NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. M. (CJP)*, 2023 NSCA 73

Date: 20231027
Docket: CAC 518790
Registry: Halifax

Between:

C.J.P.M.

Appellant

v.

His Majesty the King

Respondent

Judge: The Honourable Justice Elizabeth Van den Eynden

Appeal Heard: May 24, 2023, in Halifax, Nova Scotia

Subject: Sexual assault (s. 271 of *Criminal Code*); unreasonable verdict; misapprehension of evidence; insufficient reasons; conviction appeal;

Summary: The appellant was convicted of sexual assault pursuant to s. 271 of the *Criminal Code*. On appeal, he requests the conviction be set aside and an acquittal entered or alternatively, a new trial be ordered. The appellant contends the trial judge misapprehended evidence, rendered a verdict that was unreasonable and failed to provide sufficient reasons to support a finding of guilt.

Issues:

1. Is the verdict unreasonable?
2. Did the judge misapprehend the evidence?
3. Are the judge's reasons sufficient?

Result: Appeal dismissed. The guilty verdict is not unreasonable; the judge did not err in his treatment or apprehension of the evidence; and the judge's reasons are sufficient. The judge's

reasons, read as a whole and in context with the record, demonstrate a logical connection between the verdict and the basis for the verdict.

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 62 paragraphs.

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Respondent

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

Judges: Bryson, Van den Eynden, Beaton, JJ.A.

Appeal Heard: May 24, 2023, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Van den Eynden, J.A.; Bryson and Beaton, JJ.A. concurring

Counsel: Patrick Eagan, counsel for the appellant
Jennifer MacLellan, K.C., counsel 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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.

Reasons for judgment:

Overview

[1] The appellant was convicted of sexual assault pursuant to s. 271 of the *Criminal Code*. On appeal, he requests this Court set aside his conviction and enter an acquittal or alternatively, order a new trial. The appellant contends the trial judge misapprehended evidence, rendered a verdict that was unreasonable and failed to provide sufficient reasons to support a finding of guilt.

[2] Justice James Chipman of the Nova Scotia Supreme Court presided over the trial. His reasons for convicting the appellant are reported at *R. v. M. (CJP),* 2022 NSSC 253.

[3] For the reasons that follow, I am not persuaded the judge erred in his treatment or apprehension of the evidence. I am satisfied the guilty verdict is not unreasonable and the judge's reasons are sufficient. Accordingly, I would dismiss the appeal.

[4] I will set out the necessary background and issues raised on appeal before providing my analysis and the standard of review to be applied.

Background

[5] The sexual assault happened sometime in the early hours of August 5, 2019 during the course of a social gathering of two teenage couples who had consumed a lot of alcohol throughout the prior evening and into the morning hours. For consistency, I will use the same initials the judge did when referring to them:

- "J" is the complainant;
- "CH" is the complainant's then boyfriend;
- "H" is the complainant's female friend; and,
- "CM" is the appellant and H's then boyfriend.

[6] Due to a number of delays related to the COVID pandemic, CM's trial took place in June 2022. The judge released his decision in September 2022 and CM was sentenced in November 2022.

[7] In his reported decision (at paras. 10 - 61) the judge reviewed the evidence in some detail. In order to place the grounds of appeal in context, the following background will suffice.

[8] The Crown called J, CH and J's mother as witnesses together with a sexual assault nurse examiner and a toxicologist. The defence elected not to call any evidence.

[9] The record establishes that H's parents were away and she invited CM, J and CH over to her home. All four of them consumed alcohol throughout the evening as they socialized. All four became intoxicated to varying degrees.

[10] Eventually, in the early morning hours, the four retired to H's bedroom and laid on her queen-sized bed. CH was on the outside edge. Next to him was J, then H, then the appellant CM on the other edge.

[11] At one point the bed began to shake. CH looked over J to see what was happening. CH explained that he believed CM and H were having sex. CH said he held J and tried to ignore the other couple having sex.

[12] At some point H and J changed positions in the bed so that J was lying next to CM. Later on, H wanted to go upstairs to get something to eat and asked CH to come with her. CH said he asked CM to go with H but CM refused.

[13] Before leaving the bedroom, CH asked J if she would be fine if he left the room and understood she agreed. However, before going upstairs with H, he told CM "just don't do anything" while he left the bedroom.

[14] CH explained that earlier in the evening CM told him that tonight would be "just like last weekend". CH took this as a reference to something CM told him, in particular, that CM and H partied with another couple the previous weekend and he (CM) had sex with the other woman "so she didn't feel left out".

[15] The record illustrates some gaps in J's recall of the events that evening and in the bedroom. She testified that she was "pretty drunk, but I was still aware" and when getting into bed she was "pretty much half asleep". However, she recalled changing positions with H; the bed moving; CH and H leaving the bedroom together and CH asking her if she was ok and responding that she was.

[16] J's next memory was when CM was on top of her. She explained she was lying on her back and CM:

> "had my legs up a bit, but they were bent, . . . I said to him to stop . . . I said no and please stop. And I remember him telling me it was fine, and he said no. And he grabbed my legs on the inner thigh . . . and just pulled them up and kept going. . . . He put his penis inside my vagina . . . Like inserting and exserting [sic], I guess. Like, pumping. . . . after he grabbed my legs . . . I don't really remember . . . that's all I remember was after he grabbed my legs and held them up. And then I don't remember after that happened if he would have said anything or did anything else".

[17] J said she did not consent to intercourse.

[18] CH said he was not upstairs long (5 or 10 minutes) and when he returned to the bedroom, he saw CM on top of J. He said CM's hands were on either side of J's head and CM was having sex with J "extremely roughly". CH said he froze for a few seconds, then called out to CM by his first name. At that point CM apparently ran out of the room crying.

[19] CH then went to attend to J. In his opinion, she was intoxicated but not extremely so. There were some further limited interactions between the couples but eventually J and H returned to the bed to sleep. CH slept on a couch outside the bedroom. CM retired to a spare bedroom.

[20] J's mother testified that the next day she noticed something was "off" with her daughter's boyfriend CH and her daughter was "distant".

[21] Later that day, when J and CH were driving to an event, CH asked J if she remembered what happened the night before and that CM raped her.

[22] J explained that speaking with CH caused her to process what had happened to her the previous night. She said:

> . . . Pieces and stuff just started to come back.
>
> . . .
>
> . . . I remembered what [CM] had done, but I guess with [CH] saying it in the way he did, like, that [CM] raped you, I . . . cause I was only 16 at the time, and I was very . . . not simple minded, but I never thought of things like that. And that
>
> . . . I guess things like that would happen to me.

> So, once he said that, I was like that is what happened. Like . . . 'cause I didn't want him to. Like . . . kind of like it was, like, that realization of that, I guess.

[23] After realizing this, J disclosed to her mother later that same day that she had been sexually assaulted. Her mother took her to the IWK where J underwent a sexual assault examination.

[24] The judge summarized the evidence of the SANE nurse:

> [52] Jane Collins is a sexual assault nurse examiner (SANE) nurse who was called in along with SANE nurse Shannon Taylor to examine J on the evening of August 5, 2019, at the IWK Avalon Sexual Assault Centre. Ms. Collins' c*urriculum vitae* was entered as exhibit 2. She spoke to the Healthcare Practitioner's Guide, SANE chart notes and traumagrams (all entered as exhibits) she completed based on the three, to three and a half hour long interview and examination of J.
>
> [53] Ms. Collins described J as "teary at first but calm, pleasant" during the detailed assessment. On cross-examination Ms. Collins agreed that she made a demeanor assessment but that she could not say what caused J's demeanor to be as she described.
>
> [54] Owing to J's relatively young age a speculum examination was not conducted. Overall, no trauma was detected on J's body.
>
> [55] At page two of the notes there appears these "Details of Assault" based on the patient's "own order of recall and words":
>
>> Me and my boyfriend were drinking/partying with another couple (my friend and her boyfriend). My boyfriend left the room and my friend did as well – so I was alone with CM (assailant). Then he sexually assaulted me. I was intoxicated but I was clear that I didn't want that to happen. I pushed him off but he wouldn't stop.

[25] The toxicologist expert called by the Crown analyzed a sample of J's urine and blood that was gathered on August 5, 2019. In addition to opining on alcohol concentration and its effect on J, the expert also addressed the impact of a drug J had been prescribed and taken. The judge summarized the expert evidence as follows:

> [56] Elizabeth Hird is a forensic toxicologist with the RCMP. Her c*urriculum vitae* was introduced as exhibit 5 and she was qualified as an expert in:

> the absorption, distribution, elimination of alcohol and drugs in the human body, including the blood alcohol concentrations to the time of incident;
>
> pharmacological and toxicological effects of alcohol and drugs on the human body taking into consideration factors such as sampling delay, tolerance, method of administration;
>
> analytical techniques for the isolation, detection and quantitation of drugs and alcohol from the biological and non-biological samples; and
>
> interpretation of toxicological findings.

[57] Ms. Hird's forensic science and identification services laboratory report dated November 12, 2020, was introduced and she confirmed that she examined one urine sample and one of the two blood samples taken from J on August 5, 2019. She noted as follows regarding sertraline:

> Sertraline (Zoloft®) is a drug used for the treatment of mental depression and obsessive compulsive disorder. It is a newer type of antidepressant sometimes referred to as a selective serotonin re-uptake inhibitor (SSRI). Although classified as a CNS depressant, SSRI's have a reduced sedative effect when compared to older antidepressants however, in certain patients drowsiness may be shown. This is more likely in the early stages of treatment. Other side effects of the drug may include dizziness, fatigue and insomnia. Again these effects are likely to be more noticeable shortly after the start of treatment or following high dosage.

[58] Ms. Hird said that given the dosage, when administered (in the morning) and other factors that in her opinion the drug "would have been very well tolerated and have very few side-affects in [J]."

[59] Ms. Hird spent considerable time going over the potential affects of alcohol. She stated that alcohol ingestion, "reduces what you see and what you pay attention to", noting that the brain has less capacity to process when impaired by alcohol. Ms. Hird went over specific scenarios provided by the Crown prosecutor which mirrored the testimony of J and also CH regarding J's alcohol consumption on August 4th and 5th. Given all of the variables and the somewhat conflicting testimony, Ms. Hird provided three potential blood alcohol concentration (BAC) ranges for J at the material time:

> .95 - .175
>
> .167 - .217
>
> .194 - .245

[60] Ms. Hird stated that if one had a BAC of 100 or less that there would generally be a "mild intoxicating effect." She noted the permissible legal limit for driving (.80) and that one's central nervous system is increasingly depressed as the BAC gets higher such that .300 and greater is dangerous.

> [61] On cross-examination Ms. Hird acknowledged that the ranges she set forth were “theoretical calculations” based on many variables. She agreed that she provided very large ranges and could not conclude with certainty which range J was in, albeit she would expect confusion and vomiting at the higher range.

[26] The credibility of J and CH was of central importance to the Crown’s case. The judge found both J and CH to be credible and reliable witnesses. The judge was satisfied the Crown had proven beyond a reasonable doubt that CM sexually assaulted J and a conviction under s. 271 of the *Criminal Code* was entered. CM received a custodial sentence of 2 years’ followed by a period of probation.

[27] CM appeals against conviction only.

[28] Additional background will be reviewed in my analysis as required.

Issues

[29] CM refined his grounds of appeal set out in his Notice of Appeal to these in his factum:

1. Is the verdict unreasonable?
2. Did the judge misapprehend the evidence?
3. Are the judge’s reasons sufficient?

[30] Although CM set out three discrete grounds to be determined, he did not argue them separately in his factum nor in his oral submissions. Rather his complaints appear to be combined with no clear delineation. In its factum, the Crown attempted to distill CM’s arguments and addressed them separately. I will do the same.

[31] The appellate standards of review these grounds of appeal attract are set out in my analysis.

Analysis

Is the verdict unreasonable?

[32] CM’s unreasonable verdict submissions focus on the judge’s credibility and reliability findings. In his view, the judge:

- did not review J's evidence with a critical eye;
- did not address the extent to which J's evidence (as to whether a sexual assault occurred) was "planted" in her mind by her boyfriend CH;
- ignored or gave insufficient weight to the deficiencies in J's memories of material events;
- did not resolve important contradictions in J's evidence;
- did not explain why he found the complainant's evidence compelling and believable;
- did not explain with any exactness what testimony of the complainant and CH was corroborated; and
- did not adequately analyze/explain why he accepted evidence of the complainant and CH in the face of their level of intoxication, which impacted their reliability and credibility.

[33] From CM's perspective, had the judge not committed the above alleged missteps he would have found J and CH to be uncredible and unreliable witnesses – a finding which would result in his acquittal.

[34] *Standard of review for an unreasonable verdict:* A complaint of an unreasonable verdict is viewed through the lens of (1) whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered; and (2) whether the judge drew an inference or made a finding of fact essential to the verdict that is plainly contradicted by the supporting evidence, or is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the judge. (See *R. v. C.P.*, 2021 SCC 19 at paras. 28-30 and *R. v. Bou-Daher*, 2015 NSCA 97 at para. 30).

[35] As CM's unreasonable verdict submissions challenge the judge's credibility findings it is important to note that in assessing credibility, trial judges hold the advantage over appellate courts and their findings are entitled to deference. That said, a verdict can be overturned based on credibility findings if an appellate court finds, upon a review of all the evidence and paying proper attention to the special position of the trial judge, the verdict is unreasonable. This was explained by the Supreme Court of Canada in *R. v. W.(R.)*, [1991] 2. S.C.R. 122:

> [20] It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and

> consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White v. The King*, 1947 CanLII 1 (SCC), [1947] S.C.R. 268, at p. 272; *R. v. M. (S.H.)*, 1989 CanLII 31 (SCC), [1989] 2 S.C.R. 446, at pp. 465-66. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

[36] Further, the Crown also relied upon circumstantial evidence to establish CM's guilt. The judge's reliance on such evidence, is examined under the standard explained in *R. v. Villaroman*, 2016 SCC 33:

> [55] … Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: [citations omitted].

[37] Turning to the judge's reasons, it is clear the judge was aware that the credibility of J and CH was crucial to the Crown's case. The judge said:

> [62] The Crown's case is primarily dependant on the evidence of J and to a somewhat lesser degree, CH. Accordingly, J's and [CH's] (sic) credibility and reliability are of critical importance.

[38] After setting out the correct legal principles that guide such assessments, the judge held:

> [72] On the whole of the evidence I found J and CH to be truthful, authentic and compelling witnesses. They were credible witnesses whose testimony was largely corroborated by evidence external to their separate *viva voce* testimony. Both J and CH had decent recollections and the flaws in their memory, gaps or inconsistencies arise from normal expected failings and imperfections and not deceit or fabrication.
>
> …

> [76] I find J's account of the sexual assault to be buttressed by the evidence of CH. His first-hand account of what he saw from the doorway of the bedroom is specific and provides corroborative evidence of CM sexually assaulting J in the immediate aftermath of her protestations. His description of what he observed was unshaken on cross-examination and I find that he did not embellish the circumstances.
>
> [77] Both J and CH acknowledged their respective levels of alcohol ingestion and understandable memory failings dating back three years. Their evidence was genuine and did not come across as scripted or choreographed. There were inconsequential inconsistencies in their evidence; however, when I weigh the totality of the evidence, I find that these two witnesses were entirely credible and reliable in their separate accounts of CM engaging in unwanted sexual intercourse with J. ...

[39] As to the impact of J's alcohol consumption at the relevant time the judge found she was intoxicated but not extremely intoxicated. Further the prescribed drugs J was taking had no bearing on her state of mind. The judge reasoned:

> [74] Once at the [H's] residence all four teenagers consumed alcohol. J was just [age redacted by judge]; however, she had about a year's experience of drinking alcohol on a perhaps weekly basis. She knew about her tolerance and what it took to become "blackout drunk" and to the point of vomiting. At the time she was around [age redacted by judge]. During the course of four or five hours she drank four to seven coolers and on her evidence and her mother's (which I prefer in this area over CH's evidence), I find that she consumed five percent alcohol coolers; i.e., Mike's Hard Lemonade and one of H's coolers but not Black Fly coolers. Although she took her regular dosage (.75 mg in the morning) of sertraline, I find, based on the expert evidence of Ms. Hird, that this would not have had any bearing on her state of mind. On balance, and having regard to all of the evidence, I find that at the time of the allegation, J would have been intoxicated but not extremely intoxicated.

[40] The judge rejected CM's submissions that it would be dangerous to convict him on the evidence of J and CH. The judge was satisfied the Crown had proven beyond a reasonable doubt that CM sexually assaulted J. The judge explained:

> [73] The Defence argued that it would be dangerous to convict on the evidence of J and CH. In making this argument the Defence pointed to numerous times when each of these witnesses said that they did not remember or did not know about certain specifics dating back to August 2019. To this I make the obvious initial comment that by the time of the trial the matters in issue occurred almost three years earlier. To cite just one example, I appreciated the candour of J

> when she said that she could not recall whether she worked on the day of the get-together.
>
> …
>
> [75] … Given the totality of the evidence I find that soon after CH and H left the bedroom she was sexually assaulted by CM. CM got on top of her and, … proceeded further in the face of J making it clear that she was unwilling to engage in sexual contact. In particular, I find the complainant's evidence that she said "stop", "no" and "please stop" extremely compelling and believable.
>
> …
>
> [77] … In the result, I find the requisite elements of s. 271, sexual assault, are made out. I find beyond a reasonable doubt that CM sexually assaulted [J].
>
> [78] [CM] is hereby convicted that he on or about the 5th day of August 2019 at or near …, Nova Scotia, did unlawfully commit a sexual assault on [J].

[41] The Crown submits that the verdict was not unreasonable:

> 3. The verdict was not unreasonable. … The Appellant did not testify or call any evidence, which can be taken into account in considering whether the verdict was unreasonable.
>
> …
>
> 33. ... It is open to a trial Judge to believe some, all, or none of a witness' testimony. A trial Judge is not required to deal with every alleged deficiency or inconsistency in the trial evidence. …The trial Judge found that the Complainant was unshaken on the core testimony that she communicated her lack of consent to the Appellant. He found that her evidence in this regard was buttressed by the testimony of [CH] that he saw [CM] penetrating [J]. When caught in the act [CM] ran past him crying. This evidence established the elements of the offence of sexual assault contrary to s.271 of the *Criminal Code*. The evidence of [CH] and [J] established the sexual contact and the evidence of [J] established the lack of consent. Acceptance of [J's] evidence, and of [CM's] reaction to being seen by [CH], inexorably led to establishment of the *mens rea* of the offence, that the accused knew that the Complainant was not consenting, or was reckless or wilfully blind as to the absence of consent.
>
> …
>
> 36. The Appellant alleges, as he did at trial, that [J's] inability to recall what happened minutes before the sexual assault or minutes after, yet clearly recall that she communicated her lack of consent, is entirely too convenient and provides an insufficient basis for a finding of guilt beyond a reasonable doubt. A similar argument was rejected by this Court in *R. v. Al-Rawi* [2021 NSCA 86]. In that case, the Appellant argued that the Complainant's memory losses were feigned

> and that it was "entirely incredible the complainant could vividly describe the alleged sexual assault but could not recall other aspects of the evening". While the Respondent acknowledges the facts of every case are different, Justice Bourgeois in *Al-Rawi* found that it was open to the trial judge to find that the Complainant was credible even though she was unable to recall more mundane aspects of the evening of the sexual assault. A similar finding was made by Justice Chipman on the facts of this case. There is nothing inherently unreasonable about so finding.

[42] Many of the arguments CM is advancing on appeal as to why J and CH were not credible or reliable witnesses were presented to the judge and rejected. Apart from making the above noted assertions of error, CM has not identified anything in the record that persuades me the judge made any error or that the verdict is unreasonable. In my view the judge's determinations were open to him on this record. I would dismiss this ground of appeal.

Did the judge misapprehend the evidence?

[43] CM says the judge misapprehended expert and lay evidence and made determinations of fact unsupportable by the evidence, particularly in regard to J's ability to recall events due to her alcohol and prescription drug consumption.

[44] More specifically, CM alleges the expert toxicology evidence does not support the judge's finding that J was "intoxicated but not extremely intoxicated". CM also takes issue with the judge's dismissal of the effects of Sertraline (Zoloft) on J's state of mind at the relevant time. Further, it appears CM views the judge's finding that the evidence of J and CH was "largely corroborated by evidence external to their separate *viva voce* testimony" in and of itself, demonstrates the judge misapprehended material evidence.

[45] Intermingled in this ground are some overlapping complaints CM made respecting his unreasonable verdict ground. I have not restated any duplicate complaints as they have already been addressed and disposed of.

[46] *Standard of review for misapprehension of evidence*: A misapprehension of evidence constituting a miscarriage of justice pursuant to s. 686(1)(a)(iii) of the *Criminal Code* has been described as:

- a mistake regarding the substance of the evidence;
- a failure to consider evidence relevant to a material issue;

- and a failure to give proper effect to the evidence or some combination of these failings.

For this Court to intervene, CM must establish the judge misapprehended evidence and additionally, any misapprehension played an essential part in the judge's reasoning process that led to conviction. (See *R. v. Davidson,* 2022 NSCA 85 at para. 20).

[47] In response to CM's claim of error the Crown submits:

> 4. The trial Judge did not misapprehend the evidence. The most significant of the alleged misapprehensions noted by the Appellant, that the evidence [J] and [CH] was "largely corroborated by evidence external to their separate viva voce testimony" has a basis in the trial evidence. The trial Judge's conclusion that [J] was "intoxicated but not extremely intoxicated" was an available inference.
>
> …
>
> 40. The trial Judge made no error interpreting the expert evidence regarding the effect of Zoloft taken in the morning by someone using it for almost two months. Ms. Hird testified:
>
>> If they've taken sertraline in the morning, they will have achieved their peak blood concentration of sertraline some point earlier in the day, and then that dose will be on the decline until they take their next dose. So, if they're then using alcohol, I would expect that to have the predominant effect on an individual.
>
> 41. During closing submissions defence counsel conceded that he could not argue Zoloft heightened [J's] impairment.
>
> 42. The trial Judge's characterization that [J] was "intoxicated but not extremely intoxicated", should be understood colloquially, with the words given their ordinary meaning. He based this on "all the evidence", and not just the evidence of Ms. Hird.
>
> 43. The trial Judge accepted … [J] drank 4 to 7 Mike's Hard Lemonade (5% alcohol) and one of H's coolers, … He found [J] drank these over 4 or 5 hours. The trial Judge did not specifically place [J's] BAC within any of the ranges suggested by the expert, but his comment she was not "extremely intoxicated" was an apt layman's description of the ranges contemplated by the witness.
>
> …
>
> 46. Although he did not make a specific finding as to what [J's] BAC was, or which range she fell into, the Court could draw corroboration from the evidence

> of the expert regarding symptoms which would be suffered by [J] as she approached 100 or 200 BAC.

[48] Similar to the previous ground, although CM states the judge misapprehended evidence and the misapprehension had a material impact on the judge's decision to convict, CM did not establish the judge misapprehended any evidence let alone any misapprehension that would leave the conviction on unsteady ground.

[49] In my view, the record reveals the judge clearly grasped the nature of the evidence before him. The judge was mindful of the correct legal principles that guided his assessment of the evidence and the determinations he was called upon to make. CM may disagree with the judge's findings but that does not make them wrong and subject to appellate intervention. I would dismiss this ground of appeal.

Are the judge's reasons sufficient?

[50] The most direct claim CM makes about the judge's reasons being insufficient is this:

> 28. It is respectfully submitted that, from the reasons for Decision of the Learned Trial Justice, the path which the Honourable Justice took through confused and conflicting evidence to an ultimate determination of guilt beyond a reasonable doubt is not at all apparent to the Accused.

[51] However, it can be gleaned from CM's overall submissions that he relies upon the same arguments advanced under the first two grounds to underpin his insufficient reasons contention.

[52] *Standard of review for sufficiency of reasons*: In *R. v. R.E.M.*, 2008 SCC 51, the Supreme Court of Canada summarized how complaints of insufficient reasons should be analyzed by appellate courts:

> [35] In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and

> the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[53] In response to CM's claim of insufficient reasons the Crown submits:

> 5. ... The trial Judge found [J] to be a credible and reliable witness. Her evidence of the sexual assault was supported by the evidence of [CH] whom the trial Judge also found to be credible and reliable. The trial Judge was unwilling to draw the inference that either witness was lying. The trial Judge found that the alleged frailties and inconsistencies in their evidence was inconsequential. A trial judge is not required to specifically address every inconsistency in the evidence or every argument made by counsel. The reasons both inform the Appellant why he was convicted and allow for appellate review.
>
> …
>
> 48. The trial Judge's reasons were sufficient both factually and legally. They reflect how the case was presented and its live issues. The reasons explain to the Appellant, who has been represented throughout, why he was convicted.
>
> …
>
> 60. Many of the arguments now made by the Appellant were put to the [trial judge] during closing submissions by the [Crown]. The trial Judge's Reasons read in context of the closing submissions address many of the Appellant's concerns about why alleged inconsistencies and frailties in the evidence were found to be insignificant. Clearly the trial Judge accepted many of [the Crown's] arguments.
> …

[54] As established earlier, in assessing the sufficiency of the judge's reasons a functional approach is required. The judge's reasons are to be read as a whole. I must be satisfied there is a logical connection between the verdict and the basis for the verdict. In other words, the verdict must be intelligible. To be so, a detailed description of the judge's process in arriving at the verdict is unnecessary. Rather, as noted earlier in *R. v. R.E.M*, the Supreme Court of Canada directs:

> …

> [35]…
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial. …

[55] I agree with the Crown, that on this record, the judge's reasons are both factually and legally sufficient. In *R. v. G. F.*, 2021 SCC 20 the Court addressed the test for factual and legal sufficiency of reasons:

> [70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.
>
> [71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.

[56] CM says the judge's written reasons do not confront what CM contended at trial to be the most serious flaws/inconsistencies in the complainant J's evidence—primarily variances in what she said in her police statement and her evidence at trial about what she remembered of the events in question. Further, the judge did not confront the defence theory that the idea that a sexual assault occurred was "planted" in J's mind by CH. In other words, CM says the "why" is missing in the judge's conclusion J was a credible and reliable witness.

[57] As earlier observed, an accused person is entitled to know what the judge decided and why. It is also true, as a general statement, that a judge is not required to address every inconsistency in the evidence or every argument advanced at trial. However, it is important for a judge to address material inconsistencies and key arguments advanced in their decision. That way, it is clear to those affected the judge grasped the relevant evidence and arguments.

[58] It is fair to say that the judge's written reasons do not address, at least in any direct and detailed manner, the above noted evidentiary issues and arguments raised by CM. Had the judge done so, the conclusions drawn and his reason for doing so, would be clearer to the reader.

[59] That said, as stated earlier, I am satisfied the judge's reasons are factually and legally sufficient. That is because we have the benefit of the trial record which enabled me to confirm there was a sufficient factual basis for the judge's findings and no material inconsistency remained unresolved such that the guilty verdict can be called into question.

[60] It is evident from the record the judge clearly understood the evidence and arguments advanced by both the Crown and defence. The judge was very engaged in both the defence and Crown submissions. The judge sought clarity where needed and posed probing and relevant questions to counsel on their respective views of the evidence and arguments advanced. His reasons, read as a whole and in context with the record, demonstrate a logical connection between the verdict and the basis for the verdict.

[61] For the foregoing reasons, CM's complaints under this ground of appeal lack any substance. In short, I am satisfied the judge's reasons sufficiently explain why CM was convicted and in a manner that permits effective appellate review. Consequently, I would dismiss this ground of appeal.

Conclusion

[62] On this record, I am satisfied that: the guilty verdict is not unreasonable; the judge did not err in his treatment or apprehension of the evidence; and the judge's reasons are sufficient. I would dismiss the appeal.

Van den Eynden, J.A.

Concurred in:

Bryson, J.A.

Beaton, J.A.