NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. D.C.*, 2023 NSCA 20

Date: 20230330
Docket: CAC 515945
Registry: Halifax

Between:

D.C.

Appellant

v.

His Majesty the King

Respondent

Restrictions on Publication:
Section 110(1) of the *Youth Criminal Justice Act,* and
Sections 486.4(1)(2) and 486.5(1) of the *Criminal Code of Canada*

Judges: Farrar, Bourgeois and Derrick, JJ.A.

Appeal Heard: December 5, 2022, in Halifax, Nova Scotia

Subject: Criminal law. Sexual assault. Assessing credibility. Reliance on out-of-box demeanour. Stereotypical reasoning or impermissible generalizations. Use of Snapchat messages as evidence of guilt.

Summary: The appellant and the complainant were friends. One day after school the complainant and the appellant spent time together at the appellant's home before the complainant had to go to work. They had sexual intercourse which the complainant alleged was without her consent. The appellant testified it was consensual. In Snapchat messages exchanged the next day the appellant made statements the Crown argued were admissions of guilt. The appellant's Snapchat responses also contained denials. The trial judge was satisfied the Crown had proven guilt beyond a reasonable doubt and convicted the appellant. The trial judge placed a significant emphasis on the appellant not looking at the

complainant while she testified. He reached conclusions about how a person would respond when accused of sexual assault. He found the complainant credible despite submissions by the appellant that her testimony contained material inconsistences, particularly in relation to the photographing of Snapchat messages she exchanged with the appellant the following day. The trial judge treated the Snapchat messages as admissions of guilt by the appellant.

Issues:

1. Did the trial judge err in his credibility assessment of the appellant by:
   (a) improperly relying on the appellant's out-of-box demeanour?
   (b) relying on stereotypical reasoning or impermissible generalizations?

2. Did the trial judge err in his credibility assessment of the complainant by:
   a) failing to consider and resolve material inconsistencies in her evidence?
   b) misapprehending material evidence?

3. Did the trial judge err by treating the Snapchat messages as an admission of guilt by the appellant?

Result:

The appeal is allowed. The appellant's conviction is quashed and a new trial ordered. The trial judge committed reversible errors in assessing the credibility of the appellant. He should not have relied on the appellant's out-of-box demeanour. He made generalizations about the appellant's post-incident conduct. He also made reversible errors in his assessment of the complainant's credibility by failing to resolve material inconsistencies in her testimony and misapprehending material evidence. Errors in his credibility assessment tainted his determination that the appellant made admissions of guilt in his Snapchat exchange with the complainant. Derrick, J.A. agreed the trial judge made reversible errors when assessing the appellant's credibility.

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Appeal Heard:	December 5, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Farrar, J.A. concurring; Derrick, J.A. concurring in result
Counsel:	Zebedee Brown, for the appellant Timothy O'Leary, for the respondent

Youth Criminal Justice Act

Identity of offender not to be published

110 (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Criminal Code of Canada

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).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 -- other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

> **(a)** as soon as feasible, inform the victim of their right to make an application for the order; and
>
> **(b)** on application of the victim or the prosecutor, make the order.

Order restricting publication -- victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

[2] In October, 2019, the appellant, D.C., had sexual intercourse with the complainant, K.R. They were high school students, aged 17 and 16 respectively, at the time.

[3] The complainant said the sexual activity occurred without her consent, and went to police in April, 2020 to report the incident. The appellant was subsequently charged with sexual assault and choking to overcome resistance contrary to ss. 271 and s. 246(a) of the *Criminal Code*.

[4] Given his age, the appellant's trial proceeded in the Youth Justice Court before the Honourable Judge Christopher Manning. The appellant and complainant were the only two witnesses called. The appellant acknowledged he and the complainant had sexual intercourse on the date in question, but testified the complainant consented to the activity and was a willing and engaged participant.

[5] The trial judge found the appellant guilty of sexual assault, but entered an acquittal in relation to the choking charge. The appellant was subsequently sentenced to a term of 60 days of custody, followed by 30 days of supervision in the community. Additionally, the trial judge imposed a further 18 months of probation.

[6] The appellant now seeks to challenge his conviction and sentence in this Court. For the reasons to follow, I would allow the appeal of conviction, and order a new trial. As such, it is not necessary to address the appellant's complaints regarding the sentence imposed.

Background

[7] The trial was held on October 28, 2021. As noted earlier, the only two witnesses were the complainant and the appellant. The Crown, with the appellant's consent, introduced into evidence an exchange of messages between him and the complainant which had occurred on the day following their sexual encounter. The messages had been sent on Snapchat, an application on their respective cell phones.

[8] Given a new trial is ordered, I will not undertake a comprehensive review of the evidence, but set out only what is necessary to address the allegations of error.

For now, a review of the non-contentious background, the nature of the Snapchat messages, and the positions of the parties at trial, will assist in contextualizing the reasons to follow.

[9] With respect to the background, I note:

- As stated earlier, the appellant was 17 years of age and the complainant 16 when an act of sexual intercourse took place between them on October 18, 2019;
- They were known to each other. They had become friends the previous summer and had "hung out" on a number of occasions along with other mutual friends;
- One of the other persons who was part of the summertime group was S, who was the complainant's best friend. S was interested in the appellant. S and the appellant began dating and were, by October 18th, in a relationship;
- The appellant and complainant only had a half-day of school on October 18th. She had to work at a local grocery store at 5 p.m.;
- The complainant called the appellant and asked him if he could give her a drive to work. He agreed and went to her house to pick her up. They then went to the appellant's home;
- The appellant and complainant went to his bedroom. Nobody else was home. They both smoked marijuana. The sexual activity took place;
- The appellant drove the complainant to work, but first went through a Tim Horton's drive-through because the complainant wanted to get something to eat;
- The following day, the complainant reached out to the appellant via Snapchat. They exchanged messages. The complainant used her mother's cell phone to take photos of messages; and
- On April 19, 2020 the complainant reported to police that she had been sexually assaulted by the appellant, following which she provided photos of the Snapchat messages.

[10] The Snapchat messages were introduced by the Crown at trial and marked as Exhibit 1. The appellant did not challenge admissibility. Various aspects of the

Snapchat messages will be discussed later. For now, it suffices to describe the nature of the exhibit in general terms:

- The exhibit consists of 11 pages, each of which is a photograph of a cell phone. The entire screen is visible in each photograph;
- The photographs show the screen of the complainant's phone, and further, they depict messages being exchanged between the appellant and the complainant on Snapchat;
- There is a time displayed on the screen of the complainant's cellphone in each of the 11 photographs. There are two photos showing 12:40 PM, one with 12:41 PM, three with 12:47 PM, one with 12:53 PM, one at 12:59 PM, and three at 1:13 PM; and
- The messages from the complainant contain allegations of sexual assault. In the messages from the appellant, there appear both apologies, and denials that the sexual encounter was non-consensual.

Position of the parties at trial

[11] The Crown submitted the sex which took place in the appellant's bedroom on October 18, 2019, was not consensual. Based on the complainant's testimony, the Crown alleged the appellant assaulted the complainant using significant force, which included choking her. The Crown tendered the photographs of the Snapchat messages and asserted the appellant's comments therein should be viewed as an admission of guilt.

[12] At trial the appellant testified the sexual intercourse between himself and the complainant was consensual. He said the complainant was untruthful in her testimony, particularly in her description of their interaction in his bedroom. He asserted that after they had sex, they both regretted what they had done because of their mutual betrayal of S.

[13] The appellant testified that when he was dropping the complainant off at her work, she told him she would say he raped her if anyone found out about the encounter.

[14] Contrary to the Crown's submission that the Snapchat messages contained admissions of guilt, the appellant argued his responses in the Snapchat messages should be interpreted as him not admitting to sexual assault, but being remorseful

for having cheated on his girlfriend with her best friend. He said the messages also contained clear denials of having sexually assaulted the complainant. The appellant testified there were messages missing from Exhibit 1 in which he had made further denials, but he could not remember the specific contents.

[15] Before the trial judge, the appellant submitted the Snapchat messages were detrimental to the complainant's credibility in two ways. Firstly, he asked the trial judge to consider that the complainant had made no reference in the messages to being forcibly assaulted or choked, contrary to her trial evidence. Rather, she had described the interaction as being "seduced" and a result of the appellant pleading with her to have sex. Further, the appellant argued the complainant had not provided the police with a copy of all of the messages exchanged between them, rather she had selected only those that supported her narrative the sex had been non-consensual. The appellant submitted there were a significant number of messages missing, and the complainant's failure to acknowledge the messages were incomplete and her changing evidence as to when and how the photographs were taken, gave rise to credibility concerns regarding her evidence.

Decision under appeal

[16] The trial judge rendered an oral decision on April 7, 2022 in which he set out his reasons for finding the appellant guilty of sexual assault. It has not been reported.

[17] Near the outset of his reasons, the trial judge identified credibility as being the central issue in the case. He said:

> Generally, the surrounding facts in these cases are not in dispute. There is no question that on October 18, 2019, D.C. and K.R. engaged in sexual intercourse in the bedroom of D.C. The question is whether this was a consensual act or a sexual assault and whether or not choking occurred, aimed to enable assist D., D.C. in committing the sexual assault. **Credibility is, of course, the primary issue in this case.** Credibility relates to the truthfulness or veracity of the evidence of the witnesses. ...
>
> (Emphasis added)

[18] Later, the trial judge again noted:

> ...I've spoken about credibility, which examines the honesty or veracity of a witness. There is also reliability, that looks at the ability of the witness to observe, recall, and describe events with accuracy. In this case, the critical issue is

> credible, credibility. **At first blush, both K.R. and D.C. would appear to be reliable and credible witnesses**. Obviously, however, their descriptions of what took place at D.C.'s home are irreconcilable. K.R. testified she was sexually assaulted. D.C. says it was a completely consensual act. …
>
> (Emphasis added)

[19] After reviewing the evidence of the complainant and appellant, the trial judge made the following observations regarding their respective demeanour:

> I wanted to make a comment or two about demeanour. I observed K.R. testifying in the witness box next to me. I noticed that her whole body was visibly shaking during her testimony, and at times, she broke into tears. **During her testimony, D.C., the accused did not look at her, but instead stared off into the corner of the courtroom on the opposite side of the room from where she was seated. I noted that initially and made several att. .., several purposeful efforts to watch this as her evidence continued. On each occasion when I checked this, the pattern was exactly the same. It seemed to be a very purposeful act. There can, of course, be many reasons why an accused would not make eye contact with a complainant in a case such as this, but the studious ignoring of the complainant by the accused was something I have never seen before in close to 40 years being in court on a regular basis. It was certainly not a case where the accused wanted to face his accuser.**
>
> As noted previously, when the defence elected to call evidence, D.C. was an engaging witness, responding appropriately to questions and maintaining eye contact with his counsel, with the Crown during cross-examination, and indeed with me. I'm well aware of the need to exercise extreme caution when considering evidence of demeanour (see, for example, the Ontario Court of Appeal in *R. v. Trotter*, paragraph 40), but I'm also aware of the statement of the Supreme Court of Canada in *R. v. N.S.* in 2012, confirming that the witness' demeanour can be of value in assessing credibility. **In this case, it is but one aspect of my assessment of credibility.**
>
> (Emphasis added)

[20] The trial judge then proceeded to assess the complainant's credibility. He found her to be "a very credible witness". The trial judge concluded that the complainant's late reporting to the police was not problematic in terms of her credibility. With respect to the Snapchat messages the trial judge said:

> …K.R. was extensively cross-examined on Exhibit 1, the Snapchat conversation, and it was suggested to her that when she provided the Snapchat messages to the RCMP, she left out certain messages. She replied strongly that nothing was intentionally left out. In my opinion, she answered these questions in a very straightforward manner. She was neither defensive nor aggressive in her

> responses and did not, at any time, embellish her evidence, as far as I could tell. I accept her evidence that she took photos of the Snapchat exchange using her mother's phone. She did it without knowingly omitting anything, and she was not attempting to create a narrative about D.C. trying to seduce her. …

[21] It is clear the Snapchat messages, "a critical piece of evidence", were central to the trial judge's credibility assessment. He noted:

> ...The complainant indicated she initiated the conversation on the day following the incident at the home of D.C. She conceded the first words of the conversation were initiated by her, and although not captured by Exhibit 1, her opening words were, "Why didn't you listen to me?" This is not the only part missing from the whole Snapchat exchange that took place between K.R. and D.C. Mr. Brown pointed out during cross-examination and emphasised in summation that there appears to be gaps and jumps, including the following:
>
> (a) There are extenders of letters visible on page 7, but the corresponding portions of the letters do not appear on page 6, suggesting some portion is missing;
>
> (b) There is a gap of six minutes between the last message on page 7 and the first message on page 8; and
>
> (c) There is a gap of 14 minutes between the last message on page 8, 12:59, and the first on page 9, 1:13.

[22] After reviewing counsels' respective views on what use the court should make of the messages, the trial judge noted:

> As noted, Snapchat is, is a form of texting in which the message, once received, is soon automatically deleted. To preserve these messages, K.R. testified that she photographed the Snapchat conversations using another phone, her mother's, and nothing was intentionally left out and there are no pages missing. She forcefully denied that she had created Exhibit 1 to lay a narrative or groundwork for the basis of her complaint. **I accept her evidence that she did not photograph messages selectively nor purposely omit any messages that were unsupportive of her complaint against D.C. If it had been the case that she deleted unfavourable messages, there were messages of denial from D.C. that remain part of Exhibit 1 that would, presumably, may have met the same fate if she was indeed deleting messages.**
>
> (Emphasis added)

[23] The trial judge reviewed a number of case authorities which address the use and reliability of incomplete messages and concluded:

> It's common ground that the identified parties are "K.R., being "Me" and D.C. being [D.C], and what appears in Exhibit 1 was indeed what was said by the respective parties. **There is some question about whether everything was captured in Exhibit 1, but nothing specific that either party could point to and say with clarity, quote, "I said this and it's not contained within this exhibit and it affects the reliability of what is here".**
>
> (Emphasis added)

[24] Having found the complainant credible, the trial judge turned to an assessment of the appellant's credibility. As will be discussed in further detail later in these reasons, the trial judge's assessment of D.C.'s credibility involved "a close look at his evidence concerning the drop-off of K.R. at [the grocery store] and his reaction and responses to Exhibit 1, the Snapchat exchange". In short, the trial judge was skeptical the appellant would have conducted himself in the way he did both when dropping the complainant off at work, and the following day, if she had threatened him with a false claim of rape as he claimed.

[25] The trial judge ultimately concluded:

> After considering all the evidence, and particularly my conclusion that there was no threat of saying rape made at the [grocery store] and the Snapchat conversation, I find that I do not accept the evidence of D.C. Furthermore, his claim that this was a consensual sexual act does not raise a reasonable doubt in my mind.
>
> I do accept the evidence of K.R. I found her to be a credible witness, responsive to questions, and I accept her evidence of what took place. **She did not make an immediate report to the police. She did not want to lose her relationship with [S]**, and it's quite clear she did not consent to have sexual intercourse with D.C. I accept that she told him no, she was not interested and tried, unsuccessfully, on many occasions, to block his physical advances.
>
> I find D.C. guilty of sexual assault.
>
> (Emphasis added)

[26] The trial judge ended his reasons by finding the appellant not guilty of the choking charge under s. 246 of the *Criminal Code*.

Issues

[27] In his Notice of Appeal, the appellant set out the following grounds of appeal with respect to his conviction:

1. In the assessment of the Appellant's credibility, it was an error of law to give weight to the following facts:

   (a) He looked away while the Complainant testified.

   (b) He did not react as might be expected when threatened with a rape accusation.

2. It was an error of law to draw inferences adverse to the Appellant from a texting conversation provided by the complainant with unexplained gaps and missing messages.

3. Evidence of when the sexual encounter became public knowledge, which was important to the Appellant's defence, was misapprehended.

4. The verdict was unreasonable.

[28] After having considered the oral and written submissions of the parties and reviewing the record, I would re-frame the issues to be determined as follows:

1. Did the trial judge err in his credibility assessment of the appellant by:

   (c) improperly relying on the appellant's out-of-box demeanour?

   (d) relying on stereotypical reasoning or impermissible generalizations?

2. Did the trial judge err in his credibility assessment of the complainant by:

   (a) failing to consider and resolve material inconsistencies in her evidence?

   (b) misapprehending material evidence?

3. Did the trial judge err by treating the Snapchat messages as an admission of guilt by the appellant?

[29] The appellant brought a Motion for Fresh Evidence. In support, he filed an affidavit in which he set out his explanation for why he did not look at the complainant while she testified. As relayed in his Pre-Sentencing Report, the appellant's affidavit states he was acting on the instruction of his legal counsel.

[30] The affidavit was provisionally accepted, but the evidence contained therein is not necessary, or relevant, to address the issues raised on appeal.

Analysis

[31] Before embarking on an analysis of the trial judge's credibility assessments, I will set out the legal principles that govern an assessment of credibility, both generally, and in the context of sexual assault allegations.

[32] Justice Derrick has recently addressed principles relating to the assessment of credibility, particularly in relation to allegations of sexual assault in *R. v. Stanton*, 2021 NSCA 57, at para. [67]. This included:

- The focus in appellate review "must always be on whether there is reversible error in the trial judge's credibility findings". Error can be framed as "insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict" (*R. v. G.F.*, 2021 SCC 20, para. 100).
- Where the Crown's case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant's evidence be tested in the context of all the rest of the evidence (*R. v. R.W.B.*, [1993] B.C.J. No. 758, para. 28 (C.A.).
- Assessments of credibility are questions of fact requiring an appellate court to re-examine and to some extent reweigh and consider the effects of the evidence. An appellate court cannot interfere with an assessment of credibility unless it is established that it cannot be supported on any reasonable review of the evidence (*R. v. Delmas*, 2020 ABCA 152, para. 5; upheld 2020 SCC 39).
- "Credibility findings are the province of the trial judge and attract significant deference on appeal" (*G.F.*, para. 99). Appellate intervention will be rare (*R. v. Dinardo*, 2008 SCC 24, para. 26).
- Credibility is a factual determination. A trial judge's findings on credibility are entitled to deference unless palpable and overriding error can be shown (*R. v. Gagnon*, 2006 SCC 17, paras. 10–11).
- Once the complainant asserts she did not consent to the sexual activity, the question becomes one of credibility. In assessing whether the complainant consented, a trial judge "must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant …" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 61).

- "Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events…" (*Gagnon,* para. 20).
- The exercise of articulating the reasons "for believing a witness and disbelieving another in general or on a particular point … may not be purely intellectual and may involve factors that are difficult to verbalize … In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization" (*R. v. R.E.M.*, 2008 SCC 51, para. 49).
- A trial judge does not need to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence (*R.E.M.*, para. 56).
- "A trial judge is not required to comment specifically on every inconsistency during his or her analysis". It is enough for the trial judge to consider the inconsistencies and determine if they "affected reliability in any substantial way" (*R. v. Kishayinew*, 2019 SKCA 127, para. 76, Tholl, J.A. in dissent; aff'd 2020 SCC 34).
- A trial judge should address and explain how they have resolved major inconsistencies in the evidence of material witnesses (*R. v. A.M.*, 2014 ONCA 769, para. 14).

[33] To the above I would add:

- The failure to articulate how credibility concerns are resolved, particularly in the face of significant inconsistencies in a complainant's testimony, may constitute reversible error, as an accused is entitled to know why the trial judge is left with no reasonable doubt (*R. v. Dinardo*, 2008 SCC 24, para. 31).

1. Did the trial judge err in his credibility assessment of the appellant?

[34] The trial judge said the appellant was a bright, articulate, and responsive witness, and that at first blush, he appeared reliable and credible. However, the appellant was ultimately not believed by the trial judge, nor did his evidence give rise to a reasonable doubt on the only issue in contest – whether the sex was

consensual. I am satisfied the trial judge committed two fundamental and fatal errors in the assessment of the appellant's credibility.

Reliance on out-of-box demeanour or behaviour

[35] This Court has previously cautioned trial judges about the peril of relying on out-of-box demeanour in assessing credibility. In *R. v. N.M.*, 2019 NSCA 4, a trial judge's reliance on an accused's demeanour and behaviour while watching a complainant testify was found to undermine his credibility assessment and resulting conviction. The appellant says the same error arises here.

[36] The Crown submits that use of out-of-box demeanour is not fatal to a credibility assessment, and says the trial judge's own words demonstrate he placed little reliance on the appellant's out-of-box behaviour. Specifically, the Crown noted that at the sentencing hearing the trial judge said:

> ...I took notice of D.C.'s comments at page 7 of the, of the pre-sentence report that he purposefully looked away from the victim throughout the trial, based upon his legal advice and not out of any disrespect. To be clear, Mr. [C], I did not base my, my decision on your deliberate avoidance of looking at the complainant, but I gave reasons for that. But your point is taken.

[37] Before addressing the trial judge's use of the appellant's behaviour while seated in the courtroom, it will be helpful to review how other appellate courts have viewed the use of out-of-box observations.

[38] The Crown says the leading decision on the use of out-of-box demeanour is a decision of the Ontario Court of Appeal, *R. v. T.M.*, 2014 ONCA 854. In *T.M.*, the Court dismissed the appellant's challenge to his convictions relating to the historical sexual abuse of his daughter and step-daughter. One of the grounds of appeal alleged the trial judge had erroneously relied upon the appellant's courtroom demeanour while listening to the testimony of other witnesses.

[39] In rendering the Court's decision, Justice Laskin wrote:

> [51] As is evident from this passage, the trial judge was commenting on the appellant's demeanour during the complainants' testimony and before the appellant himself testified. **Yet, when the appellant did testify, the trial judge did not ask him to explain his demeanour, nor did he alert defence counsel that he may comment on it in his reasons**.

> [52] The appellant submits that the trial judge erred by relying on the appellant's demeanour when he was not on the witness stand giving evidence as a basis to reject his evidence. He argues that what he did while sitting beside his lawyer at the counsel table during his daughters' testimony had no probative value. Yet the trial judge relied on the appellant's courtroom demeanour, and his reliance cannot be excused by a saving comment that he was only making an observation and not judging the appellant on his demeanour.
>
> (Emphasis added)

[40] He further explained that the reliance on out-of-box demeanour carries higher risk of an accused being treated unfairly and the judge misinterpreting what was observed in the witness box:

> [62] Of course, I accept that triers of fact -- judges and juries -- can draw inferences about a witness's credibility from the witness's demeanour while that witness is testifying. And that is so, as Lacourcière J.A. noted, even though the witness is not given an opportunity to explain any particular mannerisms while testifying. **But most witnesses expect to be judged on their demeanour while testifying as well as on the substance of their evidence. They recognize that people communicate both verbally and non-verbally and that the two cannot always be separated. I do not think witnesses have the same expectation when they are not in the witness box**.
>
> [63] The third and related concern, which arises in the case before us and which I have just adverted to, **is the potential unfairness of the trial judge's reliance on the accused's demeanour outside the witness box when the trial judge does not give the accused any opportunity to explain the accused's courtroom demeanour**.
>
> [64] The final concern relates to the first concern. Our court has emphasized that the probative value of an accused's apparently calm reaction to an allegation of sexual abuse is highly suspect. Accused testify in the unfamiliar and stressful environment of the courtroom. Without a baseline to judge how they react to a stressful situation, their demeanour, even while testifying, is susceptible to misinterpretation. See *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.); *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161 (C.A.); and *R. v. Bennett* (2003), 67 O.R. (3d) 257 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 534. **And the risk of misinterpretation is even higher when the accused is not testifying, but is simply sitting in the courtroom.**
>
> (Emphasis added)

[41] In concluding the judge's reliance on the appellant's out of box demeanour did not give rise to error justifying intervention in the circumstances of that case, Justin Laskin explained:

> [67] What then of the trial judge's finding concerning the appellant's credibility? **I would be troubled by the trial judge's rejection of the appellant's evidence if I thought it was based solely or even primarily on the appellant's demeanour outside the witness box.** But I do not think that it was. Even discounting the trial judge's saving comment, at most he placed modest reliance on the appellant's courtroom demeanour. **I do not think any "manifest unfairness" arises from his having done so. He gave other cogent reasons for rejecting the appellant's evidence**. For example, the trial judge compared the appellant's cross-examination with his examination-in-chief, and said:
>
> > In cross-examination, he was a very different person. I found that he was flippant, he was argumentative, he was unresponsive to questions. He further exhibited a lack of candor when responding to questions. At one point he rebuffed the Crown Attorney for asking longwinded questions. Mr. Larsh did not ask him longwinded questions. On a number of occasions he paused and seemed to be stalling for time before answering a question. That goes to candor. He complained that he didn't understand questions put to him yet the questions that were put to him were as simple as the ones put to him in-Chief by Mr. McLean.
>
> [68] And significantly, the trial judge's considered acceptance of the credibility of the complainants' evidence was itself a reason and compelling explanation for his rejection of the appellant's evidence: see *R. v. D. (J.J.R.*) (2006), 215 C.C.C. (3d) 252, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 69, at para. 53.
>
> (Emphasis added)

[42] The Crown further relies on *R. v. Diabas,* 2020 ONCA 283, where the Ontario Court of Appeal, despite expressing that it would have been "preferable" for the judge to not refer to the accused's demeanour during the complainant's testimony, found that doing so did not give rise to a miscarriage of justice. The Court concluded:

> [31] That said, we are not persuaded that the trial judge's reference to the appellant's demeanour outside the witness box gave rise to a miscarriage of justice in this case. The trial judge gave lengthy reasons analyzing the evidence presented and made detailed findings of credibility based on the evidence. Although the reference was made as part of the trial judge's opening summary of her conclusions, no further reference was made to this factor as part of the trial judge's subsequent detailed assessment of the appellant's credibility. In the circumstances, we conclude this isolated reference was of no significance to the trial judge's conclusions.

[43] The Quebec Court of Appeal takes a less forgiving view of out-of-box demeanour being used to assess credibility. In *Parkinson-Makara v. R.*, 2012

QCCA 2011, the accused was detained in a provincial jail awaiting sentencing when he was charged with three new counts of uttering death threats and criminal harassment. The complainants included a correctional officer who testified she had been harassed and intimidated by the accused during his detention. In his reasons for conviction, the trial judge took note of the accused's aggressive behaviour in the courtroom and found this supported the correctional officer's testimony she had felt intimidated by their exchange. The trial judge concluded his courtroom behaviour and demeanour also impacted negatively on the accused's credibility.

[44] The Court of Appeal allowed the appeal, finding it was a fundamental error for the trial judge to rely on "irrelevant" information in her assessment of the issues, including credibility. The Court (Hilton, St. Pierre and Gascon, JJ.A) wrote:

> [3] In the main, his appeal focuses on various grounds related to the fairness of the trial in the manner it was conducted by the trial judge. **It also brings into question whether the trial judge improperly took account of irrelevant factors in his determination of Mr. Parkinson-Makara's guilt on the counts for which he was found guilty.**

And later:

> [25] There is also the issue of the trial judge drawing a link between the behaviour of the appellant in the courtroom and the belief Ms. Sura entertained that she felt threatened. A similar issue arose in *LSJPA - 121*, an incest case in which the complainant had testified to the behaviour of her older brother during their adolescence and afterwards. The trial judge there took it upon herself to "évaluer aussi les attitudes et comportements observés chez l'accusé" in her courtroom outside the context of his testimony. …
>
> [26] The unanimous reasons delivered on behalf of this Court emphasized that the only relevant considerations it belonged to a trial judge to assess were those that arose from the accused's testimony as a witness. …
>
> [27] These grounds alone are sufficient to set aside the verdicts of conviction, **since it is apparent the judge's assessment of the appellant's behaviour in the courtroom but outside the witness box had an impact on his conclusion that the appellant did commit the offences for which he was found guilty**. In principle, therefore, a new trial should be ordered on all three counts. …
>
> (Emphasis added)

[45] The Alberta Court of Appeal has also found that a trial judge's reliance on an accused's behaviour in the courtroom is problematic, giving rise to sufficiency of reasons and trial fairness concerns. In *R. v. Salai*, 2007 ABCA 30, an appellant,

convicted of trafficking, asserted the trial judge had improperly relied upon her observation of his behaviour while a defence witness was testifying. In her reasons the trial judge noted she had viewed the appellant gesturing or signalling to the witness as he was testifying. She found this conduct impacted negatively on both the witness's and the appellant's credibility.

[46] In allowing the appeal, Justice Berger for the Court explained:

> [13] The absence of recited factual underpinnings for the judge's conclusory statement regarding "signalling", in my view, undermines the ability of this Court to engage in meaningful appellate review of the conclusion reached: ***R. v. Sheppard***, [2002] 1 S.C.R. 869. **Also, the failure to afford to counsel any opportunity to address the matter before adjudicating on its significance constitutes an error of law in these circumstances**. The trial judge first mentioned the alleged misconduct involving the witness and the Appellant when she gave her reasons for finding the Appellant guilty.
>
> [14] The trial judge's blunt comments suggest that she may well have believed that counsel saw the gestures as she did. As she did not say when her observations were made, the connection between the gestures and specific evidence is unknown. The physical location of the Appellant in the courtroom would normally have been behind counsel or to the side of the courtroom. Ordinarily, therefore, counsel would not necessarily be looking in the direction of the Appellant at all times. Even if counsel might have seen some conduct of the witness, counsel may well have not appreciated any significance to what was seen. Crown counsel did not mention anything nor propose such occurrence to be of evidential significance in argument to the trial judge. Accordingly, one must infer that the Appellant's counsel had no notice of a need to call evidence on the point or to make submissions which might explain the improper conduct which the trial judge ultimately attributed to the Appellant.
>
> [15] **There is, in my opinion, a qualitative difference between taking account of a witness's demeanour in assessing his or her credibility and relying upon perceived conduct that the judge concludes is consistent with an attempt to interfere with a witness's oath and to thereby obstruct justice.** The trial judge's conclusion that the signalling impacted Fouquette's credibility was based on more than an assessment of Fouquette's demeanour on the witness stand. Rather, it was based, to some undisclosed degree, on actions extraneous to Fouquette occurring outside the witness stand and involving someone else in the courtroom. **Absent timely disclosure of her observations, there was no opportunity for counsel to make diligent inquiry to ascertain whether the trial judge's observations and conclusions were accurate, or whether she misinterpreted something entirely innocuous**. On this record, there is no way of knowing what the trial judge had in mind when she perceived "signalling" between Fouquette and the Appellant. Counsel were, accordingly, precluded from

> addressing the trial judge's concerns. Meaningful appellate review, in the result, is also thwarted.
>
> (Emphasis added)

[47] I turn now to the appellant's assertion the trial judge erred by relying upon his courtroom behaviour. The trial judge's observation as to the appellant's conduct has been set out earlier. It warrants being repeated:

> I wanted to make a comment or two about demeanour. I observed K.R. testifying in the witness box next to me. I noticed that her whole body was visibly shaking during her testimony, and at times, she broke into tears. **During her testimony, D.C., the accused did not look at her, but instead stared off into the corner of the courtroom on the opposite side of the room from where she was seated. I noted that initially and made several att. .., several purposeful efforts to watch this as her evidence continued. On each occasion when I checked this, the pattern was exactly the same. It seemed to be a very purposeful act. There can, of course, be many reasons why an accused would not make eye contact with a complainant in a case such as this, but the studious ignoring of the complainant by the accused was something I have never seen before in close to 40 years being in court on a regular basis. It was certainly not a case where the accused wanted to face his accuser.**
>
> As noted previously, when the defence elected to call evidence, D.C. was an engaging witness, responding appropriately to questions and maintaining eye contact with his counsel, with the Crown during cross-examination, and indeed with me. I'm well aware of the need to exercise extreme caution when considering evidence of demeanour (see, for example, the Ontario Court of Appeal in *R. v. Trotter*, paragraph 40), but I'm also aware of the statement of the Supreme Court of Canada in *R. v. N.S.* in 2012, confirming that the witness' demeanour can be of value in assessing credibility. **In this case, it is but one aspect of my assessment of credibility.**
>
> (Emphasis added)

[48] I take no issue with the case authorities cited by the trial judge regarding the use of a witness's demeanour evidence. However, those authorities do not address nor endorse the use of an accused's out-of-box demeanour or behaviour as being available tools in assessing credibility. Those cases speak only to testimonial demeanour. The trial judge did not acknowledge this Court's prior warning about the use of out-of-box demeanour, nor seemingly turn his mind to the appropriateness of its use in the case before him. He did not provide the appellant with an opportunity to address the conduct he determined to be the purposeful "studious ignoring of the complainant".

[49] I have no doubt the trial judge's observations of the appellant significantly informed his credibility assessment. The trial judge's own words underscore the appellant's conduct in the courtroom made a marked impression on him, so much so that he continued to monitor the appellant's behaviour during the course of the complainant's testimony. The impact of the appellant's courtroom conduct was such that the trial judge felt compelled to add he had seen nothing like it in his nearly 40 years attending court. The trial judge's comment made later at the sentencing hearing does nothing to dispel what is clear from his own earlier words – the appellant's behaviour in the courtroom made a negative impression on him and it had an impact on the assessment of his credibility.

[50] I agree with the Quebec Court of Appeal that the behaviour demonstrated by an accused outside of the witness box is not usually relevant.[1] That is, quite simply, because such conduct is not evidence. When the trier of fact is a jury, it is instructed to rely only on evidence which has been properly placed before it. In the *Canadian Judicial Council – National Judicial Institute Model Jury Instructions*, it is suggested that jurors be told:

> **You must consider only the evidence presented in the courtroom**. **Evidence is the testimony of witnesses and things entered as exhibits. It may also consist of admissions.**
>
> The evidence includes what each witness says in response to questions asked. Only the answers are evidence. The questions are not evidence unless the witness agrees that what is asked is correct.
>
> The Crown and the defence have agreed about certain facts. This is called an "admission" . You must accept those admitted facts without further proof.
>
> (Emphasis added)

[51] It would constitute misdirection if jurors were told they could observe an accused's behaviour and demeanour while listening to other witnesses, and use their interpretation of that conduct as part of determining guilt or innocence. It should be no different when the trier of fact is a judge alone.

[52] I further agree with the Alberta Court of Appeal that the use of an accused's courtroom behaviour outside of the witness box, gives rise to serious trial fairness concerns. It is a foundational principle that an accused is entitled to know the case against them, and to be able to respond accordingly. An accused has the ability to

[1] There may be an exception when an accused puts his own demeanour into question during the trial. That did not occur in this instance.

respond to evidence introduced during trial by choosing to call evidence, by discussing evidence in their submissions, or both. The same cannot be said of a judge's observations of behaviour outside of the witness box which are only disclosed at the time of conviction.

[53] I am cognizant of the outcomes in *T.H.* and *Diabas* where the use of similar courtroom behaviour did not justify setting aside convictions. I agree there may be circumstances where a judge's reference to an accused's out-of-box demeanour or behaviour may, in the context of the particular case, not give rise to error justifying intervention. In both those cases, it would appear the trial judges gave other cogent and detailed reasons for their credibility determinations and foundations for conviction. The same cannot be said about the trial judge's reasons in the present case.

[54] I am satisfied that in these circumstances, it was improper for the trial judge to utilize his observations of the appellant's courtroom behaviour as a factor in his assessment of credibility. Basing his credibility assessment, even partially on factors the appellant had no ability to respond to, constituted an error of law. I would allow the appeal on the basis of this error alone.

Reliance on stereotypical reasoning or impermissible generalization?

[55] The appellant says the trial judge impermissibly assessed the believability of his evidence "by comparing it to an arbitrary expected standard of human behaviour". He argues the trial judge's credibility assessment was negatively, and improperly, impacted by how the trial judge thought a person would normally respond to a false allegation of rape. In his factum he explains:

> 102. In regard to DC's description of the threat in the [grocery store] parking lot, the trial judge considered it implausible that DC "made no real attempt to stop and talk to her – she was a, she, of course, was a friend of his – or to do so later that evening or indeed the next morning", "He didn't make any effort to stop her or to talk to her to find out why she would say such a thing".
>
> . . .
>
> 107. A dozen different people threatened with a false rape accusation in the [grocery store] parking lot might react in a dozen different ways. There is no yardstick of believability. It is well within the realm of understandable human behaviour that some would be dumbfounded, try to avoid further confrontation with their accuser, and turn to friends for support. …

[56] There has been much said in recent decisions about the impermissible use of stereotypical reasoning and generalized assumptions about human behaviour when assessing credibility. I have found Justice Paciocco's description of these two errors in *R. v. J.C.*, 2021 ONCA 131, to be helpful:

> [57] There are two relevant legal rules that identify impermissible reasoning relating to the plausibility of human behaviour. These rules overlap in the sense that both may be breached at the same time.
>
> **(1) The Rule Against Ungrounded Common-Sense Assumptions**
>
> [58] The first such rule is that judges must avoid speculative reasoning that invokes "common-sense" assumptions that are not grounded in the evidence or appropriately supported by judicial notice: *R. v. Roth*, 2020 BCCA 240, at para. 65; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286, at paras. 19-27; *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289, at paras. 35-36. For clarity, I will call this "the rule against ungrounded common-sense assumptions".
>
> . . .
>
> [61] Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence**. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour**.
>
> [62] It was therefore an error in *R. v. J.L.*, 2018 ONCA 756, 143 O.R. (3d) 170, at paras. 46-47, for the trial judge to infer that a complainant would not have consented to sex outside on the dirt, gravel and wet grass where the sexual act occurred, in mid-December. This conclusion was not a permissible logical inference drawn from the evidence. It was, instead, an additional factor for consideration introduced impermissibly into the deliberation process based on an untethered generalization about human behaviour. Had there been evidence from the complainant that she was careful or concerned about her appearance, her clothing, or her physical comfort, the impugned inference would have been grounded in evidence and would have been permissible.
>
> (Emphasis added)

[57] With respect to the use of stereotypes, Justice Paciocco wrote:

> **(2) The Rule Against Stereotypical Inferences**
>
> [63] The second relevant, overlapping rule is that factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour. I will call this "the rule against stereotypical inferences". Pursuant to this rule, it is an error of law to rely on stereotypes or erroneous

> common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility: *Roth*, at para. 129; *R v. A.B.A.*, 2019 ONCA 124, 145 O.R. (3d) 634, at para. 5; *Cepic*, at para. 14. **It is equally wrong to draw inferences from stereotypes about the way accused persons are expected to act***: R. v. Quartey*, 2018 ABCA 12, 430 D.L.R. (4th) 381, at para. 21, aff'd 2018 SCC 59, [2018] 3 S.C.R. 687; and see *Cepic*, at para. 24.
>
> [64] Two points are critical in understanding this rule and ensuring that it does not impede proper judicial reasoning.
>
> [65] First, like the rule against ungrounded common-sense assumptions, the rule against stereotypical inferences does not bar all inferences relating to behaviour that are based on human experience. It only prohibits inferences that are based on stereotype or "prejudicial generalizations": *R. v. A.R.D.*, 2017 ABCA 237, 422 D.L.R. (4th) 471, at paras. 6-7, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218.
>
> . . .
>
> [68] The second critical point in understanding the rule against stereotypical inferences is that this rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence. Professor Lisa Dufraimont makes this point admirably in "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 Queen's L. J. 316, at pp. 345-46, 350; and it is reinforced in *A.R.D.*, at paras. 6-8, 62; and *Roth*, at para. 73.
>
> [69] For this reason, it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype: *Roth*, at paras. 130-38. For example, in *R. v. Kiss*, 2018 ONCA 184, at paras. 101-2, evidence that the complainant did not scream for help was admitted, not to support the impermissible stereotypical inference that her failure to do so undermined the credibility of her claim that she was not consenting, but for the permissible purpose of contradicting her testimony that she had screamed to attract attention.
>
> (Emphasis added)

[58] Finally, Justice Paciocco described the impact of such errors as follows:

> [73] As a matter of principle, an error is "based" on a stereotype or improper inference when that stereotype or improper inference played a material or important role in explaining the impugned conclusion. Where it did so, even if the trial judge offered other reasons for the impugned conclusion, it cannot safely be said that the trial judge would have reached the same conclusion without the error. Where the erroneous reasoning does not play a material or important role in reaching the impugned conclusion, and was only incidental, the accused will not have been prejudiced by it and no reversible error occurs.

[59] The above principles have been adopted and applied by this Court. See, for example, *R. v. Cooke*, 2020 NSCA 66 and *R. v. Al-Rawi*, 2021 NSCA 86 (leave to appeal denied, [2021] S.C.C.A. No. 487).

[60] I turn now to the complaint before us. The appellant was questioned in cross-examination as to why he did not attempt to respond at any point to the complainant's threat of claiming rape either in the parking lot or later. He said he was stunned by the allegation, and didn't know what to do. However, the trial judge had difficulty with the appellant's explanations. He said:

> I have some difficulty with his description of what happened at the complainant's work. As K.R. was getting out of his vehicle, he says she made threats to him to say "rape" in the event that anyone found out that they'd had sex that afternoon. He said he made no real attempt to stop and talk to her – she was, a, she, of course, was a friend of his nor to do so later that evening or indeed the next morning.

[61] Later in his decision the trial judge returned to this concern, and noted:

> He didn't make any effort to stop her or to talk to her or find out why she would say such a thing.

[62] With respect, I am satisfied the trial judge utilized an assumption, not grounded in the evidence, about how a person would respond when falsely accused of sexual assault. He held the appellant's behaviour up against the assumption an innocent accused would confront a complainant in such circumstances, and it clearly informed his credibility assessment. In doing so, the trial judge erred in law. I would also allow the appeal on this basis.

2. Did the trial judge err in his credibility assessment of the complainant?

[63] I am mindful of the deferential lens which must be used in assessing the trial judge's credibility assessments. I am further cognizant that his reasons must be read as a whole and not parsed or forensically examined. After considering the entirety of the record, I am satisfied the trial judge's credibility assessment of the complainant also demonstrates material errors. I will explain.

Failure to resolve material inconsistencies

[64] The Snapchat messages were not only central to the Crown's case, but a critical aspect of the appellant's defence. As explained earlier, the appellant asserted the messages provided by the complainant were only a portion of their exchange, and she had selectively chosen which ones to provide to police. Raising doubt about the complainant's intentions and ultimate credibility was foundational to the appellant's defence.

[65] Not surprisingly, the complainant was questioned closely about the Snapchat exchange and how the photos in Exhibit 1 came to be taken. Her evidence in direct included:

- The day following the encounter, she reached out to the appellant on Snapchat. She acknowledged her originating message to the appellant did not appear in Exhibit 1. The following exchange took place in terms of the content of that originating message:

  Q. Do you recall what your message said that you sent to him the next day?

  A. The first one?

  Q. Yes?

  A. **No. I know what it was about, but I can't remember what it said at first.**

  Q. And did he respond to you?

  A. Yes.

  Q. How did...how did he first respond to you?

  A. At first, he said he was sorry.

- Later in her direct examination, the complainant's testimony regarding the content of the missing first message was different:

  Q. Is your initial message to him that morning captured in any of this?

  A. No.

  Q. Okay, so if we go back to page one where is says "@[D]", "I'm sorry, [K], I really am, I feel like I should be shot TBH", do you recall what was said by you before that?

  A. **I said, "Why didn't you listen to me?"**

- She testified there were no messages missing between page 8 (showing 12:59 PM) and page 9 (showing 1:13 PM) of Exhibit 1;

- She acknowledged the time showing on the messages (12:40 PM to 1:13 PM) accurately reflected the time of day when the messages were exchanged;
- She testified she provided the text messages to [S] on February 29, 2019 and they "had planned to go to the RCMP together".
- She said she went to the RCMP on April 19, 2019.

(Emphasis added)

[66] In cross-examination, the complainant testified as follows:

- She used another cell phone to take pictures of the Snapchat exchange because she didn't want the appellant to be aware she was taking them;
- The complainant confirmed that if she had taken a screenshot in the Snapchat application on her own cell phone, the appellant would have been notified the image had been saved;
- The complainant testified the photos were taken as the conversation was occurring:

  Q. **And I understand what you said is that these images were made while the conversation was taking place; is that right?**

  A. **Yes.**

- She confirmed the continuous nature of the messaging:

  Q. And was this conversation interrupted for periods of time? Did you put the phone down, and you had to go and do other things when you didn't hear a reply from [D] for a while?

  A. No.

  Q. Okay, this is a continuous back and forth; that's right?

  A. Yes.

  Q. And it starts at 12:40 on the first; is that correct?

  A. Yes.

  Q. And it ends at 1:13; that's right?

  A. Yep.

  Q. So you and [D] were exchanging these messages for, I guess, 33 minutes, just over half an hour?

A. Yes.

- The complainant denied there were any messages missing between page 3 (12:41 PM) and page 4 (12:47 PM) of Exhibit 1;
- The complainant denied there were any messages missing between page 7 (12:53 PM) and page 8 (12:59 PM) of Exhibit 1;
- The following exchange took place in response to counsel asking the complainant about the time gap between page 8 (12:59 PM) and page 9 (1:13 PM):

Q. Continuing on to the next page, we see at the top of page eight, first of all, the timestamp is that 12:59, and then it jumps to 1:13, and in this conversation of continuous exchange of messages that lasts for over half an hour, would you agree that there appears to be here approximately 14 minutes of that conversation that's been left out?

A. **I wasn't taking pictures as we were texting. I took the pictures after all of this.**

Q. **I thought you said that you took the pictures during the conversation, and that it started at the time indicated and it ended at the time indicated on the screen; is that not correct?**

A. The conversation did, yes. I went to go get Mum's phone, still leaving the conversation open up on my phone, taking the pictures.

Q. **Okay, so do you mean that after the conversation was all done, you then went back and took the pictures?**

A. **Yes.**

Q. Okay, and so you took a picture of the screen, scrolled up, took a picture, scrolled up, took a picture, is that how you did it?

A. I read over them.

Q. Okay, you read over them, scrolled, and took the pictures; is that correct?

A. Yes.

Q. And so the timestamps that...I mean, the times that we see at the top of each picture, those are the actual time, right, where it says 1:13 p.m., what it's saying is the time now is 1:13 p.m.; that's right?

A. Yes.

Q. **So are you saying that it took you more than half an hour to take these photographs of the screen after the fact, that you**

started at 12:40 p.m., and by the time you were done taking 11 pictures of this conversation, it was 1:13 p.m.; is that what you are saying?

A. **Yes.**

(Emphasis added)

[67] In redirect the complainant confirmed that the time reflected at the top of each of the photos in Exhibit 1 is when she took the picture of what was displayed on the screen of her cell phone.

[68] The court had some questions for the complainant following her testimony concerning the messages she had emailed to the RCMP:

Q. Are you satisfied that Exhibit 1 shows all the messages that you sent to the RCMP on you pdf?

A. I'm not quite sure what you're getting at with "satisfied"?

Q. You had a collection of messages on your phone.

A. Yes.

Q. You sent them in a document, electronic document, to Constable Brad Savage?

A. Yes

Q. He printed them off?

A. Yes.

Q. Are you satisfied with what is printed off, is what you sent, everything that you sent him?

A. Yes.

[69] In closing submissions, counsel for the appellant argued the complainant's evidence regarding the Snapchat messages should raise serious concerns about her credibility:

> Now, I'd submit that one thing we do know about this string of text messages is that these 11 pages are not complete, that this is not a complete record of the texting conversation that took place between [K] and [D]. And we received contradictory evidence from [K] about the recording of these messages. So, initially she testified that these photographs were taken live, during the chat, that she was using another phone to take pictures as it happened. And I would suggest that the time shown on the phone is contemporaneous with when those message exchanges were occurring, so, looking at the first page, where it says "12:40 p.m."

> at the top, if she was taking the pictures as the messages were being sent, those messages would have been sent at 12:40. That's when that exchange happened, or thereabouts. **But when it was pointed out to Ms. [R], in cross-examination, that that would show quite conclusively that messages were missing because there are large gaps in the time where there are not messages, she changed her evidence and she then testified that she didn't take the picture contemporaneously but that she scrolled through afterwards and took the pictures afterwards.**
>
> . . .
>
> And her testimony that these were taken afterwards is contradicted by the images themselves, and this is a point that my friend brought out on re-direct – we can see, in some of the images, for instance, on page 8, in the bottom left corner, there's that icon of a person with the three dots. And when asked about that, Ms. [R] confirmed that what that means is that, at that moment, the other person is composing their message. That's what it tells you. So, clearly, if the pictures were being taken after the fact, we wouldn't see any icons like that, but they do appear, I believe, on several pages. Yes, they do appear on, perhaps, most pages in fact.
>
> **So, I'd submit, first of all, that, in trying to avoid this very important question about the completeness of these messages, we see Ms. [R] change her testimony, search for an explanation that lines up with the problem that's being presented to her on the stand, and hastily try to come up with some explanation, rather than just simply acknowledge that messages are missing.** And I would suggest that that does speak to her reliability and credibility in this court, and it speaks to how seriously she does or does not take these proceedings and the search for truth.
>
> (Emphasis added)

[70] The trial judge found the complainant was not evasive under cross-examination. He further found she had not intentionally omitted messages that had been exchanged between herself and the appellant. These were key findings not only in the assessment of her credibility but in ultimately convicting the appellant.

[71] With respect, there were several problematic aspects of the complainant's evidence that the trial judge either inadequately addressed, or failed to consider at all. These includes:

- The complainant testified she took the photographs of the messages as she was texting with the appellant. She testified the messaging was a continuous back and forth without gaps for over 30 minutes. When challenged why there would be such large time differences shown on the photos if the messaging was continuous, the complainant then

testified that she took the photos after the messaging exchange ended. The appellant raised this evidence as a credibility concern in his closing submissions. At best the complainant's evidence was confusing regarding her documentation of what the trial judge found to be "a critical piece of evidence" – at worst, it was inconsistent and evasive. The trial judge did not address this concern raised by the appellant;

- The trial judge accepted there was an initial message from the complainant to the appellant which said "Why didn't you listen to me?" which had not been included in Exhibit 1. This finding laid the foundation for the interpretation of the appellant's messages to follow. However, the trial judge failed to consider the complainant had originally testified she could not remember what the first message she sent to the appellant had said. It was only later in her evidence that her recollection became more specific. This was a critical aspect of the evidence for both the prosecution and the defence. Before accepting one version of the complainant's evidence, it was incumbent upon the trial judge to resolve what appeared to be an improvement of the complainant's memory in the course of her testimony;
- The appellant testified there were messages missing in the Snapchat exchange which included further denials. In his closing submissions, Crown counsel acknowledged there were messages in the exchange missing from Exhibit 1. The trial judge also accepted there were messages missing from the exchange. In cross-examination, the complainant initially remained adamant there were no messages missing notwithstanding defence counsel pointing out a lack of continuity in content and other indicators of missing messages. She finally testified that no messages were "intentionally left out".

[72] The trial judge found "She replied strongly that nothing was intentionally left out" and that the photos were taken "without knowingly omitting anything". With respect, the evidence before the trial judge called for a closer consideration before reaching this conclusion. Firstly, the trial judge did not address why the complainant was initially so reluctant to admit messages were missing from Exhibit 1 when it was clear from the evidence, including her own, there were gaps where messages were exchanged yet not included in the photographs given to the police. Given the issues in contention, he should have considered why the complainant adamantly denied that possibility during the vast majority of her

testimony, and whether her reluctance to admit the obvious impacted upon her credibility.

[73] The trial judge's acceptance the complainant did not intentionally omit messages is problematic. The evidence in this instance called out for the trial judge to assess the plausibility of the complainant mistakenly omitting parts of the exchange when taking the photographs. She testified the messaging was a continuous back and forth, without interruption. If that is the case, how many messages were missed in the time gaps demonstrated in Exhibit 1? For example, two pages of messages were captured as having occurred at 12:40, and three pages were captured at 12:47. If the messaging was continuous as the complainant testified, then there was potentially a significant number of messages which were exchanged during the time gaps which the complainant did not photograph. Given the importance of the Snapchat messages and the defence theory, before concluding messages were not intentionally omitted, the trial judge ought to have considered the potential volume of messages missing and whether it was plausible the complainant could have mistakenly overlooked them. If the trial judge had considered the entirety of the evidence, he may have reached another conclusion and viewed the complainant's credibility in a different light.

Misapprehension of material evidence

[74] Not every misapprehension of evidence will call into question a trial judge's conclusion. However, errors in the analytical path leading to conviction can justify appellate intervention (*R. v. J.C.*, 2018 NSCA 72; *R. v. P.(J.)*, 2014 NSCA 29, leave to appeal denied, [2014] S.C.C.A. No. 255). I am satisfied the trial judge's assessment of whether the complainant was credible relied, at least in part, on a misapprehension of evidence.

[75] The appellant sought to weaken the complainant's credibility by questioning the delay between the alleged assault on October 18, 2019, and her report to police on April 19, 2020. The appellant submitted that going to the police was only triggered by it becoming public knowledge that he and the complainant had engaged in sex, and she needed to advance a story of non-consensual sex to protect her reputation.

[76] The trial judge determined the late reporting did not impact on the complainant's credibility. In doing so, he explained:

> K.R. testified that S, the girlfriend of D.C., was a close friend, and at one point, she described her as her best friend. She clearly did not want that friendship to end, and it was her belief that D.C. and S. enjoyed a good relationship. K.R. was 16 at the time of this incident in October, 2019. **She did not report it to the police until February 29, 2020**, when she discovered that D.C. had told somebody about their encounter.

And later:

> I do accept the evidence of K.R. I found her to be a credible witness, responsive to questions, and I accept her evidence of what took place. **She did not make an immediate report to the police. She did not want to lose her relationship with [S]**, and it's quite clear she did not consent to have sexual intercourse with D.C.
> …
>
> (Emphasis added)

[77] There are two concerns with the trial judge's above conclusion and resulting dismissal of the appellant's challenge to her credibility. First, the trial judge rationalized the complainant's late report to police was because she did not want to lose her relationship with S. However, nowhere in the evidence did the complainant say she was fearful of her friend finding out about the sexual encounter. Rather, the complainant testified she was not concerned about S. knowing she had sex with the appellant. The trial judge's dismissal of the challenge to the complainant's credibility relied upon a misapprehension of her evidence.

[78] Further, the trial judge was of the view the complainant made a report to police on February 29, 2020. The evidence establishes the report to police was made nearly two months later, on April 19, 2020. At first blush, this error may seem inconsequential. However, the evidence also demonstrated that the complainant had advised S of the encounter on February 29, 2020 and had given her copies of the Snapchat exchange. Clearly, the complainant's delay in going to police could not have been because of her fear of S becoming aware of the encounter and losing the friendship – S was aware, had the messages, and still the complainant delayed in reporting to police. This was evidence, either overlooked or misapprehended by the trial judge, that could have impacted upon the complainant's credibility as argued by the appellant.

3. Did the trial judge err by treating the Snapchat messages as an admission of guilt by the appellant?

[79] The errors identified in the trial judge's credibility assessment are individually and collectively sufficient to set aside the appellant's conviction. However, I will address the appellant's concern about the trial judge's use of the Snapchat messages.

[80] In closing submissions the appellant provided the trial judge with three case authorities relating to the use of electronic messaging in situations where the conversation is incomplete. He argued those authorities demonstrated that incomplete exchanges should not be utilized to infer an admission of guilt.

[81] In his reasons, the trial judge responded to this argument and the cases provided. He said:

> Mr. Brown provided very helpful case law relating to this issue – three cases: *Stewart*, *S.S.* and, and *Mootoo*. In *Mootoo*, the complainant took screenshots of sexually explicit messages received on her phone. She did not capture all messages received and some messages were cut off, and it was clear that the full conversation was not before the court – a very similar scenario to what we have here. Davis, J. made the following observations. Text messages and Snapchat messages by the same token are an accurate record of what was said. If the meaning of a text message is clear on its own, the message can be admissible, even if it was part of a longer conversation that was not all captured. In the case before him, there was no evidence that the messages were deliberately captured in such a way to alter or manipulate their meaning (see paragraphs 78 to 82).
>
> I also considered the *Stewart* and *S.S.* cases and found that they dealt with situations far more unreliable than those of either the *Mootoo* case or this case before the court.
>
> It's common ground that the identified parties are K.R., being me, and D.C. being, being [D.C.], and what appears in Exhibit 1 was indeed what was said by the respective parties. There is some question about whether everything was captured in Exhibit 1, but nothing specific that either party could point to and say with clarity, quote, "I said this and it's not contained within this exhibit and it affects the reliability of what is here".

[82] In his factum, the appellant says:

> 70. The Appellant takes no issue with the overall admissibility of the text message exchange as part of the Crown case as evidence of the date of the incident and to demonstrate that sexual contact had taken place between KR and DC. However, due to incompleteness and the distinct risk that the messages had been edited by KR, it was unsafe to rely upon them to infer an admission of guilt by DC.

[83] The appellant argues the trial judge erred in using the Snapchat messages as an admission because they were incomplete. Although acknowledging he agreed to the admissibility of Exhibit 1, this, he asserts, was only for the purpose of assessing credibility, and not to be used otherwise.

[84] The Crown argues the trial judge did not err in using the incomplete Snapchat exchange, and "[b]y agreeing to the admissibility of the Snapchat messages, the Appellant was agreeing they were not so speculative and unsafe that their probative value was overborne by their prejudicial effect". The Crown submits the trial judge was entitled to interpret and weigh the messages, and it does not constitute an error just because the appellant disagrees with the interpretation.

[85] I am satisfied the trial judge made no error when he accepted the Snapchat messages were admissible despite the potential they were incomplete. The trial judge correctly stated the law that "if the meaning of a text message is clear on its own, the message can be admissible, even if it was part of a longer conversation that was not all captured". In *R. v. Schneider*, 2022 SCC 34, the Supreme Court addressed the admissibility of an overheard, but incomplete, conversation as an admission of guilt. The majority found that the exclusion of a partial conversation is not automatic, and a trial judge's analysis of the ultimate use of the content was a contextual one (at para 72). In my view, the same reasoning applies in the instance of incomplete text or Snapchat messages.

[86] The trial judge reviewed the message contents and ultimately concluded:

> In my view, this is very powerful evidence of a young man being confronted about what he has done and trying first to apologise and accept responsibility, then deny, minimise, and try to explain away.

[87] Although I am satisfied the trial judge correctly looked at the context in which the messages were sent and received in his analysis of their reliability, I find his conclusion the Snapchat messages were admissions of guilt by the appellant was undermined by error.

[88] By the time the trial judge turned his mind to the use and interpretation of the Snapchat messages, he had already found the complainant was "a very credible witness" and moreover, he had accepted her evidence that she did not purposely omit any messages, nor had she been selective in the messages provided to police. The trial judge had also already concluded the complainant's first words in the exchange were "Why didn't you listen to me?" Further, the trial judge had already

found the appellant's credibility to have been negatively impacted by his out-of-box behaviour.

[89] I have explained why the above conclusions are tainted by error. I am satisfied the trial judge's resulting finding the contents of Exhibit 1 were reliable and the interpretation of the appellant's responses as admissions are based, at least in part, on these flawed conclusions. As such, the trial judge's finding that the appellant's responses in Exhibit 1 were admissions of guilt is also flawed.

[90] Although not specifically argued on appeal, there is another aspect of the trial judge's reasoning on this point which I find problematic. In assessing the reliability of Exhibit 1, the trial judge appears to place weight on the fact that neither party was able to say what was said in the missing messages. The complainant denied there were messages missing. It was only the appellant who asserted Exhibit 1 contained gaps in the conversation during which he had made additional denials. It would appear the trial judge, in finding the messages reliable, considered that the appellant was unable to specifically and with clarity provide content of the missing messages to show they were unreliable. In short, it appears the trial judge looked to the appellant to disprove the reliability of the incomplete messages the Crown sought to use as an admission against him. If so, this would constitute an improper burden to place upon the appellant.

[91] To conclude, it would have been open to a judge to find the Snapchat messages in the present instance to have constituted an admission of guilt notwithstanding the incompleteness of the exchange. However, the errors committed by the trial judge tainted his analysis and the ultimate interpretation of the appellant's messages.

Disposition

[92] For the reasons above, I would allow the appeal, quash the appellant's conviction, and order a new trial on the sexual assault charge.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Concurring Reasons:

[93] I have had the benefit of reading the reasons of my colleague, Justice Bourgeois. I am in agreement that the appeal should be allowed on the grounds of errors committed by the trial judge in his assessment of the appellant's credibility. In concurring with my colleagues' view that a new trial should be ordered, I wish to add some additional comments. My concurrence should not be taken to indicate I agree with all the points in Justice Bourgeois' reasons.

Appellate Review

[94] Deference to credibility findings is displaced only by a clear and material error. (*R. v. Delmas*, 2020 ABCA 152, para. 5; upheld 2020 SCC 39; See, also: *R. v. Gagnon*, 2006 SCC 17, para. 10; *R. v. Brunelle*, 2022 SCC 5, para. 8; *R. v. Palmer*, 2022 ABCA 232, para. 30.) "Material errors made in the course of credibility determination on the path to conviction can be fatal" (*R. v. J.C.*, 2018 NSCA 72, at para. 50).

[95] The requirement that a trial judge's reasons are to be read generously, as a whole, and with the presumption that the judge knows the law[2] does not afford those reasons deference where material error is identified.

[96] I have come to the conclusion the trial judge made material errors in his assessment of the appellant's credibility by placing reliance on the appellant's out-of-box demeanour and by drawing unfounded inferences from the appellant's conduct after the event.

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[2] *R. v. Gerrard*, 2022 SCC 13, at para. 2.

Out-of-Box Demeanour

[97] My colleague at paragraphs 34-53 of her reasons has authoritatively reviewed the law on the use of out-of-box demeanour in assessing the credibility of an accused person. I agree the trial judge's statement when sentencing the appellant that he had not based his decision on the appellant's out-of-box demeanour is of no value to the assessment of whether he erred.

[98] In this case I am not satisfied the trial judge's credibility assessment was untainted by his observations of the appellant during the complainant's testimony. Although the trial judge said the appellant's out-of-box demeanour was "but one aspect of my assessment of credibility", it was, in my view, an influential aspect. It drew the trial judge's attention to the extent that he felt compelled to study the appellant while the complainant testified. He saw it as a "pattern" of conduct that was deliberate, a "studious ignoring of the complainant", which he had "never seen before in close to 40 years being in court on a regular basis". The trial judge concluded his comments by noting this accused had "certainly" not wanted "to face his accuser".

[99] As Justice Bourgeois has identified, the trial judge's reliance on the appellant's out-of-box demeanour as even "one aspect" of his credibility assessment raises serious trial fairness concerns. The trial judge made his observations before the appellant had stepped into the witness box. A seed of scepticism was taking root in his mind. His commentary about what he observed was not neutral: its tone and emphasis had a critical edge. It is apparent that by the end of the complainant's testimony the trial judge had formed a negative impression of the appellant.

[100] I view the trial judge's reliance on out-of-box demeanour as inconsistent with the presumption of innocence. The appellant had to expect his testimonial evidence would be subject to scrutiny by the trial judge but was entitled to not have how he listened to the complainant's testimony factored into the question of whether the Crown had proven his guilt beyond a reasonable doubt.

[101] Trial fairness is also implicated by the appellant not being put on notice during the trial that his out-of-box demeanour had captured the trial judge's attention. He was offered no opportunity to explain. In the context of the fresh evidence application we were provided with the appellant's affidavit on the issue. In it the appellant said the following:

> It is true that I avoided looking at the Complainant. However, I was following the advice of my lawyer. When we were preparing for trial, Mr. Brown talked to me about strategies for maintaining my composure and controlling anxiety during the trial. He told me I should avoid any behaviour in the courtroom that could appear as if I was trying to intimidate or demean the Complainant such as glaring at her, eye-rolling, grimacing or sighing. He said that I might find it difficult to sit quietly and keep a neutral outward appearance while listening to her repeat awful allegations that I say are false. He said that I was not required to look at the Complainant while she testified, and that if it would help me to remain calm I could just pick a spot on the courtroom wall and look there while I listened.

[102] I mention the appellant's affidavit in relation to the trial judge not raising his concerns about the out-of-box demeanour. Leading into his comments about how remarkable it was, the trial judge acknowledged there can "be many reasons why an accused would not make eye contact with a complainant in a case such as this". He should have recognized he was not equipped to assess why the appellant was not looking at the complainant and that it was dangerous and improper for him to draw a negative inference from his observations. Notably, in the course of working on his decision the trial judge did raise concerns about a possible evidentiary issue with trial counsel which was dispensed with in a telephone conference call.

[103] The appellant's out-of-box demeanour should have played no role in the trial judge's assessment of his credibility. I agree it constituted reversible error requiring the appellant's conviction to be set aside and a new trial ordered.

Assumptions Not Grounded in the Evidence

[104] I also agree the trial judge committed reversible error in how he used the appellant's testimony about the interaction with the complainant at the grocery store in his credibility assessment. He made the same error in his analysis of the appellant's evidence about the day following the sexual encounter.

[105] The appellant testified that when dropping the complainant off at the grocery store she threatened to claim he had raped her if it became known they had had sex. The trial judge found it notable the appellant "made no real attempt to stop and talk to her" despite them being friends, "or to do so later that evening or indeed the next morning". In describing the appellant's testimony about the next day, the trial judge commented on his decision to go to a social gathering in the next community: "Rather than seeing his friend and straighten it out, he decided he'd see a group of friends in [***] and engage in some partying".

[106] The trial judge's difficulty with the appellant's explanation for his response to the threat he claimed the complainant made was not grounded in anything other than an apparent expectation of what a truly innocent person would have done.

[107] This aspect of the trial judge's credibility assessment can be contrasted with how he dealt with the appellant's responses to the complainant's accusations in the Snapchat messages. He anchored that analysis in the evidence before him. After reviewing the initial exchange of Snapchat messages, he said:

> …He had many hours to consider what he says he was told in the [local grocery store] parking lot, mainly that [the complainant] might cry rape, to which he says he immediately protested. When, however, faced with the same or similar accusations many hours later, his initial responses confirms the statement she makes.

[108] The appellant's credibility had to be consistently assessed in accordance with the correct legal principles and without material error. The trial judge's assessment had to be free of improper inference. The trial judge fell into error by taking an unfavourable view of the appellant's testimony where it conflicted with unfounded assumptions of what his reaction should have been. It is not possible to say with confidence his credibility assessment would have been the same in the absence of this error, especially when viewed with his use of the appellant's out-of-box demeanour.

[109] I would allow the appeal on this ground as well.

[110] With one exception, I will not be addressing the other issues raised in Justice Bourgeois' reasons. I will briefly comment on the Snapchat messaging issue.

The Snapchat Messages

[111] The appellant did not object to the admissibility of the Snapchat messages. He viewed the messages as useful for cross-examining the complainant. Once the Snapchat messages were admitted, it was for the Trial Judge to decide what weight should be given to them.[3] There is no requirement in law that only a complete conversation can be accorded weight.[4]

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[3] *R. v. Sium*, 2022 SKCA 102, at para. 46.
[4] *R. v. Schneider*, 2022 SCC 34, at paras. 68 and 69.

[112] Justice Bourgeois has addressed the issue of whether the trial judge erred in his treatment of the Snapchat messages. She finds the trial judge correctly stated the law and took account of the context in which the messages were sent and received for the purpose of determining if they were sufficiently reliable to support an inference of guilt by admission. She concludes the trial judge's use of the Snapchat messages as admissions by the appellant was contaminated by error. She finds the trial judge's interpretation of and reliance on the appellant's responses in the Snapchat could not survive the errors he committed in his analysis of the appellant's credibility. I respectfully disagree. The content of the initial Snapchat exchange alone speaks for itself. I find the errors committed by the trial judge in assessing the appellant's credibility do not come into play. On this point, I take a divergent view from that of my learned colleague.

Derrick, J.A.