NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Patel*, 2024 NSCA 40

Date: 20240403
Docket: CAC 523192
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Jainish Sureshkuma Patel

Respondent

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

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	January 29, 2024, in Halifax, Nova Scotia
Subject:	Sexual assault. Consent. Acquittal. Standard of Review. Assessment of credibility. Proof beyond a reasonable doubt.
Summary:	The complainant testified that she did not consent to any of the sexual contact. The respondent said it was consensual. The trial judge assessed credibility. He did not accept the complainant's evidence about certain aspects of the interaction with the respondent. He also made adverse credibility findings in relation to the respondent. However he concluded he had a reasonable doubt on the issue of consent and acquitted.
Issues:	(1) Did the trial judge conclude he had a reasonable doubt about the respondent's guilt without considering all the evidence? (2) Did the trial judge engage in stereotypical reasoning and refuse to apply common sense?

Result: The appeal is dismissed. The trial judge committed no reversible errors of law. He was not persuaded by the evidence that guilt had been proven to the requisite standard of proof beyond a reasonable doubt despite his misgivings about the respondent's credibility. He considered the whole of the evidence, did not engage in stereotypical reasoning and appropriately cautioned himself on the risks associated with common-sense reasoning in sexual assault cases.

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 79 paragraphs.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Patel*, 2024 NSCA 40

Date: 20240403
Docket: CAC 523192
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Jainish Sureshkuma Patel

Respondent

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

Judges:	Wood, C.J.N.S., Scanlan and Derrick, JJ.A.
Appeal Heard:	January 29, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Wood, C.J.N.S. and Scanlan, J.A. concurring
Counsel:	Mark K. Scott, K.C., for the appellant Matthew R. Kennedy, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

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.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

Introduction

[1] On March 31, 2023 in an oral decision[1], Judge Alan Tufts of the Provincial Court of Nova Scotia acquitted the respondent of sexual assault. The Crown appeals the acquittal.

[2] The trial judge is alleged to have committed a constellation of errors:

- Piecemealing of the evidence.
- Failing to consider the whole of the evidence related to the live issues at trial.
- Misapprehension of the evidence.
- Explicit refusal to apply common sense and human experience to his assessment of credibility.
- Stereotypical reasoning.

[3] As the reasons that follow explain, I am satisfied the trial judge did not commit any reversible errors. I would dismiss the appeal.

Facts

[4] There were two central witnesses in this case: the complainant, G.M., and the respondent. They were the only witnesses to the sexual activity. There was no dispute that penile-vaginal penetration occurred. The respondent testified it was consensual. The complainant said it was not. The only issue was whether the Crown had proven beyond a reasonable doubt the complainant had not consented.

The Evidence of G.M.

[5] The complainant, G.M., who lived alone in a small second-floor walk-up apartment, would order food from a nearby pizza shop where the respondent worked as a delivery driver. He had previously delivered food to G.M. They knew

[1] *R. v. Patel* (31 March 2023), Dartmouth 8449769 (NSPC).

each other in that context but were not friends. On May 31, 2020 the respondent brought G.M.'s food order to her apartment. CCTV footage from the lobby of the apartment building showed him arriving. He left 13 minutes later.

[6] When the respondent arrived with her order, G.M. "buzzed" him into the building. She opened the door of her apartment which she leaned against to keep it from closing. She said she has issues with her spine which necessitated her bracing herself against something in order to stand up. She testified she had some physical disabilities: a deteriorating spine, hip issues and a missing kneecap.

[7] When the respondent arrived just outside the door he was pulling at the crotch area of his tight jeans. This led to G.M. commenting that he was never going to have children. The respondent then handed her the debit machine and, without being invited to do so, he stepped inside and put G.M.'s food order on the kitchen stove. G.M. said as the respondent passed her the debit machine he accidentally hit her breast with it, saying "oops, sorry" when that happened.

[8] As G.M. was completing the debit transaction, the respondent started to ask personal questions about whether she lived with anyone. At the same time he was touching her left arm which she had bruised in an earlier fall. G.M. asked him not to do that. She testified she did so because "…you just don't touch somebody like that. We're not friends". According to G.M.'s narrative, the respondent then touched her left breast without her consent. She told him not to. He then planted an unwanted open mouth kiss on her closed mouth and kept touching her breast, contact which G.M. said was starting to hurt.

[9] G.M. testified the respondent turned her around and led her to the bedroom. As they went he was putting his hands down her pants—she was wearing a tank top, underwear and pajama bottoms. She testified she was so frightened she "just started blanking out". She was scared the respondent might be carrying a "religious" knife (G.M. knew the respondent was originally from India).

[10] G.M. said that in the bedroom she did what she was told by the respondent, including removing her pajama bottoms and lying on her stomach on the bed. The respondent got on top of her and penetrated her vagina twice, ejaculating on her back.

[11] G.M. firmly denied she had consented to any of the sexual contact.

[12] While engaged in penetrating her, the respondent was pulling on G.M.'s left breast. She said it was very painful and felt as though he was "trying to rip it off".

[13] After he ejaculated the respondent abruptly left. G.M. said she could hear his belt buckle jingling which indicated to her his jeans were not done up. G.M. cleaned her back with wet wipes and her vagina with a little gin she found in the bottom of a bottle. She testified it was the only disinfectant she had available.

[14] Not the next day but the day following, G.M. went to the hospital and saw a SANE[2] nurse. She said she experienced "excruciating" pain in her left breast which the SANE nurse testified was bruised and scratched. G.M. said she experienced swelling in her breast for several days and pain for several weeks.

[15] G.M. testified that after the incident with the respondent, she slept on her couch until she replaced the mattress on her bed. She said this was because she kept having nightmares and couldn't sleep.

The Evidence of the Respondent

[16] The respondent gave his evidence through an interpreter. He testified to having had a friendly relationship with G.M. On the first occasion he delivered food to her he said she invited him in to see her apartment. On the day the sexual activity happened he said she asked him to place the delivery on her stove. He gave a description of what then happened that contrasted significantly with G.M.'s evidence.

[17] The respondent denied G.M.'s description of what led to the penetrative sex. He said it was G.M. who made the sexual advances, first hugging him and saying how lonely she was. She started touching his bum and penis which aroused him. She proposed they have sex and led him by the hand to the bedroom. The respondent said they first had intercourse with G.M. lying on her back and then in the position that G.M. had described, on her stomach being penetrated from behind. The respondent testified that during intercourse he had been touching G.M.'s breast. He denied causing the injuries described by G.M. and documented by the SANE nurse.

[18] The respondent said the sexual contact with G.M., including the penetrative sex, was consensual.

---

[2] Sexual Assault Nurse Examiner.

[19] The respondent denied lying to police when questioned. He said he was "confused" and scared to talk about what had happened. He did not know what to say and what not to say and felt culturally restrained in relation to discussing sex. He testified he just "skipped" the sexual part of his interaction with G.M. He agreed he had told police the presence of his DNA in G.M.'s apartment might be explained by him having sneezed there due to "a sneezing problem". He admitted he had told police he rebuffed G.M.'s advances saying he had a girlfriend, and left.

[20] The respondent denied G.M. had limited mobility due to her disability—he acknowledged she had told him she had back issues—and testified she removed her pajama pants quite quickly.

[21] The Crown tendered CCTV footage from the lobby of G.M.'s apartment building which showed the respondent's arrival and his departure.

The Trial Judge's Decision

[22] The trial judge ultimately did not find G.M. credible in relation to the critical issue he had to decide – whether the Crown had proven beyond a reasonable doubt that she had not consented to penile-vaginal penetration. He found aspects of G.M.'s testimony, taken with the respondent's denial, raised a reasonable doubt. He recognized throughout his decision that he had to consider all the evidence before deciding whether the Crown had met its burden.

[23] The trial judge explicitly acknowledged that in assessing the credibility of G.M. and the respondent he was not choosing which version was more believable. He recognized he could not decide that G.M. must be telling the truth on the basis of querying why she would lie about "something like this".

[24] The trial judge worked his way through what he could and could not use to assist in his credibility assessments. He found "one of the most important measures" of credibility is found in a witness' inconsistencies and whether they can be reconciled. Unresolved inconsistencies may give rise to reasonable doubt. He identified dishonesty as a relevant factor in assessing credibility. He said a witness' demeanour had to be treated with care and could not be a sole or determining factor in the credibility analysis. The judge noted a complainant's motive to fabricate is a relevant factor.

[25] The trial judge recognized that common sense and human experience can be brought to bear in assessing credibility although he cautioned himself about the

risks of falling into stereotypical reasoning based on "some perceived notion of what a person may or may not do in any situation", particularly in the context of "private sexual behaviour".

[26] In his review of caselaw, the trial judge placed emphasis on the words of Justice Saunders in *R. v. D.D.S.*:

> [77] …Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof…?[3]

[27] The trial judge undertook a careful review of the legal principles governing the reasonable doubt standard. He recognized he was not to apply the standard to individual pieces of evidence. He quoted at length from *R. v. Nyznik*, a decision of the Ontario Superior Court of Justice, relied on by the respondent, which held the focus of a criminal trial "must always be on whether or not the alleged offence has been proven beyond a reasonable doubt".[4]

[28] In his analysis, the trial judge made the following findings in assessing the credibility and reliability of G.M. and the respondent:

- The respondent had deliberately avoided telling the police the truth about the sexual encounter with G.M.
- In his testimony he refused to admit that he had misled police.
- People lie about having sex. The respondent's lies to police did not mean the sexual activity with G.M. was not consensual.
- The respondent's lies to police and his failure to acknowledge them undermined his credibility but were not determinative of guilt.
- G.M.'s descriptive and detailed testimony about her interactions with the respondent at the front door of the apartment and in the bedroom contrasted with her lack of description about how she went down the hall to the bedroom with the respondent.

---

[3] 2006 NSCA 34.
[4] 2017 ONSC 4392 at para. 16.

- The respondent's and G.M.'s descriptions of their interactions did not differ greatly in the amount of time involved. The short duration of their time together was equally consistent with either a consensual or non-consensual sexual encounter. The trial judge rejected the Crown's argument that the 13 minutes between when the respondent went into the apartment building and when he left was indicative of non-consensual sex.

- The complainant subjecting herself to the SANE examination may indicate she was telling the truth about what happened—the trial judge cited *R. v. Steele,*[5] *R. v. Mugabo*[6] and *R. v. Koge*[7]—but was not determinative.

- The complainant's confusion over when the sex occurred and when she went to the hospital for the SANE examination did not "buttress her credibility".

- The complainant's lack of detail concerning how her pajama pants were removed made "her description less compelling and convincing".

[29] The trial judge noted G.M.'s testimony that she and the respondent did not have a "friend" relationship, yet she had made comments to him about the tightness of his jeans and that he was "never going to have kids". The judge viewed these more personal comments as inconsistent with G.M.'s "not friends" testimony. He regarded the inconsistency as "not significant". He moved on to address the issue of stereotypical reasoning, identifying it as inappropriate. Finding he could not presume, in the absence of supporting evidence, how anyone "would behave or react" in a sexual context, he concluded: "The only presumption which operates here is the presumption of innocence".

[30] As the trial judge embarked on his *R. v. W.(D.)*[8] analysis of the respondent's testimony, he again reminded himself of the imperative that he consider, on an assessment of all the evidence, whether there was reasonable doubt. He noted it was "impermissible to draw or make an inference of guilt from the simple fact that the accused is not believed". He next said he was applying the second and third

---

[5] 2021 ONCA 186 at para. 94.
[6] 2017 ONCA 323 at para. 25.
[7] 2022 NSPC 37.
[8] *R. v. W.(D.)*, [1991] 1 S.C.R. 742 (*W.D.*).

branches of *W.D.* together—considering whether the accused's testimony, "while not believed or accepted as true" raised a reasonable doubt and, further, "whether after looking at all the evidence there is a reasonable doubt about the accused's guilt".

[31] The trial judge proceeded to consider the evidence. He identified his concerns with G.M.'s credibility:

- He did not accept G.M.'s evidence that she went "blank" and was in a state of disassociation about what was happening when she said she was "guided" by the respondent to the bedroom.

- He rejected G.M.'s claim that she was scared the respondent had a knife. The trial judge found no basis for that claim. He concluded G.M. "simply made this up" as an explanation for how and why she went down the hallway with the respondent. He found this significantly undermined G.M.'s credibility.

[32] The trial judge found the respondent's testimony there was consensual sex, combined with the problems he identified with G.M.'s evidence, raised a doubt about G.M.'s claim the sexual activity, including the penile-vaginal penetration, was without her consent.

[33] The trial judge concluded it was possible the events occurred as the respondent had described. He said the respective versions of the events inside the apartment door and in the bedroom were "equally believable".

[34] The trial judge referred to G.M.'s testimony about the respondent painfully grabbing her breast. He said the SANE examination had revealed "some bruising". He found this was "not necessarily inconsistent" with what the respondent had described, stating: "He did admit that he had touched the complainant's breast while he was having sex with her".

[35] Characterizing G.M.'s description of the sexual activity as "possible, or perhaps probable", the trial judge observed this was insufficient to discharge the criminal burden of proof. He concluded he had a reasonable doubt which led to the respondent's acquittal.

The Appellant's Arguments

[36] The appellant says the prosecution case was “never properly assessed with its full, cumulative force”. Conversely, the respondent’s evidence was given “undue credence by virtue of a legal analysis that does not properly reflect the law of reasonable doubt”.[9]

[37] The appellant criticizes the trial judge for what it claims was a failure to assess the respondent’s evidence against the evidence as a whole.

[38] Framed as legal errors, the appellant particularizes its complaints of the trial judge’s reasons as follows:

<u>Added a requirement of detail to his assessment of G.M.’s credibility</u>:

[39] The appellant submits the acquittal was based on a non-existent legal requirement that, in order to be found credible, a sexual assault complainant had to provide a detailed narrative of events. In the appellant’s submission this amounted to stereotypical reasoning. The trial judge indicated he expected more detail on what caused G.M. to go into the bedroom with the respondent and remove her pajama bottoms. The judge equated lack of detail as undercutting "any compelling or convincing aspect to her testimony".

[40] The appellant says there is nothing in the caselaw establishing there is "any required level of detail before a complainant's evidence can be concluded to be compelling".[10]

<u>Piecemealed the evidence</u>:

[41] The appellant says the judge subjected individual pieces of evidence to a reasonable doubt standard or considered evidence in isolation, siloed from the remainder of the evidence.

<u>Considered and cast aside corroborating evidence</u>:

[42] The appellant says the trial judge failed to consider the full scope of the prosecution’s case when assessing whether the appellant had satisfied its burden of proving guilt beyond a reasonable doubt.

---

[9] Appellant’s Factum at para. 167.
[10] Appellant’s Factum at para. 96.

<u>Failed to consider the whole of the evidence</u>:

[43] The appellant says the trial judge committed legal error by:

- Holding that he could not ask the question: "Why would G.M. lie?" because such reasoning would reverse the burden of proof. The appellant says the judge was entitled to consider whether there was evidence of no motive to lie or whether there was no evidence of motive to lie. The appellant says there was no evidence in this case that G.M. had a motive to lie.

- Discounting of the probative value of G.M. subjecting herself to a SANE examination/ignoring the probative value of G.M.'s post-incident behaviour and demeanour. The SANE nurse witnessed acute anxiety and distress. G.M. described using gin to disinfect herself. The appellant says the trial judge should have found this to be compelling evidence relevant to the central issue of consent.

<u>Misapprehended the evidence</u>:

[44] The appellant says the trial judge's misapprehension of evidence had a legal effect by incorrectly finding G.M. gave inconsistent testimony about her relationship with the respondent. On the one hand, she commented on the respondent's tight jeans—which the judge viewed as a personal comment—and on the other hand she testified she had told the respondent touching her bruised arm was inappropriate because they were not friends.

[45] As I noted earlier, the trial judge, in characterizing this testimony by G.M. as an inconsistency, said it was "not significant".

[46] The trial judge concluded G.M.'s breast injuries "…were not necessarily inconsistent with what the accused said". The appellant notes the respondent had vehemently denied causing the injuries, and his evidence of mere touching of G.M.'s breast was in stark contrast to G.M.'s testimony and her corresponding injuries. The judge relied on the "not necessarily inconsistent" assessment in his *W.(D.)* analysis and, at the very least, it was a failure to consider the whole of the evidence.

[47] In the appellant's submission, the trial judge's other legal errors included an explicit refusal to apply common sense and human experience to his credibility

assessment. The appellant says the trial judge failed to apply common sense and human experience, essential tools in assessing credibility, to the whole of the evidence by:

- treating G.M.'s and the respondent's narratives of the events preceding the sexual intercourse as "equally believable". The appellant says this required the judge to disregard his finding that the respondent's lies to the police undermined his credibility.
- failing to consider how G.M.'s evidence contradicted the respondent's, whose credibility the judge viewed unfavourably.

Issues

[48] The issues raised by the appellant in this appeal can be collapsed into two: (1) did the trial judge conclude he had a reasonable doubt about the respondent's guilt without considering all the evidence?—this will take into account the complaints of piecemealing and casting aside corroborating evidence—and (2) did the trial judge engage in stereotypical reasoning and refuse to apply common sense?

[49] The appellant's criticism the trial judge added a requirement of detail to his assessment of G.M.'s credibility, and misapprehended the evidence, will be addressed under the two issues.

Standard of Review

[50] Pursuant to s. 676(1) of the *Criminal Code*, the Crown's right to appeal an acquittal is limited to questions of law alone. This means that Crown appeals against acquittals in proceedings by indictment[11] cannot be reversed unless an error of law has been established.[12]

[51] As this Court held in *R. v. C.E.G.*:

> [31] …the Crown has no right to argue an acquittal should be overturned because it is unreasonable or otherwise unsupported by the evidence. That is because the underlying reason for a trial judge's acquittal of an accused is a finding of

---

[11] The Crown proceeded against the respondent in this case by indictment.
[12] *R. v. George*, 2017 SCC 38 at para. 2.

> reasonable doubt--a determination that is a finding of fact or mixed fact and law (*R. v. Biniaris*, 2000 SCC 15, at para. 32).
>
> [32] An acquittal based on a conclusion of reasonable doubt unsullied by material legal error is not amenable to appeal (*R. v. Percy*, 2020 NSCA 11; *R. v. McNeil*, 2022 NSCA 55, at paras. 9-10).[13]

[52] While failing to consider all of the evidence "in relation to the ultimate issue of guilt or innocence" constitutes an error of law,[14] and an error of law can be made out by the application of stereotypical reasoning to the evidence of a sexual assault complainant [15], credibility findings do not typically engage errors of law. [16] Credibility findings are entitled to deference unless a palpable (clear) and overriding (material) error can be shown.[17] Trial judges, having heard the evidence, "are best placed to make the complex and multifaceted factual findings that culminate in fair and nuanced credibility assessments" to which deference is owed.[18]

[53] It is essential to keep in mind that appellate review is not to "finely parse the trial judge's reasons in search for error".[19] We are also prohibited from re-weighing the evidence to come to our own findings about it.[20] An appellate court cannot "translate strong opposition to a trial judge's findings of fact into legal error".[21]

[54] In a Crown appeal from an acquittal, the alleged legal errors must be shown to have had a material bearing on the acquittal.[22] The Crown can only discharge its heavy onus in an appeal against an acquittal if it can satisfy the court with a reasonable degree of certainty the verdict would not necessarily have been the same had the trial judge not committed the impugned errors.[23]

Analysis

---

[13] 2023 NSCA 1 at para. 31.
[14] *R. v. J.M.H.*, 2011 SCC 45 at para. 34 (*J..M.H.)*.
[15] *R. v. Kruk*, 2024 SCC 7 at para. 64 (*Kruk*).
[16] *Kruk* at para. 82.
[17] *R. v. Gagnon*, 2006 SCC 17 at para. 10 (*Gagnon*).
[18] *Kruk* at para. 89.
[19] *R. v. G.F.*, 2021 SCC 20 at para. 69 (*G.F.*).
[20] *R. v. C.E.G.* at para. 35.
[21] *R. v. J.M.H.* at para. 35.
[22] *R. v. Graveline*, 2006 SCC 16 (*Graveline*).
[23] *R. v. Sutton*, 2000 SCC 50, at para. 1.

[55] The Supreme Court of Canada in its recent decision of *R. v. Kruk* reminds us that an accused person cannot be found guilty simply because they are disbelieved:

> [62] …Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much -- or all -- of the accused's evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused's testimony, or does not know who to believe, the accused is entitled to an acquittal (*J.H.S.*, at paras. 9-13[24]; *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.); *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, at p. 533; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 19).[25]

[56] The Supreme Court has emphasized credibility assessment is not a “purely intellectual” exercise.[26] Trial judges have “the benefit of the intangible impact of conducting the trial”.[27] Appellate review must appreciate that:

> [20] 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.[28]

[57] This appreciation for the challenges that confront trial judges assessing credibility has been re-emphasized in *Kruk*:

> [81] Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621) With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC

---

[24] 2008 SCC 30.
[25] *Kruk*.
[26] *R. v. R.E.M.*, 2008 SCC 51 at para. 49.
[27] *G.F.* at para. 81.
[28] *Gagnon* at para. 20.

> 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.

[58] *Kruk* directs appellate courts to avoid “unjustifiably invasive scrutiny” of trial judges’ reasons, acknowledging the “delicate task” involved in credibility assessments.[29]

The Whole of the Evidence

[59] I find the trial judge did not fail to consider the whole of the evidence in his assessment of whether the Crown had met its burden of proof.

[60] The appellant says the trial judge’s assessment of reasonable doubt neglected to take account of the respondent’s lies to police. In the appellant’s submission, the trial judge is to be faulted for not returning to the respondent’s misleading statements to police when he was assessing his claims of having had a consensual sexual encounter with G.M.

[61] The trial judge concluded the respondent deliberately misled the police. He found the respondent “did not want to tell them what had happened even if it was a consensual encounter”. However he was careful to avoid relying on the respondent’s lies as a basis for finding him guilty. Noting the respondent “misled the police and refused to admit it”, he said:

> [111]…this does not necessarily mean the opposite is true and more particularly that the sexual activity he was concealing was non consensual. The reality is people do lie about having sex. This is not an unknown occurrence.
>
> [112] But I agree that both the misleading the police and his failure to acknowledge his untruthfulness undermines his credibility. This may be consistent with guilt as the Crown argues but it is not determinative of it or even probative of guilt…

[62] The trial judge’s statement about the respondent’s lies to police not being “even probative of guilt” has to be read in the context of what he said next: that the respondent had “no burden to convince me of his innocence”.

[63] It is apparent the trial judge had the presumption of innocence firmly in his mind throughout his assessment of the Crown’s case. He conducted his analysis in

---

[29] *Kruk* at para. 80.

accordance with the "overarching principle" that the fact-finding process is always governed by "the presumption of innocence enshrined in s. 11(d) of the *Charter*, and the correlative principle of the Crown's burden of proof".[30] He properly did not go from finding the respondent had lied to police to finding this was probative of guilt leading to a conviction.

[64] I do not agree the trial judge took the respondent's lies to the police "out of play" by not mentioning them again in his analysis. He found they negatively impacted the respondent's credibility but there was more he had to consider—notably the complainant's credibility, which he ultimately assessed as causing him to have serious reservations.

[65] The appellant says the trial judge should have considered the lack of evidence that G.M. had a motive to lie about being sexually assaulted by the respondent. He is criticized for saying the following in his reasons:

> [83] "Why would the complainant lie about something like this?" This is, at first blush, a very compelling response. However, it is very clear that such reasoning is not appropriate, and it can be an error of law. Simply put, it reverses the burden of proof and suggests that the accused provide an explanation or response and, in a sense, prove his own innocence.

[66] In my view, the trial judge was merely pointing to what might seem a logical question – why would G.M. lie about being sexually assaulted unless it was true? – and going on to note the question must not be used to support a determination that G.M. was telling the truth, grounding a conviction. He was reminding himself not to rely on the apparent lack of any reason for G.M. to fabricate her accusation as a basis for deciding the respondent's guilt had been proven beyond a reasonable doubt. The trial judge concluded, from an examination of aspects of G.M.'s testimony, that he did not find her credible. That finding attracts deference. Motive, or the absence of one, did not factor into his analysis. That did not amount to legal error.

[67] The appellant also criticizes the trial judge for not placing greater emphasis on G.M.'s demeanour at the SANE examination. The SANE nurse testified to G.M.'s distress, behaviour the trial judge recognized could support credibility. Although the trial judge did not expressly mention G.M.'s demeanour at the SANE examination in his analysis and merely referred to G.M.'s "willingness" to undergo the exam, his reasons show he clearly had her demeanour in mind. In stating that

---

[30] *Kruk* at para. 59.

"what a complainant did after the event" – which the appellant is emphasizing here – "may support credibility findings in some instances", the trial judge cited *R. v. Steele*[31] and *R. v. Mugabo*[32], at paragraphs 94 and 25 respectively. *Steele* at paragraph 94 cites paragraph 25 of *Mugabo* after the statement: "Post-event demeanour evidence of a sexual assault complainant can serve as circumstantial evidence to corroborate the complainant's testimony". Both *Steele* and *Mugabo* referred to the distress expressed by the complainants post-event, in *Mugabo*, during the SANE examination.

[68] The trial judge signaled his awareness of the SANE evidence and its potential significance to G.M.'s credibility, but he did not accept G.M. as a credible witness in relation to the critical issue of non-consent.

[69] The trial judge was obliged to evaluate G.M.'s evidence and that of the respondent. His reasons indicate he worked his way through an assessment of G.M.'s credibility. He had earlier noted the Crown's position:

> [69] Finally the Crown argues that the complainant's evidence is so compelling and convincing that it should be believed and accepted beyond a reasonable doubt. Because of this, it is argued the court would have reason to therefore reject entirely the accused's testimony. The Crown, in short, relies on the so-called *JJRD* principle – see *R. v. J.C.* , 2018 NSCA 72, paras. 55-57 – where based on a considered and reasoned acceptance of the complainant's testimony beyond a reasonable doubt can allow [*sic*] a trier of fact to reject the accused's denial that the complainant had not consented and therefore find him guilty.[33]

[70] The trial judge concluded he did not find G.M. a "compelling and convincing" witness. His assessment of her credibility attracts deference on appeal. We are not to re-do the credibility analysis and weigh differently, the factors he considered. The appellant is effectively seeking to have us do so.

[71] The trial judge did draw one conclusion that was palpably wrong. It was in relation to the injuries to G.M.'s breast. The judge said he recognized G.M. had "described that her breast was grabbed by the accused, and it was painful". He referred to the SANE examination identifying, as he put it, "some bruising to her left breast". That understated the evidence I described in paragraph 14. The trial judge concluded that while the bruising might support G.M.'s testimony about the respondent grabbing her breast during the penetrative sex, he found it was "not

[31] 2021 ONCA 186.
[32] 2017 ONCA 323.
[33] *JJRD* is a reference to *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252 (ONCA).

necessarily inconsistent" with the respondent's testimony that he had "touched" G.M.'s breast "while he was having sex with her".

[72] Contrary to the "not necessarily inconsistent" finding by the trial judge, the physical injuries to G.M.'s breast and her evidence about pain and swelling were incompatible with the respondent's evidence of "touching". However, the appellant has not shown this finding "had a material bearing on the acquittal".[34] While it was a palpable error it was not an overriding one. It was an error that had no legal effect.

[73] The trial judge's determination that he was left with a reasonable doubt as to guilt rested on much more than the breast-injury evidence. When he referenced this evidence very close to the end of his reasons, he had already identified what he found were issues with G.M.'s credibility. As I have said, his credibility findings are entitled to deference on appeal.

[74] On an examination of the whole of the evidence the trial judge concluded he could only say non-consensual penile-vaginal penetration had been "possible, or perhaps probable" but not that he was satisfied beyond a reasonable doubt of the respondent's guilt. This was a case where there was "a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond a reasonable doubt".[35] The judge was not required to accept the respondent's evidence or his version of the interaction with G.M. in order to acquit.[36]

Stereotypical Reasoning/Refusal to Use Common Sense

[75] I am not persuaded the trial judge refused to apply common sense and human experience in assessing credibility. He reached certain conclusions based on the evidence, and made unfavourable credibility findings in relation to both G.M. and the respondent. Appellate review must treat those credibility findings deferentially. The appellant has not shown what common sense or human experience the trial judge should have applied and how it would have led to a different result. In my view this is another submission that effectively invites us to re-weigh the trial evidence and reach a different conclusion than the trial judge.

[76] In conducting his assessment of G.M.'s credibility, the trial judge did not commit legal error by relying on stereotypical reasoning that a sexual assault

---

[34] *Graveline* note 22 at para. 14.
[35] *R. v. J.M.H.*, 2011 SCC 45 at para. 39.
[36] *Kruk* at para. 61.

complainant's lack of detail in relation to aspects of her interaction with an accused was evidence she could not be believed. He did not make a finding that a sexual assault complainant who does not provide a detailed narrative is unworthy of belief. He did not invest G.M.'s lack of detail with a stereotypical meaning, one "rooted in discrimination and inequality of treatment".[37] The trial judge viewed the missing detail as a contrast to details G.M. provided about her interactions with the respondent by the kitchen and in the bedroom. It is not impermissible to take memory gaps or the absence of detail into account in a credibility assessment.

[77] The trial judge's concern about G.M.'s narrative was combined with his analysis of G.M.'s claim she was fearful the respondent might be carrying a knife. The trial judge did not believe this evidence. His rejection of G.M.'s explanation for going with the respondent to the bedroom was a finding of fact owed deference on appeal.

[78] The trial judge appropriately cautioned himself on the risks associated with common-sense reasoning in sexual assault cases. He was careful not to engage in stereotypical reasoning. The appellant might be able to explain how the evidence could have been assessed differently but it is not the role of this Court to conduct a re-assessment. I do not find legal error in the trial judge's assessment of the evidence, which led him to conclude the Crown had not proven lack of consent beyond a reasonable doubt.

Disposition

[79] The trial judge did not commit the errors the appellant has complained of. I would dismiss the appeal.

Derrick, J.A.

Concurred in:

Wood, C.J.N.S.

Scanlan, J.A.

---

[37] *Kruk* at para. 49.