concedes that the impugned expression is not wrong, but says the judge's choice of words amounted to an unfortunate personalization of the complainant.

[113] The Crown's concession is appropriate. As detailed earlier, it is well established in our jurisprudence that an intoxicated person may still have the capacity to voluntarily agree to engage in sexual activity despite the expectation that if sober or less impaired they would not have done so.

[114] Capacity to consent mandates an inquiry as to whether the complainant had the minimal or limited cognitive capacity to understand the nature and quality of the activity, the identity of the person(s) with whom the activity is engaged, and the awareness of choice to agree or decline.

[115] It is self-evident that a person who is unconscious or insensate lacks the capacity to enter into a voluntary agreement to engage in sexual activity. But that is not the divide between capacity and incapacity.

[116] I accept the Crown's submission that the trial judge erred in law when he equated incapacity only with unconsciousness.

[117] The trial judge said that the Crown had not proven incapacity beyond a reasonable doubt because, in essence, it was unknown the "moment the complainant lost consciousness". When she was "passed out" she would have been incapable of consent. In other words, any mental state short of being unconscious gave the complainant an operating mind with the capacity to consent. With respect, this reveals legal error.

[118] The following excerpts from the judge's reasons demonstrate his flawed approach:

> In this case, there is no question the complainant was drunk when she was found in Mr. Al Rawi's taxi. **She was unconscious**. Therefore, at that moment when Constable Thibault approached Mr. Al Rawi's vehicle, **the complainant was, in fact, incapable of consenting to any sexual activity, and that also means that whenever she did pass out, she would have been incapable.**
>
> **What is unknown, however, is the moment the complainant lost consciousness**. That is important because it would appear that, prior to that, she had been able to communicate with others. Although she appeared drunk to the staff at Boomers, who would not let her in because of her state of intoxication, she had appeared to make decisions for herself, however unwise those decisions might have been.
>
> [Emphasis added]

[119] The judge's focus on unconsciousness as determinative was repeated later, when he explained:

> Once Constable Thibault was on scene, Mr. Al Rawi was not observed to be touching the complainant in any way. He therefore was not assaulting her when we know she was unconscious.

[120] By this logic, the complainant miraculously became unconscious the instant the police showed up, but in the time leading up to their arrival, she somehow had the capacity to appreciate the nature and quality of the sexual activity (at a minimum the removal of her clothes), know the identity of the respondent, and was able to understand her ability to agree or decline to engage in sexual activity with the respondent.

[121] Even if consciousness were the litmus test, there was ample evidence, ignored or disregarded by the trial judge, supporting a reasonable inference she was insensate for some time before police arrival. On this record, I see no other

reasonable inference. But whether an inference of lack of consent or capacity to consent is to be drawn is up to a trial court.

[122] The Crown has met its burden, that absent these errors, the verdict would not necessarily have been the same (see: *Vézeau v. The Queen*, [1977] 2 S.C.R. 277; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Graveline*, 2006 SCC 16).

[123] In light of my conclusion on these issues, it is unnecessary to address the other Crown complaints. I would vacate the acquittal and order a new trial.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Concurring Reasons for judgment: (Saunders, J.A.)

[124] I agree with my colleague's comprehensive analysis and conclusions.

[125] However, I wish to add to those reasons with respect to one particular issue that featured prominently in this case.

[126] I would start by welcoming efforts to engender a better understanding of a judge's duties and responsibilities. Perhaps this appeal will encourage such discussions. Like very few occupations in our country, a judge's work is conducted in public view, as required by our open courts principle, where virtually every word is transcribed, and becomes part of the public record. As well, judges swear an oath to decide the matters that come before them independently and impartially, without fear or favour, and thereby render justice according to law.

[127] A judge's duties always involve the resolute application of a host of fundamental principles that include the Rule of Law, the presumption of innocence, the Crown's never-shifting burden to prove all essential elements of the offence beyond a reasonable doubt, and the obligation to provide reasons to explain the verdict. It is well accepted that a judge "speaks" only through his or

her decision, and is prohibited from later offering further commentary to clarify or add to those reasons.

[128] Sitting on appeal, we require trial judges to make strong findings of fact, decide matters of credibility, apply the law to the evidence correctly, and express themselves in plain, unambiguous language. That is the law, which is there to protect the rights of any citizen whose actions form the basis of a criminal prosecution. And those are obligations that apply to every kind of case, so that when matters are appealed, the record from the court below will provide a proper basis for meaningful appeal.

[129] If it is shown that the trial judge erred, to the extent where appellate intervention is warranted, the appeal will be allowed, the judgement set aside, and a suitable remedy granted. Those are the "checks and balances" our system of justice provides. That is how the system is supposed to work. Just as it did in this case.

[130] Facing the legal obligation to carefully assess the evidence and then declare one's factual findings in strong, clear prose, is what trial judges in Canada do every day. Fulfilling this responsibility may produce language that seems insensitive to outside observers who know little about the case, or to those who are actually parties to the particular litigation. Maybe, in hindsight, a better choice of words, or a gentler turn of phrase, would have been preferred. But such is the reality of having to judge the conduct of others, whenever that conduct becomes the subject of criminal prosecution.

[131] When Judge Lenehan said "Clearly, a drunk can consent" he was simply stating the law (see for example: *R. v. Jensen*, 1996 CanLII 1237 (ONCA); appeal to SCC quashed [1997] 1 S.C.R. 304; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. A.Q.D.*, 2002 NSSC 222; *R. v. M.A.P.*, 2004 NSCA 27; *R. v. Siddiqui*, [2004] B.C.J. No. 2609; *R. v. Cedeno* (2005), 195 C.C.C. (3d) 468 (O.C.J.); *R. v. J.R.*, [2006] O.J. No. 2698; *R. v. J.A.*, 2011 SCC 28; *R. v. Haraldson*, 2012 ABCA 147; and *R. v. Barton*, 2017 ABCA 216). Had he said "a drunken consent is a valid consent" or "intoxicated persons, can nonetheless consent" his words would still have been a proper statement of the law, while, arguably, sounding less personal or harsh. But that is not the reason for reversal in this case, and it is important to say so, just as the Crown has acknowledged in its submissions to this Court.

[132] By all accounts, including the Crown's own expert as well as the complainant herself, she was, as the trial judge found, "clearly drunk". The pivotal issue in this case was whether, when and to what extent, the complainant's level of intoxication had affected her capacity to consent during the 11 minutes she spent in the taxi. The judge's error was two-fold: failing to conduct that critical inquiry, and failing to carefully address the considerable body of circumstantial evidence that would have informed his analysis.

[133] Anyone who took the time to read the whole of the judge's reasons in this case would recognize how he agonized over the outcome, and rendered what was obviously a very reluctant acquittal.

[134] One hopes that the outcry which greeted the release of the judge's decision in this case will not cause him or his judicial colleagues to be cowed in the way they decide the matters that come before them, and that they will continue to judge with the courage, independence and impartiality, their oath and our law demand.

Saunders, J.A.