NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Percy*, 2020 NSCA 11

Date: 20200212
Docket: CAC 480429
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Matthew Albert Percy

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	October 8, 2019, in Halifax, Nova Scotia
Subject:	Criminal law: admissibility of similar fact evidence; law of consent; misapprehension of evidence on a Crown appeal from acquittal; sufficiency of reasons
Summary:	The respondent recorded sexual activities with a complainant on his cellphone. She said she had not consented to any of those activities, and the respondent had choked her to assist in his commission of the sexual assault. Nor was she aware of the recording. The Crown applied to admit as similar fact evidence another recording found on the respondent's cellphone of sexual activities with a different complainant that appeared to show consensual conduct with the exception of times when the complainant's state of consciousness may not have been sufficient for capacity to consent. The trial judge refused to admit the similar fact evidence. The respondent testified. He denied the sexual activities were non-consensual, he had not choked the complainant and she had been aware of the video recording. The trial judge did not

believe some aspects of the respondent's testimony but could not reject his evidence. It raised a reasonable doubt and hence, he acquitted the respondent. The Crown appealed alleging numerous legal errors by the trial judge.

Issues:

(1) Did the trial judge commit reversible error in excluding the similar fact evidence?

(2) Did the trial judge err on the law of consent?

(3) Can the Crown appeal from an acquittal based on an allegation that the trial judge misapprehended the evidence?

(4) Was the trial judge's credibility analysis flawed?

(5) Were the trial judge's reasons insufficient?

Result:

The Crown can only appeal from an acquittal on an error of law alone. The trial judge committed no such error in his rejection of the Crown's application to introduce similar fact evidence. The trial judge did not conduct an improper or incomplete approach to the issue of consent. The complaint that the trial judge misapprehended the evidence in the sense that he got the substance of the evidence wrong, did not in these circumstances amount to an error of law alone, amenable to a Crown appeal. In any event, the complaint is not made out. The trial judge's credibility analysis was not flawed. The trial judge did not discuss the details of the choking and voyeurism counts. Nonetheless, his terse dismissal of those counts does not amount to legal error based on insufficiency of reasons, since we know he acquitted the respondent because his evidence raised a reasonable doubt.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 37 pages.

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Judges:	Beveridge, Farrar and Derrick, JJ.A.
Appeal Heard:	October 8, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Farrar and Derrick, JJ.A. concurring
Counsel:	Glenn Hubbard, for the appellant Roger A. Burrill, 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 victim 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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273,

279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

INTRODUCTION

[1] Triers of fact are often required to make difficult decisions in criminal cases. This can be especially so in sexual assault trials. Inconsistencies and contradictory evidence can support different outcomes.

[2] Where the trier of fact is a jury, we are not privy to the reasoning process that has led to conviction or acquittal. Trial judges give reasons that explain the result. Although they need not touch on every piece of evidence or issue, failure to provide sufficient reasons to permit effective appellate review amounts to legal error.

[3] In this case, a young university student came forward to the police. She described non-consensual sexual activities with the respondent that included choking. The police found a video that captured some of their sexual activities on the respondent's phone.

[4] The police charged the respondent with sexual assault, attempt to choke the complainant to assist in his commission of the sexual assault, and surreptitiously video recording the complainant (also known as voyeurism).

[5] The respondent testified at trial. He denied the sexual activities were non-consensual; he did not choke the complainant and she was aware of the video recording.

[6] The trial judge, the Honourable Judge William B. Digby, did not believe some aspects of the respondent's testimony. However, he found that he could not reject the respondent's evidence about the consensual nature of the sexual activities

and video recording. The trial judge was not satisfied beyond a reasonable doubt and acquitted the respondent on all counts.

[7] The Crown appeals. It claims the trial judge erred because he: did not admit similar fact evidence; misapprehended the complainant's evidence; misapplied the doctrine of reasonable doubt; misdirected himself on the law of consent; engaged in speculation on consent; and, did not provide sufficient reasons.

[8] I am not persuaded that the trial judge erred in law. Absent an error in law, the Crown cannot successfully appeal. I would therefore dismiss the appeal.

[9] I will set out sufficient facts to provide context to understand the Crown's complaints. Additional detail will be supplied later.

OVERVIEW

[10] The respondent is Matthew Percy. He worked as a groundskeeper at St. Mary's University in Halifax. Ms. C. was a student at the university. She and the respondent had met earlier in the year and were friendly. They would exchange pleasantries on campus and at the gym.

[11] On September 2, 2017, the two had a chance encounter in a university parking lot. When the respondent mentioned that he had missed his bus, Ms. C. volunteered to drive him home. During the drive, they both disclosed their respective, previously made plans to go downtown that night with friends. They agreed to rendezvous at a local pub, Durty Nelly's. Contact information was exchanged to facilitate their meeting.

[12] Over a couple of hours, Ms. C. had a beer and a glass of cider with friends before heading downtown with Ms. N. They met the respondent and his friend, Scott Purdis, at Durty Nelly's at 11:00 pm. The atmosphere was friendly. The men flirted with Ms. C. and bought her beer. Ms. N. left to join friends at the Dome.

[13] The respondent, Ms. C. and Mr. Purdis went to the Dome. The respondent and Ms. C. split a beer. Ms. C. had earlier tentatively arranged to stay at Ms. N.'s apartment. Instead, she decided to leave with the respondent to take a cab home. They would split the cost of the cab as they lived fairly close to each other.

[14] Rather than continue on to her apartment, Ms. C. went to the respondent's. She drank water. Music played. After that, the evidence sharply contrasted. Not

only did it conflict as between the complainant and the respondent, but between the complainant's direct and cross-examination and the video of the sexual activity.

[15] The complainant testified in direct-examination that while she sat on the couch, the respondent massaged her feet, and then suddenly lunged across over top of her to kiss her. He then picked her up and carried her into the bedroom. The ease with which he had done that frightened her. She described the respondent as being immediately down to just his boxers.

[16] The respondent performed cunnilingus which she found painful. She faked orgasm to dissuade continuance. She said that somehow it moved into her performing oral sex on him. She could not push herself away. She did it between his legs and then with her on top. It was non-consensual.

[17] She ended up under him and when she said no sex tonight, he choked her and said, oh yes we are having sex tonight. The sex was in the missionary position the whole time. She repeatedly said no to him, but the sex kept going. After it ended, she left his apartment to go home.

[18] She had a bruised neck the next day that she covered up with clothes. Her vagina was sore. She had said no to sex and would not have said yes to any video. She had not seen the video before she gave her police statement.

[19] In cross-examination, the complainant said that for a "normal girl" she really did not have much to drink (five drinks over approximately seven hours), but she had not consumed alcohol for some months and she experienced hangover symptoms the next day.

[20] There were some serious gaps in what she could recall. For example, she could not say if it was true or not that the respondent first asked her if he could massage her feet or whether his hand slowly moved up her leg. That could have happened. She admitted that the respondent leaned in to kiss her. She reciprocated the kissing.

[21] Her memory was refreshed that the kissing continued in the bedroom. She was okay with that. She could not disagree that the oral sex happened on the respondent first. When the video was played, it revealed that the respondent asked her to take his pants off, which she did. The recording discloses her laughing at the time.

[22] She could not recall if she went down between his legs willingly—it could have been one or the other. During oral sex, the recording also reveals that the respondent asked the complainant to spit on his penis. She does so, and then appears to lick the head of his penis. She is asked if she likes his penis, to which she replies affirmatively "Uh-huh" and "Oh yeah" and "Uh-huh".

[23] She then appeared to concede that the oral sex was consensual. Later, I will set out more details about the judge's finding and the evidence on this issue.

[24] The video displays a fairly lengthy act of vaginal intercourse, not in the missionary position as testified to by the complainant, but with her on her knees and the respondent behind her.

[25] After intercourse ended, the complainant borrowed clothes from the respondent and took a cab to her apartment to grab some sleep before an early morning training commitment.

[26] Unbeknownst to Ms. C., the police were called to St. Mary's on September 15, 2017 in response to a sexual assault complaint by a female student against the respondent. This complainant was known as Ms. T. The police immediately arrested the respondent on this complaint and seized his phone and personal belongings.

[27] The respondent declined to speak with counsel. He gave a statement to the police and consented to a forensic analysis of his phone. The police released the respondent without charges at the time.

[28] The police found two videos on the respondent's phone of sexual activities between the respondent and Ms. T. One showed apparently consensual oral sex by Ms. T.; the other, of sexual intercourse where Ms. T. appeared to be in a state of consciousness that made her capacity to consent questionable.

[29] The police obtained a search warrant to legitimize any further search of the phone. They found three videos from September 3, 2017 of sexual activity between Ms. C. and the respondent. The police did not know Ms. C.'s identity and had no complaint of wrongdoing.

[30] That changed after the police arrested the respondent on November 29, 2017 with respect to the September 15 incident with Ms. T. The police charged him with sexual assault against Ms. T. and sexual voyeurism. The police released the

respondent on December 4, 2017. A newspaper article published on December 5, 2017 disclosed some details of Ms. T.'s complaint.

[31] Ms. C. read the article. Later that day, she contacted Halifax Police. This led to the charges of sexual assault, choking and voyeurism now under appeal.

[32] With this overview, I turn to the Crown's complaints.

ISSUES

[33] The Crown's Notice of Appeal sets out the following grounds of appeal:

> 1. The Provincial Court Judge erred in law in ruling inadmissible evidence of similar acts on the part of the respondent.
> 2. The Provincial Court Judge erred in law by misapprehending the evidence of the complainant on the issue of consent.
> 3. The Provincial Court Judge erred in law in the application of the doctrine of reasonable doubt as enunciated in *R. v. W.(D.)* [1991] 1 S.C.R. 742.
> 4. The Provincial Court Judge misdirected himself as to the legal meaning of consent, and erred in law by failing to direct himself on the provision of s. 273.1 of the *Criminal Code* and on his interpretation and application of the test for capacity to consent.
> 5. The Provincial Court Judge erred in law by engaging in speculation on the issue of consent.
> 6. The Provincial Court Judge failed to provide reasons sufficient for meaningful appellate review of the correctness of the decision to acquit the respondent.
> 7. Such other grounds of appeal as may appear from a review of the record under appeal.

[34] The appellant consolidated its grounds into four general complaints of legal error: exclusion of the similar fact evidence; an improper approach to consent marred by a misapprehension of evidence; a flawed credibility analysis; and, insufficient reasons.

[35] Before addressing these complaints, it must be emphasized that the Crown has a limited right of appeal. It can only appeal on questions of law alone. Section 676(1)(a) provides:

> 676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

> (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

[36] The Crown cannot succeed on appeal because it believes an acquittal is unreasonable or unsupported by the evidence. An unreasonable acquittal is a foreign concept to the law (*R. v. Biniaris*, 2000 SCC 15 at para. 33; *R. v. Al-Rawi*, 2018 NSCA 10 at paras. 16-17).

[37] That does not mean that the Crown cannot successfully convince an appellate court that a trial judge's factual findings are an error of law alone. Cromwell J., in *R. v. J.M.H.*, 2011 SCC 45 explained that there are at least four recognized scenarios where an appeal court can overturn what appear to be factual determinations on Crown appeal where the trial judge: found facts in the absence of evidence; erred with respect to the legal effect of the facts; assessed evidence based on a wrong legal principle; or, failed to consider all of the relevant evidence. But he stressed that an acquittal based on a conclusion of reasonable doubt unsullied by material legal error is not amenable to appeal.

ADMISSIBILITY OF THE SIMILAR FACT EVIDENCE

[38] For jurisdictional purposes, the admissibility of evidence, including similar fact evidence, is a question of law alone. Questions of law usually engage a correctness standard of review. I accept entirely that a trial judge is required to correctly articulate and apply the governing legal principles on admissibility of similar fact evidence.

[39] However, to determine admissibility, the law requires a trial judge to balance the probative and prejudicial effect of the proffered evidence. For this reason, as Saunders J.A. set out in *R. v. Taweel*, 2015 NSCA 107, deference is owed on appeal to the trial judge's balance assessment:

> [63] It is settled law that a trial judge's decision *to admit* similar fact evidence is owed considerable deference on appeal. Nonetheless, the ultimate decision to allow the introduction of such evidence obliges the judge to properly assess its relevance, its probative value, and its prejudicial effect, and then carefully balance that probative value against the prejudicial impact of the evidence, were it admitted. In *Handy*, Justice Binnie explained it this way:
>
> > 153 A trial judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value. Nevertheless, a trial judge's decision to admit similar fact evidence is entitled to substantial

> deference: *B. (C.R.), supra*, at p. 739; and *Arp, supra*, at para. 42. In this case, however, quite apart from the other frailties of the similar fact evidence previously discussed, the trial judge's refusal to resolve the issue of collusion as a condition precedent to admissibility was an error of law. A new trial is required.
>
> [Emphasis in original]

[64] Watt J.A. put it similarly in *R. v. Stubbs*, 2013 ONCA 514 at ¶58:

> 58 Fourth, when evidence of other discreditable conduct is excluded under the general rule, or admitted by exception, the standard applied on appellate review is deferential: *Handy*, at para. 153*; R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 733; and *R. v. James* (2006), 213 C.C.C. (3d) 235 (Ont. C.A.), at para. 33. Appellate courts will defer to the trial judge's assessment of where the balance falls between probative value and prejudicial effect unless an appellant can demonstrate that the result of the analysis is unreasonable, or is undermined by a legal error or a misapprehension of material evidence: *Handy*, at para. 153; *James*, at para. 33.
>
> [Emphasis in original]

[40] To understand the principles that underpin the admissibility of similar fact evidence it is necessary to be clear about what it is—it is bad character evidence. The common law has long held that evidence that shows an accused committed criminal or other discreditable acts outside the parameters of the indictment is presumptively inadmissible (see for example, *R. v. Rowton* (1865), 169 E.R. 1497 (C.C.A) at p. 1506).

[41] It is inadmissible not because it is irrelevant – after all, if irrelevant, it never meets the foundational requirement of relevance to gain admittance. No, the law does not countenance admission because it may be viewed by the trier of fact as too relevant and unfair.

[42] Evidence that an accused has committed discreditable similar acts in the past risks conviction not on the basis of the strength of the Crown's evidence on the particular charge, but because of a demonstrated propensity to commit that type of offence or the accused simply deserves to be punished.

[43] The significance of the exclusionary rule can scarcely be overstated. Doherty J.A. in *R. v. Suzack* (2000), 141 C.C.C. (3d) 449, [2000] O.J. No. 100 wrote of its fundamental nature:

116 I cannot accept the Crown's submission. It is a fundamental tenet of our criminal justice system that criminal culpability depends on the Crown's ability to prove beyond a reasonable doubt that the accused committed the specific act alleged in the indictment. It has been established for over 100 years that the Crown cannot make its case by showing that the accused engaged in misconduct other than that alleged against him for the purpose of showing that the accused was the type of person who would commit the crime alleged. *Makin v. The Attorney General for New South Wales*, [1894] A.C. 57 at 65 (P.C.). Propensity evidence and the reasoning that it invites imperil this fundamental tenet by inviting conviction based on the kind of person the accused is shown to be or based on acts other than those alleged against the accused: *R. v. D.(L. E.)* (1989), 50 C.C.C. (3d) 142 at 161-162 (S.C.C.). I would not discard a rule that is so central to an accused's right to a fair trial to further a co-accused's right to make full answer and defence.

[44] In *R. v. Handy*, 2002 SCC 56, Binnie J., for the Court, explained:

39 It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in *B. (C.R.)*, *supra*, at p. 744:

> The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

40 The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": *Hamlet*, Act I, Scene v, ll. 66-67.

…

139 It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

[Emphasis in original]

[45] Typical of rules, there are exceptions. The principal one is where the accused puts his character in issue. Evidence of bad character may also be admitted where it is relevant to an issue at trial, such as motive, opportunity, means, knowledge or is incidental to a proper cross-examination of an accused (see: *R. v. S.G.G.*, [1997] 2 S.C.R. 716 at paras. 63-64).

[46] Admission of similar fact evidence is nothing more than another exception to the general exclusionary rule for bad character evidence (*R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 at pp. 724-5).

[47] Historically, admission focussed on whether the evidence came within recognized categories such as proof of identity, or to rebut a possible defence such as innocent association or accident. The category approach to similar fact evidence gave way to one overarching inquiry: Does the probative value of the proposed evidence outweigh its prejudicial effect? (See: *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421; *R. v. Sweitzer*, [1982] 1 S.C.R. 949; *R. v. B.(C.R.)*, *supra*; *R. v. Handy*, *supra*.)

[48] Binnie J.'s unanimous judgement in *R. v. Handy* did not demark wholesale or even significant change in the law—just clarity and a plainly worded framework to determine admissibility.

[49] The test is easy to state. The Crown must satisfy the trial judge on a balance of probabilities that the probative value of the evidence in relation to a particular issue outweighs its potential prejudice (para. 55).

[50] In the course of a discussion about the misconceptions and difficulties in application of the test, the following emerges:

1. The underlying basis for similar fact evidence to have probative value is through propensity reasoning (paras. 59-63);
2. Probative value can only be assessed once the issue is identified for which the evidence is proffered to advance or refute (paras. 69-75);
3. Where the issue is the *actus reus* of the offence, the degree of similarity may be higher or lower than in an identification case (para. 78);

4. The trial judge must examine the cogency and strength of the proposed evidence (paras. 82; 134);
5. The potential for collusion may sap the probative value of the evidence and preclude admission (paras. 104-113);
6. The judge must consider the potential for moral and reasoning prejudice should the evidence be admitted and its potential impact on trial fairness (paras. 137-146);
7. Finally, if the prosecution has not demonstrated that the probative value of the evidence outweighs its prejudicial effect, it must be excluded.

Analysis of the Crown's complaints

[51] The Crown suggests that the trial judge erred because he: misidentified the issue; applied the incorrect standard; went beyond his gatekeeper role; incorrectly found there was no evidence that Ms. T. consented to the video recording; and, found prejudice in the absence of evidence. While I agree that some of the expressions used by the trial judge could have been more felicitously worded, I am not satisfied that the trial judge committed reversible error.

What was the issue

[52] The similar fact evidence consisted essentially of the video of September 15, 2017 of sexual activity between the respondent and Ms. T. The trial judge described the evidence as follows:

> The evidence sought to be admitted by the Crown from the events of September 15th, 2017, to be admitted as being relevant to a live issue at trial: the two video clips taken September 15th, 2017, by Mr. Percy on his cell phone of himself and Ms. T. engaging in sexual activity in a residence room; the Saint Mary's University photo ID card of Ms. T.; the testimony of the investigating police officer identifying Mr. Percy and Ms. T. as being two persons in the video clip; the testimony of the officer who had the initial contact with Ms. T., being his observations of Ms. T. on the early morning of September 17th, 2017. That evidence is only admissible if it has probative value to a live issue before the Court.

[53] The trial judge summarized the contents of the September 15 video as follows:

> The video of the September 15th, 2017, consists of two segments, both involving two people who have been identified by the investigating officer as Ms. T. and Mr. Percy. In the first segment, Ms. T. is seen performing oral sex on Mr. Percy. Mr. Percy is holding the phone. In the second, Mr. Percy is seen having intercourse with Ms. T. Ms. T. is lying prone on her back with her head and neck hanging over the side of the bed; Mr. Percy above her, positioned between her legs, holding a cell phone in one hand.
>
> Ms. T. appears to be largely inert and unresponsive to the extent that an inference could be drawn with a high degree of confidence that she is either asleep, unconscious, or such a state that she is unable to give her consent to continued sexual intercourse. Ms. T. was not called as a witness by the Crown. There is no behaviour on her part in the video which would suggest that she was aware of the video.

[54] The Crown takes no issue with the accuracy of the trial judge's recitation of the factual matrix. However, it insists the judge misidentified the live issue, when he said:

> As can be seen from this, the complainant's state of mind is crucial from a prosecution point of view. The live issue in this case, as I see it, is credibility.

[55] The Crown says on appeal that the judge was wrong. Instead, they say the similar fact evidence was relevant to the issues of the *actus reus* of the offences and the *modus operandi* of the respondent.

[56] With respect, I see no error by the trial judge's approach. His reasons were responsive to the arguments advanced by the Crown at trial. The Crown wrote in its pre-trial brief about the issue the evidence held probative value for:

> [3] The proposed evidence does more than merely show that the accused is the type of person likely to have committed the offences charged because he has committed similar acts in the past. It is relevant evidence that establishes a modus operandi; it is tendered to prove the *actus reus*, lack of consent, to support the credibility of the individual complainants and to negate innocent explanation.

[57] The Crown essentially repeated these arguments in its oral submissions. With respect to the issue of *actus reus* of the offences, Crown trial counsel advocated:

> In this particular case, one of the issues is the *actus reus* of the offence. Now the *actus reus* of voyeurism is observation or recording, was made for a sexual purpose, plus the place of ... had a degree of privacy or that there was an expectation of privacy and of course it was surreptitiously made; i.e., there was

> lack of consent. For sexual assault, the *actus reus* is sexual assault, absence of consent, and assault which constituted unconsensual touching.

[58] In these circumstances, it is patent there was no issue about identity, accidental touching or the sexual nature of it. The video taken by the respondent captured his participation in sexual activities with the complainant, Ms. C. The sole live issue was about whether the Crown could establish the lack of consent beyond a reasonable doubt.

[59] Ever since *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, there can be no doubt that the presence or absence of consent is determined by the complainant's subjective internal state of mind towards the touching at the time it occurred (paras. 26-27). Hence, the *actus reus* of the offence of sexual assault depended on the credibility and reliability of her evidence. So too with respect to her allegation of choking and surreptitious recording.

[60] Because the Crown suggested the similar fact evidence was relevant to the *actus reus* of the offences, the trial judge referred to what the Crown was required to prove:

> In order to understand what a live issue is, one has to consider what the Crown has to prove with respect to sexual assault, choking, and surreptitious videotape recording. The latter two offences are fairly straightforward and self-evident. However, with respect to sexual assault, some explanation may be required.

[61] The trial judge then correctly concluded that the complainant's credibility, writ large, would be central to proof of the *actus reus*:

> As can be seen from this, the complainant's state of mind is crucial from a prosecution point of view. The live issue in this case, as I see it, is credibility. Credibility has more to it than simply the aspect of whether or not the person is believed to be telling the truth or not. It also encompasses reliability of that evidence which encompasses the capacity of a person to observe events as they transpired and to remember them. It is not unknown that people who believe that they are telling the truth are, in fact, mistaken.
>
> It's obvious from the change in position in Ms. C.'s evidence with respect to whether or not oral sex was consensual has some effect on assessment of her credibility. Notwithstanding that, there is some evidence from her that she did not consent.

[62] The trial judge dismissed any concerns about collusion or that the similar fact incident occurred subsequent in time to the trial offences. He then turned to

the similarities and differences between the evidence of the complainant and the September 15 videos with Ms. T.:

> Ms. C. testified that on September 3rd, she participated in sexual intercourse out of fear caused by Mr. Percy choking her and his accompanying intimidating statement, We will have sex tonight. Her evidence is she was unaware and did not consent to the video recording.
>
> On the other hand, with respect to the events of September 15th, we have no evidence from Ms. T., the young woman depicted in the video, just the two video clips. There is, similarly, no direct evidence such as a wave or a smile that she was aware or unaware of the taking of the first video clip. There is no evidence, one way or the other, with respect to the first video clip from September 15th as to whether or not she consented to that. There is no indication whether she did or did not consent to the activity in the videotape other than what can be gleaned from watching the videotape itself.
>
> With respect to the second videotape, there's the strong inference that can be drawn that she was incapable of consent. However, with respect to that intercourse, the commencement of it is not depicted on the video, so it's impossible to tell one way or the other whether it commenced as sexual activity that was consented to or not. There's also, as I may have mentioned, no evidence with respect to whether or not she was actually aware of the video ... there was no evidence she was ... from her that she was unaware of the video and did not consent to it. There is the similarity between the videos. They are discontinuous and that there is unrecorded activity between the segments.

[63] The trial judge responded directly to the Crown's suggestion that the similar fact evidence demonstrated the respondent's disposition to be indifferent whether or not the person with whom he engages in sexual activity is consenting. It is obvious that he discounted the probative value of the evidence given the dissimilarity of the two events and the lack of information about the September 15 event in order to assess cogency. He reasoned:

> My difficulty with that is that is a very broad statement or inference to be drawn from two events which are dissimilar insofar as consent is concerned. One is a consent allegedly over the protestations of a conscious person, Ms. C., who gives in out of fear. The other is a person who is incapable of consent.

[64] And later:

> With respect to the evidence of the choking, there is nothing in the similar fact evidence that Mr. Percy has a proven propensity to physically abuse his partners such as choking them in order to obtain their consent. So with respect to that charge, the similar fact evidence has no weight.

> With respect to the videotaping, there is a possible inference that can be drawn that Mr. Percy videotaped ... or videoed both individuals when they were not consenting. That is, however, an inference unsupported by any evidence from Ms. T. with respect to the events of September 15th. It is difficult to assess cogency when there is a paucity of information.
>
> With respect to both the sexual assault charge and the videotape ... and the video charge under Section 246, it is my conclusion, on a balance of probabilities, that the prejudicial effects would outweigh the probative effects, the probative evidence the Crown asked me to draw, being weakly based in inference.
>
> The application for admission of similar fact evidence is denied. **It is, of course, possibly subject to review should my characterization of the live issue at trial and anticipated evidence turn out to be not in accordance with the way the case further develops.**
>
> [Emphasis added]

[65] At no time did trial counsel suggest to the trial judge that he had misidentified the live issue.

[66] A useful template on the post-*Handy* framework can be found in *R. v. Bent*, 2016 ONCA 651 (suppl. reasons by Gillese, J.A., 2016 ONCA 722), where Strathy C.J.O., for the Court, described what was involved in the probative value and prejudicial effect inquiries.

[67] At the heart of the probative value is the improbability of coincidence between the similar acts and the acts at issue in the proceeding such that it would be an affront to common sense that the similarities were due to coincidence (*Bent* at para. 37; *Handy* at para. 41). This engages four inquiries:

> 39 *First*, the evidence must relate to a specific issue, so that it is plainly not adduced merely to show that the defendant is of bad character. Evidence adduced merely to show that the defendant is a bad person who is likely to engage in criminal acts is inadmissible propensity evidence. As Binnie J. noted at para. 71 of *Handy*, the general disposition of the accused does not qualify as "an issue in question".
>
> 40 In assessing the probative value of the evidence, the court must identify the issue in question and ask how the similar acts tend to prove that issue. In *Handy*, Binnie J. noted that in cases such as this, where the issue is *actus reus* rather than identification, the degree of similarity required is not necessarily higher or lower, but rather the issue is different and the "drivers of cogency in relation to the desired inferences will therefore not be the same": *Handy* at para. 78.
>
> 41 *Second*, the court must determine whether the similar fact evidence is tainted by collusion, which undermines the improbability of coincidence.

> 42 *Third*, the court should consider the similarities and differences between the evidence that forms the basis of the charge and the evidence of similar acts sought to be admitted. In considering the cogency of the similar fact evidence in relation to the inferences sought to be drawn, Binnie J. suggested, at paras. 82, 122, 128 and 132 of *Handy*, that the following factors may be examined:
>
> - the proximity in time between past act and current offence: a greater lapse of time tends to undermine the premise of continuity of character or disposition; remoteness in time may also affect relevance and reliability;
> - the extent to which the other acts are similar in detail to the charged conduct;
> - the number of occurrences of the similar acts: an alleged pattern of conduct may gain strength if a greater number of instances compose it;
> - the circumstances surrounding or relating to the similar acts: depending on the circumstances, these considerations could strengthen or weaken the probative value;
> - any distinctive features unifying the incidents: greater distinctiveness would tend to increase the probative value;
> - any intervening events: certain intervening events might undermine the probative value, such as evidence of supervening physical incapacity; and
> - any other factor that would tend to support or rebut the underlying unity of the similar acts.
>
> 43 Not all factors will exist or be necessary in every case.
>
> 44 *Fourth*, the court must consider the strength of the evidence that the similar acts occurred. . . .

[68] With respect to the probative value of the proffered evidence, the trial judge identified the issue. As detailed above, he: ruled out any suggestion of collusion; examined the similarities and differences; and, considered the strength of the evidence.

[69] From the trial judge's analysis, delivered in the context of an oral decision, the Crown parses out certain phrases to allege the judge used an incorrect standard; went beyond his gatekeeper role; erred in law by making a finding of no evidence; and, found prejudice without evidence. I will briefly address each complaint.

Incorrect standard

[70] The Crown argues that the judge used the admissibility threshold for identification. They cite these comments by the trial judge:

> If one was to compare the two events side by side without the element of identification of Mr. Percy, could you draw any conclusion as to whether or not the two events were likely committed by the same person? I don't think there is sufficient evidence of similarity that you could. If, for example, you had a second complainant who indicated that she was choked or physically abused or threatened, that would have more cogency.

[71] While it would have been better had the trial judge not made this reference, I am satisfied he in no way imposed a higher threshold sometimes referenced for similar fact evidence proffered to prove identification. His comments merely highlighted the disparate nature of the alleged acts.

[72] The judge was well aware of the task he faced. He looked at the similarities and differences between the offence alleged by Ms. C. and the acts depicted in the videos of September 15 with Ms. T.

[73] I earlier quoted some of the key paragraphs of the trial judge's analysis. Immediately prior to the comments complained of above, the judge said:

> The Crown, in order to support Ms. C.'s credibility, asks the Court to draw an inference from these two events that Mr. Percy is the type of individual and has a disposition such that he is indifferent as to whether or not the person with whom he is engaging in sexual activity is consenting to the activity. From this, they seek to support the credibility of Ms. C. The result, of course, is if the credibility of Ms. C. is enhanced, the clear result is that Mr. Percy's testimony, where it differs on the key issue, should be given less credit. That is to say, is more unlikely to be accurate.
>
> My difficulty with that is that is a very broad statement or inference to be drawn from two events which are dissimilar insofar as consent is concerned. One is a consent allegedly over the protestations of a conscious person, Ms. C., who gives in out of fear. The other is a person who is incapable of consent.

[74] The trial judge's reasons do not suggest he required the similar fact evidence to satisfy any of the commonly used labels found in identification cases that the evidence must amount to "signatures" or "hallmarks" or "fingerprints". In *Handy*, Binnie J. referred to the power of similar fact evidence whether it is for identification *or* about the character of the act:

> 90 On the facts of *B. (C.R.)*, the majority concluded that the accused was shown to have a situation specific propensity to abuse sexually children to whom he stood in parental relationship, and there was a close match between the "distinct and particular" propensity demonstrated in the similar fact evidence and the misconduct alleged in the charge, although even the majority considered the

> admissibility to be "borderline" (p. 739). **Similar fact evidence is sometimes said to demonstrate a "system" or "*modus operandi*", but in essence the idea of "*modus operandi*" or "system" is simply the observed pattern of propensity operating in a closely defined and circumscribed context.**
>
> **91 References to "calling cards" or "signatures" or "hallmarks" or "fingerprints" similarly describe propensity at the admissible end of the spectrum precisely because the pattern of circumstances in which an accused is disposed to act in a certain way are so clearly linked to the offence charged that the possibility of mere coincidence, or mistaken identity or a mistake in the character of the act, is so slight as to justify consideration of the similar fact evidence by the trier of fact.** The issue at that stage is no longer "pure" propensity or "general disposition" but repeated conduct in a particular and highly specific type of situation. At that point, the evidence of similar facts provides a compelling inference that may fill a remaining gap in the jigsaw puzzle of proof, depending on the view ultimately taken (in this case) by the jury.
>
> [Emphasis added]

[75] The Crown alleged that the similar fact evidence demonstrated the *modus operandi* of the respondent. The trial judge was well within his role to examine the similarities and differences between the trial allegations and the similar fact evidence and assess its probative value.

Gatekeeper role

[76] The Crown quotes the following to demonstrate the judge erred in law by going beyond his gatekeeper role:

> The Crown has made reference to many other similar facts between the events such as hair colour, the fact that they're students at Saint Mary's, that drinking was involved. **In my view, none of those are conclusive of anything**.
>
> [Emphasis added]

[77] The highlighted sentence is the claimed error. If the judge applied a test of conclusiveness, this would be legal error because *Handy* makes it clear that such a test is too onerous and strays into the realm of the trier of fact (paras. 94-97).

[78] The argument comes from parsing the judge's reasons. He at no time required the *similar fact evidence* to be conclusive. The judge did no more than comment on some of the claimed similarities. When his remark is put into context, the trial judge really meant that the claimed similarities were not *probative* of anything. The full context of his comment is as follows:

> In my view, the inference to be drawn by comparing these two circumstances that the Crown asked for is overly broad and not supported in that it doesn't defy probability. The Crown has made reference to many other similar facts between the events such as hair colour, the fact that they're students at Saint Mary's, that drinking was involved. In my view, none of those are conclusive of anything.
>
> I think it would be fair to say that many individuals, university students, are persons of the same age, go down to the local bars and imbibe in alcohol on the weekend and go home and engage in whatever they engage in. Whatever that is, I don't think shows a *modus operandi* to indicate anything about the ultimate issue of consent.

[79] The comment by the trial judge was about the claimed-for similarities of hair colour, the university connection and alcohol consumption, not the overall probative value of the similar fact evidence.

Finding of no evidence

[80] The Crown argues that the judge incorrectly found there was "no evidence" as to Ms. T.'s lack of consent to being video recorded. It says there was ample circumstantial evidence that Ms. T. had not consented.

[81] The argument focuses on the trial judge's comments:

> There's also, as I may have mentioned, no evidence with respect to whether or not she was actually aware of the video ... there was no evidence she was ... from her that she was unaware of the video and did not consent to it.

[82] And later:

> With respect to the videotaping, there is a possible inference that can be drawn that Mr. Percy videotaped ... or videoed both individuals when they were not consenting. That is, however, an inference unsupported by any evidence from Ms. T. with respect to the events of September 15th. It is difficult to assess cogency when there is a paucity of information.

[83] The Crown argues that the trial judge erred in law in the same way that was recognized by this Court in *R. v. Al-Rawi*, *supra* (paras. 89-103) where the trial judge erroneously found no evidence of lack of consent without any consideration of the substantial body of circumstantial evidence. I am unable to agree.

[84] First of all, the judge was well-aware of the circumstantial evidence and the inference that could be drawn that Ms. T. was at some point incapable of consent. The full context of the first quote the Crown relies on demonstrates:

> With respect to the second videotape, there's the strong inference that can be drawn that she was incapable of consent. However, with respect to that intercourse, the commencement of it is not depicted on the video, so it's impossible to tell one way or the other whether it commenced as sexual activity that was consented to or not. There's also, as I may have mentioned, no evidence with respect to whether or not she was actually aware of the video ... there was no evidence she was ... from her that she was unaware of the video and did not consent to it. There is the similarity between the videos. They are discontinuous and that there is unrecorded activity between the segments.

[85] Second, the trial judge was required to assess the strength of the proposed evidence. He made no finding that there was "no evidence" of lack of consent, but pointed out the obvious—Ms. T. was not a witness, and hence he had no *viva voce* testimony from her. The judge did not misapprehend the evidence, nor otherwise commit legal error.

Finding of prejudice without evidence

[86] The Crown says the judge erred in law when he turned to the prejudice issue:

> In addition to the distraction from the issue here, I think it's significant that based on that paragraph in *R. v. Handy*, the accused is prevented from calling evidence which would rebut the inference that the Crown wishes drawn, and that is that the accused is a person who is indifferent as to whether or not his sexual partner is consenting. For example, if the accused could call evidence from other sexual partners in the past that he was respectful of their right to consent or not consent, that would rebut the inference that the Crown seeks to draw. As I said earlier, I think that inference is overly broad. That deals with the question of credibility in regard to the sexual assault.

[87] The trial judge's comments immediately follow his quote from the guiding principles on prejudice from *Handy*, which included:

> 146 Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in Sopinka, Lederman and Bryant, *supra*, at §11.74). Thus the practical realities of the trial

> process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

[88] In these circumstances, I decline to make a definitive pronouncement on the ultimate admissibility of evidence that might be mustered to try to rebut the inference that the respondent is the type of person who acts with indifference to the absence of consent with sexual partners. There would be at least the risk that such evidence might be considered inadmissible as it would be tendered to support the accused's credibility and possibly offend the collateral fact rule.

[89] However, even if the trial judge erred when he attached significance to the risk of prejudice from being unable to call evidence, the error was harmless.

[90] I say this because the trial judge had already found the similar fact evidence lacked strong probative value and the prejudice to the respondent was evident. The Crown at trial acknowledged the video of September 15 to be "highly prejudicial". Furthermore, here the respondent did not have the opportunity to cross-examine Ms. T. He would be forced to defend himself on two cases and be cross-examined on the September 15 allegation even before his trial on those charges.

[91] I would therefore not give effect to this ground of appeal.

CONSENT

[92] The Crown claims the trial judge committed legal error on the issue of consent when he:

1. Engaged in speculative stereotypical reasoning on how a complainant would react to a sexual assault;
2. Applied a "lay-person's" definition of consent rather than the legal "multi-stage analysis required for legal consent";
3. Misapprehended the complainant's evidence on her consent to oral sex; and,
4. Misinterpreted the video evidence.

[93] To understand the Crown's complaints, I need to add some additional details from the trial and the judge's reasons. During cross-examination, the complainant was confronted with details from the video of the fellatio. This included the following:

Q. During the video, it would have been right before the spot I played for you. He's asking you, "Do you like my dick?" and you go "Uh-huh." Then he asks you again, "Oh, yeah." Then you go "Uh-huh" again.

A. I don't really know what that means. It could have really meant a lot of things.

Q. Okay. So you're saying when you said it, you don't know what you meant by that.

A. Yes.

…

Q. And you agree with me that in terms of the video, I'm going to submit to you that there was positive indication of a sexual act by you laughing.

A. The laugh at that point?

Q. Yes.

A. Ahh, I don't know.

…

Q. **Am I correct in stating the oral sex was consensual?**

A. It was ... yes, I let it continue.

Q. It was consensual. So if I suggested to you there was a phone call into your phone at roughly 5:28 so after you had got home from the cab, do you remember getting that phone call?

[Emphasis added]

[94] In the course of his reasons on the admissibility of the similar fact evidence, the trial judge reviewed the evidence and commented:

> She indicated that she did not wish to perform oral sex on Mr. Percy and that he was holding her head such that at times she could not breathe and her head was being pushed down on his penis. She indicated she told Mr. Percy that she did not want to have sexual intercourse with him, but eventually participated out of fear because he grabbed her neck, choked her, and at or near that time said that they were going to have sex that night.
>
> Ms. C. stated that she was affected by the alcohol she had consumed and that, as a result, her memory as to the events and the sequence of events was not complete.
>
> On cross-examination, and after again reviewing the video of herself performing oral sex on Mr. Percy, **she conceded that the oral sex was consensual**. . . .
>
> [Emphasis added]

[95] The respondent testified. He gave detailed evidence about the events of September 3. For the most part, I need only touch on the generalities. He did not carry the complainant into the bedroom. They walked together. He requested permission to film their activities. The complainant consented, after reassurance it would not end up online. She willingly performed oral sex on him. Her head was free to move, he just held her hair. She saw the camera [the phone]. There was no force. The complainant never said nor showed any absence of consent, but the reverse. She asked about condoms. He never touched her neck. There was no act of choking.

[96] The respondent underwent a thorough and skillful cross-examination. This included the following exchange about the videos:

> Q. No. Is it, did you keep it because, did you keep it because you only filmed parts that looked consensual and you could show it if you ever got caught for sexually assaulting her?
>
> A. Oh my gosh, you're reaching. No.
>
> Q. No? So the fact that you only videotaped parts that appear to be consensual and not other parts never, it never entered your mind that you would keep that in case you were sitting in this kind of courtroom at some future date?
>
> A. How could I ever imagine that something like this would happen to me, that someone that I know I had consensual sex with would say that I sexually assaulted them, when throughout the whole sexual action there's nothing but laughter between both of us, positive reinforcement over the sex. It just doesn't make any sense.

[97] The expert evidence from the Crown witness was that there had been no alteration or deletion of any of the videos found on the respondent's phone.

[98] The only blemish the trial judge found in the respondent's testimony was his response about when or whether he expected sexual activity. The respondent's evidence on this was:

> Q. And you were hoping maybe that that would be in a sexual manner?
>
> A. No.
>
> Q. No. So you had no thoughts of, in your mind, of any sexual encounter at all with her at, while you're sitting in the cab asking her to come in for a drink of water?
>
> A. The thought might have crossed my mind but I didn't, I wasn't banking on anything.

Q. I know, but when did that thought cross your mind?

A. Maybe when I had my hand on her leg when I was at the Dome.

Q. Okay. So that's the first inkling that you get in your mind that you'd like to have sex with her that night?

A. Well, no.

Q. Was it before that?

A. No. Kind of when we were in the state of kissing one another and holding one another.

Q. So you said ...

A. Things evolve when you're with another person and you're holding them and you're kissing them and then things move forward like that. I never forced myself upon [Ms. C.], ever.

Q. So back in the Liquor Dome, is that when you first thought that you could have sexual relations with her that night?

A. No.

[99] The trial judge did not believe this aspect of his evidence. He said the following:

> There is one aspect of Mr. Percy's evidence that I reject as being untrue. Mr. Percy indicated that he was not considering the possibility of sexual activity when he was at the bar with Ms. C. or in the cab ride home or as he was getting out of the cab to go into his apartment at 3 a.m. I'd have to say that regardless of who the individual was at that circumstances, in the circumstances where you've met someone in a bar downtown and assuming that the other person was of a sexual orientation that was attracted to you, that for that not to cross somebody's mind is a little bit surprising.
>
> That might be considered stereotypical thinking, but in Mr. Percy's case there are reasons to reject his testimony, in my view…

[100] The trial judge correctly instructed himself that mere disbelief or outright rejection of an accused's evidence did not equate to proof of guilt beyond a reasonable doubt.

[101] The judge found he was not persuaded by the respondent's evidence that the complainant did in fact consent, but he could not reject his evidence. It raised a reasonable doubt, and hence an acquittal followed. One of the key paragraphs in his reasons is:

> The contradictions or the change in position in Ms. C.'s evidence between cross and direct troubles me greatly. It troubles me to the extent that since she cannot remember parts of the event, it's impossible to say that Mr. Percy is lying when he talks about the questions he asked with respect to consent and the responses he got. **He doesn't have to persuade me that they did happen, he only has to raise a reasonable doubt. I find that I can't reject his evidence in that regard**. When I compare that evidence to the evidence of Ms. C., I'm left with the conundrum that if she acknowledges that she was consenting to the oral sex, when she denied it in cross [*sic*], given her poor recollection, can I be satisfied beyond a reasonable doubt of the accuracy of the rest of her evidence? **I find that I cannot be satisfied beyond a reasonable doubt that that evidence is accurate**.
>
> [Emphasis added]

[102] With this additional background, I turn to the Crown's complaints. It is convenient to address the first two together.

Stereotypical reasoning and improper definition of consent

[103] The Crown argues the judge's remarks, when he assessed the complainant's testimony in light of the video, display a speculative and stereotypical approach contrary to the direction in *R. v. A.R.J.D.*, 2017 ABCA 237 (aff'd, 2018 SCC 6). The trial judge's remarks were:

> However, there are times when that hand is not on her head and the activity such as licking the penis after spitting on it at Mr. Percy's request had the appearance of being entirely voluntary. She does not state that before that, that there was any specific threat made to her, and the actions shown during her performing oral sex on him, although partially supporting her version of events, strongly suggests that she was a willing participant. It's hard to imagine someone giggling during such an event when they were doing so out of fear or a sense of compulsion.

[104] The Crown emphasizes that the complainant's evidence was clear—she never subjectively agreed or consented to oral sex or intercourse. She participated solely because of fear. The trial judge was well-aware of the correct approach to a determination of the *actus reus*—it is governed by the complainant's subjective state of mind. He quoted and applied the law set out in *R. v. Ewanchuk*, *supra*.

[105] Merely because a complainant says that they did not consent does not end the work of the trier of fact. That testimony needs to be assessed in light of the totality of the evidence. Major J., in *Ewanchuk*, made this clear:

> [29] **While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place.** If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
>
> [30] **The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct.** The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.
>
> [Emphasis added]

And:

> [61] In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching to occur. **Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant**. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of the sexual assault is established and the inquiry must shift to the accused's state of mind.
>
> [Emphasis added]

[106] The trial judge did what he was supposed to do—assess the complainant's credibility in light of the totality of the evidence. The judge disabused himself of any adverse inferences about consent based on a delayed report or alcohol consumption.

[107] The trial judge examined the differences in Ms. C.'s testimony and the events depicted in the video. The judge never expressed any preconceived expectations about how an actual victim should behave, but instead he examined how this complainant behaved. This is a far cry from the situation in *R. v. A.R.J.D.*, *supra*, where the trial judge reasoned that "[a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as

avoiding the perpetrator". The judge in that case then erroneously discounted the complainant's evidence because she had not behaved as he would have expected from a victim of sexual assault.

[108] I am not persuaded that the trial judge here engaged in forbidden speculation or a stereotypical approach. The judge's comment that the oral sex had the appearance of being voluntary reflects what the Crown itself thought. It was not determinative, but a factor the judge could consider. Equally, he observed that the giggling seemed incongruous for an intimate act done out of fear or compulsion.

[109] The Crown argues on appeal that the questions posed to the complainant about whether she consented to fellatio were improper, as was the trial judge's reliance on her apparent concession it was consensual. This, the Crown says, introduced a lay person's notion of consent rather than the required analysis involved in the legal definition.

[110] The Crown bases its argument on the direction from the Supreme Court in *R. v. Hutchinson*, 2014 SCC 19 that the *Criminal Code* establishes a two-step approach to analyze consent to sexual activity. The first is to examine if the complainant voluntarily agreed to the sexual activity. If the complainant consented, or there is a reasonable doubt that they did, the second step is to consider whether the apparent consent was rendered inoperative by fraud, coercion or lack of capacity.

[111] McLachlin C.J. and Cromwell J., for the majority, summarized the approach as follows:

> 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)).

[112] Section 273.1 of the *Criminal Code* defines consent and itemizes where no consent is obtained. The precise version of s. 273.1 is not germane to the Crown's

argument and my analysis. I will quote the relevant sections from the current version, which are as follows:

> 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.
>
> …
>
> (2) For the purpose of subsection (1), no consent is obtained if
>
> > (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> >
> > (a.1) the complainant is unconscious;
> >
> > (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
> >
> > (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> >
> > (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> >
> > (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.

[113] In addition, s. 265(3) precludes consent where a complainant submits or does not resist:

> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> > (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.

[114] As the Crown emphasizes, the complainant repeatedly said that any participation in the sexual acts was not voluntary. Indeed, her evidence was that she repeatedly said "no". However, the respondent testified that he obtained her agreement to sexual activity, at no time did she say "no" or otherwise express any lack of agreement.

[115] The trial judge found he had a reasonable doubt whether she had not consented to the sexual activity. The case did not involve any issue of her capacity, although she had consumed alcohol, nor fraud or abuse of a position of trust. She testified she felt fear and the respondent choked her, a fact the respondent vehemently denied.

[116] The trial judge had a reasonable doubt about her state of mind that night:

> I acknowledge that Ms. C. is of the belief that she was sexually assaulted. She doesn't have to hold that belief to the same standard of proof beyond a reasonable doubt that I'm required to satisfy. And when I say she holds the belief, that is the belief that she has when she came to court to testify. **It is her state of mind on the night of September 7th (sic) which is crucial, whether she did or did not consent. Given what I've indicated, the Crown has failed to prove, in my view, the standard beyond a reasonable doubt that she did not, in fact, consent.**
>
> [Emphasis added]

[117] There may well be cases where a trial judge must examine the issue whether factual consent has been vitiated by any of the factors set out in s. 273.1(2) or s. 265(3) such as in *R. v. C.B.K.*, 2015 NSCA 111. But here, the issue of voluntary agreement and the factors of fear or application of force and express words of disagreement were not just closely aligned, they were inseparable. A separate analysis would have been redundant.

[118] I see no reversible error.

[119] As to the question itself, the examination of the complainant was, in these circumstances, in no way improper. No one misunderstood what was being asked. The Crown did not object to the questions, nor did it seek leave to re-examine the complainant on the issue of her responses when pressed as to whether she had consented to fellatio. In fact, the Crown itself had posed similar questions to the complainant—that is, had she consented.

Misapprehension of evidence

[120] The Crown suggests the trial judge misapprehended the evidence in two respects: the transcript demonstrates that the complainant did not in fact change her position and concede the fellatio was consensual; and, he misinterpreted the actions captured on the video. Both, it says, were material and played an essential role in his decision to acquit.

[121] Justice Doherty, in *R. v. Morrissey* (1995), 80 O.A.C. 161, set out the fundamental principles that guide appellate courts when faced with an argument from *conviction* that a trial judge misapprehended the evidence. A misapprehension of evidence can arise from:

> …a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence.
>
> [para.83]

[122] A misapprehension of evidence attracts appellate remedy on a conviction appeal as a miscarriage of justice if the misapprehension compromised trial fairness. If the error is one of law, the onus will shift to the Crown to demonstrate that it did not result in a miscarriage of justice (s. 686(1)(b)(iii)). These principles are settled and adopted in legions of cases (see for example: *R. v. Lohrer*, 2004 SCC 80; *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34; *R. v. C.L.Y.*, 2008 SCC 2; *R. v. J.P.*, 2014 NSCA 29, leave denied, [2014] S.C.C.A. No. 255).

[123] But this is a Crown appeal from an acquittal. The parties seem to have assumed that if the trial judge misapprehended the evidence, this constitutes an error of law alone, and subject to the additional Crown burden of demonstrating that the verdict would not necessarily have been the same (see*: R. v. Graveline*, 2006 SCC 16 at paras. 14-16; *R. v. Spinney*, 2010 NSCA 4), a new trial order would ensue.

[124] Doherty J.A. in *R. v. Morrissey* mentioned the different approach mandated where it is the Crown that alleges a misapprehension of evidence on an appeal from an acquittal:

> 83 I will now address the effect of the trial judge's misapprehension of the evidence. Submissions premised on an alleged misapprehension of evidence are commonplace in cases tried by a judge sitting without a jury. A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence. **Where, as in the case of Crown appeals from acquittals (*Criminal Code*, R.S.C. 1985, c. C-46, s. 676(1)(a)) and appeals to the Supreme Court of Canada pursuant to s. 691, the court's jurisdiction is predicated on the existence of an error of law alone, characterization of the nature of the error arising out of the misapprehension of evidence becomes crucial. The jurisprudence from the Supreme Court of Canada demonstrates the difficulty in distinguishing between misapprehensions of the evidence which constitute an error of law alone and those which do not**: *Harper v. R.*,

> [1982] 1 S.C.R. 2, 65 C.C.C. (2d) 193; *Schuldt v. R.*, [1985] 2 S.C.R. 592, 23 C.C.C. (3d) 225; *R. v. Roman*, [1989] 1 S.C.R. 230, 46 C.C.C. (3d) 321; *R. v. B.(G.)* (No. 3), [1990] 2 S.C.R. 57, 56 C.C.C. (3d) 181; *R. v. Morin*, [1992] 3 S.C.R. 286, 76 C.C.C. (3d) 193. **The recent trend in that court suggests that most errors which fall under the rubric of a misapprehension of evidence will not be regarded as involving a question of law**: *R. v. Morin*, *supra*; J. Sopinka, M.A. Gelowitz, The Conduct of an Appeal (Markham: Butterworths, 1993), pp. 85-89.
>
> 84 The need, for jurisdictional purposes, to classify a misapprehension of the evidence as an error of law, as opposed to an error of fact or mixed fact and law, does not arise in this court where the appeal is from conviction in proceedings by way of indictment. Section 675(1)(a) gives this court jurisdiction to consider grounds of appeal which allege any type of error in the trial proceedings. The wide sweep of s. 675(1)(a) manifests Parliament's intention to provide virtually unobstructed access to a first level of appellate review to those convicted of indictable offences.
>
> [Emphasis added]

[125] Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd ed, vol 3, loose-leaf, (Toronto: Canada Law Book) accurately summarizes the law on this issue:

> 23.1022 [. . .] A misapprehension of evidence does *not*, with the exception of an error as to the legal effect of found facts, constitute a question of law but constitutes, at most, a mistake of mixed law and fact with the result that the Crown, generally, cannot appeal an acquittal on the ground of a misapprehension of evidence unless it also involves a misapprehension of a "legal principle".

[126] In *R. v. Morin*, [1992] 3 S.C.R. 286, Sopinka J., for the Court, reinstated an acquittal because the Alberta Court of Appeal had overstepped its jurisdiction when it allowed a Crown appeal on the basis that the trial judge had erred in law by failing to consider all of the relevant evidence. Justice Sopinka made it clear that the approach to the issue of evidence assessment by a trial judge does not automatically transfer from conviction to acquittal appeals.

[127] If a trial judge gets the law wrong when they fail to reach a conclusion in law based on undisputed or found facts, the appeal court can intervene to arrive at the correct legal effect of undisputed facts (para. 16). But where it is said that a trial judge failed to appreciate the relevant evidence, this cannot amount to an error of law unless the failure is based on a misapprehension of an applicable legal principle (para. 18). (See also: *R. v. Corey*, 2011 NBCA 6; *R. v. George*, 2017 SCC 38.)

[128] Here, the Crown does not allege any error in an applicable legal principle in the assessment of the evidence—just that the trial judge got the evidence wrong in the sense he was mistaken as to the substance of it. This does not raise an issue of law alone. Nonetheless, as the parties have fully argued the alleged misapprehension issue, I will deal with it as if it could amount to an error of law alone.

[129] For an appeal from conviction, the general principles of law with respect to misapprehension of evidence were recently reviewed by Mainella J.A. in *R. v. Jovel*, 2019 MBCA 116, which I would respectfully adopt:

> 34 In *R v Whiteway (BDT) et al*, 2015 MBCA 24, the following summary was provided as to what is, and what is not, a misapprehension of the evidence (at para 32):
>
> > 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 (*R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161 at para. 83; and *R. v. Sinclair*, 2011 SCC 40 at para. 13, [2011] 3 S.C.R. 3). A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge (*R. v. Lee*, 2010 SCC 52 at para. 4, [2010] 3 S.C.R. 99). It is insufficient that the judge may have misapprehended the evidence; the error must be readily obvious (*Sinclair* at para. 53).
>
> 35 **As part of its duty to not usurp the function of a trial judge, an appellate court cannot characterise a trial judge's interpretation of evidence as a misapprehension simply because it does not agree with it, it raises some unease or concern, or it may be a mistake** (see *R v CJ*, 2019 SCC 8, adopting 2018 MBCA 65 at paras 67-68; and *Sinclair* at para 53). **This is particularly the case when the interpretation of evidence is based on a credibility assessment, because assessing credibility is not a science and, given the many factors that go into such decisions, it is not always amenable to precise articulation by a trial judge** (see *Gagnon* at para 20; and *R v REM*, 2008 SCC 51 at para 49).
>
> [Emphasis added]

[130] The Crown points to the following aspect of the trial judge's reasons:

> Her position with respect to the oral sex that she was performing on him was that his, Mr. Percy was holding her head and moving her head up and down on his penis. A careful look at Exhibit 7, video IMG0205, supports her testimony in the sense that, yes, you can see the hand of Mr. Percy on her head; however, there are times when that hand is not on her head and the activity such as licking the penis after spitting on it at Mr. Percy's request had the appearance of being entirely voluntary. She does not state that before that, that there was any specific threat

> made to her, and the actions shown during her performing oral sex on him, although partially supporting her version of events, strongly suggests that she was a willing participant. It's hard to imagine someone giggling during such an event when they were doing so out of fear or a sense of compulsion.
>
> **I found, when asked about that, she, herself, was at a loss, it seemed to me, for an answer and then said, "Well, I consented."**
>
> [Emphasis added]

[131] The transcript reveals the actual exchange about consent to the fellatio. I quoted it earlier. For convenience, I will repeat it:

> Q. Am I correct in stating the oral sex was consensual?
>
> A. It was ... yes, I let it continue.
>
> Q. It was consensual. So if I suggested to you there was a phone call into your phone at roughly 5:28 so after you had got home from the cab, do you remember getting that phone call?

[132] There is a clear danger to simply read the cold words of a transcript and conclude that a trial judge misapprehended the evidence. Here, the trial judge heard and watched the complainant testify. He found as a fact that she was at a loss for an answer, and in essence, conceded she had consented. The addition of the words "I let it continue" could have been seen by a trier of fact as an important qualification of a complainant's answer and a significant contraindication of a voluntary agreement, and hence not consent within the meaning of s. 273.1 of the *Criminal Code*. This trial judge did not.

[133] We are not privy to the body language, hesitations or pauses between words. It is decidedly not our function to re-interpret the evidence in a fashion more favourable to the Crown in order to conclude that the trial judge misapprehended the evidence. This is particularly so when the interpretation involves the context and nuance of witness' credibility.

[134] The issue of the extent and number of changes in the complainant's reactions and responses in cross-examination was not new. I earlier quoted the trial judge's comments in his *voir dire* decision where he had made a similar observation. The respondent argued at the end of the trial that the complainant had conceded, yes, the oral sex was consensual. Trial Crown replied that the complainant had not changed her testimony, but she had said, "No, I allowed it to continue." He urged the trial judge to review the evidence.

[135] The trial judge did not agree with the Crown's interpretation after this evidence had been flagged for him to consider. In these circumstances, I am not persuaded that the trial judge misapprehended the evidence.

[136] The Crown also says the trial judge simply got the contents of the video wrong when he found the respondent's hand was not always on the complainant's head and she had licked the head of his penis with her tongue.

[137] The trial judge commented that it was only after having watched the video a number of times that one could discern the finer details and nuances of the activities. The judge made findings of fact of what is depicted on the video. I am not persuaded that his interpretation amounts to a misapprehension. We are not at liberty, absent misapprehension of a legal principle, on a Crown appeal to disturb factual determinations, even if we were convinced they were unreasonable—which, in any event, I am not.

[138] I would not give effect to this ground of appeal.

FLAWED CREDIBILITY ANALYSIS

[139] The Crown says the trial judge engaged in speculation when he considered the respondent's evidence, and examined the complainant's evidence in piecemeal fashion, which reveal a flawed credibility analysis.

[140] I find no merit in these suggestions. The trial judge commented unfavourably on the respondent's evidence about when it had crossed his mind about a sexual encounter with the complainant:

> However, for him to say to me the possibility of having a sexual encounter with Ms. C. hadn't crossed his mind in the circumstances which we're dealing with here now, I simply don't believe him. I think that was an effort by Mr. Percy to put himself in a better light. I'm sure, from the press, he must realize that he's not necessarily regarded in some circles in the highest light.

[141] The claimed fatal speculation is about the respondent's recognition that he was not well-regarded, given the press coverage. What is important is that the trial judge did not believe the respondent's evidence. It is irrelevant that the trial judge inferred, without positive evidence, that the respondent had to be aware of the negative press coverage. The judge gave many other reasons why he did not believe the respondent on this aspect of his evidence.

[142] The Crown's complaint about piecemeal assessment of the complainant's evidence is not borne out by the trial judge's reasons. He thoroughly reviewed her testimony. On direct, the judge found her evidence to be compelling. He had no reason to doubt her honesty. The judge then focussed on the reliability of her evidence. Defence counsel had challenged the complainant on cross-examination with the content of the video and the respondent's version of events. The trial judge found that her reaction and responses in cross-examination were very much in contrast.

[143] The judge was bothered, not just by the content of the video, but by the numerous unexplained gaps in the complainant's recollection and concessions that the respondent's account, put to her in cross-examination, could have happened.

[144] Based on the totality of the evidence, the trial judge had a reasonable doubt. The Crown's argument on appeal in this respect is nothing more than an attempt to have us revisit the evidence and come to a different conclusion. That is not our role.

[145] I would not give effect to this ground of appeal.

SUFFICIENCY OF REASONS

[146] It is now well-settled that a trial judge has a duty to give reasons. The duty exists in order to permit meaningful appellate review, explain to the accused why they were convicted and to ensure public accountability (*R. v. Laing*, 2017 NSCA 69 at paras. 15-18; *R. v. Bent*, *supra* at paras. 77-79).

[147] The Crown says the trial judge's reasons are insufficient because they fail to address the substance of key issues in the case. The reasons really say nothing about the choking and voyeurism charge and the evidence that supported those allegations. In addition, it argues that the reasons fail to address what it says was the central argument made by the Crown about the respondent's credibility—he tailored his evidence to fit the Crown disclosure materials.

[148] The trial judge could have said more about the choking and voyeurism charges, but in these circumstances, the dearth of discussion does not amount to legal error.

[149] The trial judge painstakingly reviewed the evidence and the principles that guided his determination of credibility. If he had been satisfied beyond a reasonable doubt based on the complainant's evidence in light of the totality of the

evidence, that the respondent had committed a sexual assault, conviction would be virtually inevitable on the choking and voyeurism counts. Conversely, if he had a reasonable doubt because he could not reject the evidence of the respondent on the key issue of consent to sexual activity, acquittal would be virtually inevitable on the other counts.

[150] That is precisely what happened here. Immediately after reaffirming the Crown's failure to prove beyond a reasonable doubt that the complainant had not in fact consented, he simply said, "That also applies with respect to counts 2 and 3."

[151] There is little doubt that more could have been said, but the trial judge's terse dismissal of those counts does not amount to legal error based on insufficiency of reasons. We know why the respondent was acquitted on those other counts. The complainant said she was choked and did not consent to the video, which she knew nothing about. The respondent testified he did not choke the complainant, she consented to the video and was aware of the camera.

[152] The trial judge found he could not reject the respondent's evidence. Hence, he had a reasonable doubt. There is no sustainable ground of appeal based on insufficiency of reasons. It is plain from the reasons why the respondent was acquitted. This is well-explained by Binnie J. in the seminal case of *R. v. Sheppard*, 2002 SCC 26:

> 46 These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. **Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene**. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict *properly* scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular

> case, the deficiency in the reasons precludes it from properly carrying out its appellate function.
>
> [Emphasis added]

[153] Furthermore, the Crown has had no difficulty identifying from the reasons for judgment what it says are errors of law alone, even though in my view, they were ultimately unpersuasive.

[154] I would not give effect to this ground of appeal and would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Derrick, J.A.