

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. S.M.*, 2026 NSCA 30

Date: 20260413

Docket: CAC 513675

Registry: Halifax

Between:

S.M.

Appellant

v.

His Majesty the King

Respondent

Judges: Wood, C.J.N.S, Farrar and Gogan, JJ.A.

Appeal Heard: February 17, 2026, in Halifax, Nova Scotia

Facts: The appellant and the complainant were married from September 2013 to August 2017. During the marriage, the complainant alleged multiple incidents of non-consensual sexual activity and assaults by the appellant. The appellant was charged with sexual assault, assault, and uttering threats based on these allegations (paras [1-3](#)).

Procedural History:

- *R. v. S.F.M.*, 2021 NSSC 368: The trial judge convicted the appellant of two counts of sexual assault and one count of assault, while acquitting him on another count of sexual assault and a count of uttering threats. The appellant was sentenced to 39 months for the first count of sexual assault, 18 months concurrent for the second count, and 30 days concurrent for the assault (paras [5, 9](#)).

Parties' Submissions: • Appellant: Argued that the trial judge erred in applying the law of honest but mistaken belief in communicated consent, particularly regarding the sexual assault convictions (para [6](#)).

• Crown: Cross-appealed, arguing that the trial judge erred in applying sentencing principles (para [8](#)).

Legal Issues: • Did the trial judge err in law by failing to properly apply the test for honest but mistaken belief in consent? (para [19](#))

Disposition: • The appeal was allowed, and the convictions on Counts 1 and 2 were set aside. A stay of proceedings was ordered (paras [9-10](#), [55](#)).

Reasons: Per Farrar J.A. (Wood, C.J.N.S. and Gogan, J.A. concurring):

The trial judge failed to properly apply the test for honest but mistaken belief in communicated consent. The judge conflated the complainant's lack of desire with a lack of consent, without adequately assessing whether the complainant's ultimate consent was voluntary or vitiated by duress or threats. The trial judge's findings did not support a conclusion that the appellant's belief in consent was unreasonable or that he failed to take reasonable steps to ascertain consent. Given the appellant had served his sentence, a new trial was not in the interest of justice, warranting a stay of proceedings (paras [20-54](#)).

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 55 paragraphs.

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Restriction on Publication: 486.4 and 486.5

Judges: Wood, C.J.N.S, Farrar and Gogan, J.J.A.

Appeal Heard: February 17, 2026, in Halifax, Nova Scotia

Written Release: April 13, 2026

Held: Appeal allowed, per reasons for judgment of Farrar, J.A.;
Wood, C.J.N.S. and Gogan, J.A. concurring

Counsel: Zeb Brown, for the appellant
Paul Niefer, 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.

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.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

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.

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:

Introduction

[1] The appellant S.M. and the complainant (S.K.) were married from September 2013 to August 2017.

[2] The complainant alleged that throughout the marriage there were numerous incidents of non-consensual sexual activity and assaults.

[3] As a result, the appellant was charged on a five count indictment with the following offences:

1. That he between the 23rd day of September, 2013 and the 25th day of August, 2017 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on [S.K.], contrary to Section 271 of the *Criminal Code*.
2. AND FURTHER that he between the 1st day of September and the 30th day of September, 2016 at the same place aforesaid, did unlawfully commit a sexual assault on [S.K.], contrary to Section 271 of the *Criminal Code*.
3. AND FURTHER that he between the 1st day of May and the 31st day of August, 2017 at the same place aforesaid, did unlawfully commit a sexual assault on [S.K.], contrary to Section 271 of the *Criminal Code*.
4. AND FURTHER that he between the 23rd day of September, 2013 and the 25th day of August, 2017 at the same place aforesaid, did unlawfully assault [S.K.], contrary to Section 266 of the *Criminal Code*.
5. AND FURTHER that he between the 23rd day of September, 2013 and the 25th day of August, 2017 at the same place aforesaid, did unlawfully utter a threat to [S.K.] to cause bodily harm or death to the said [S.K.], contrary to Section 264.1(1)(a) of the *Criminal Code*.

[4] The trial proceeded before Associate Chief Justice Patrick Duncan (as he was then) sitting as a judge alone over 15 days in 2020 and 2021, concluding on March 25, 2021.

[5] On July 6, 2021, the trial judge rendered an oral decision¹ convicting the appellant of Counts 1, 2 and 4. He was acquitted on Counts 3 and 5. On Count 1 he was sentenced to 39 months in a federal institution; on Count 2 he was sentenced to 18 months to be served concurrently with the sentence imposed on Count 1; and

¹ Reported 2021 NSSC 368.

on Count 4 he was sentenced to 30 days concurrent to the sentences on Counts 1 and 2. The appellant has fully served his 39 month sentence. His warrant of committal expired in June 2025.

[6] The appellant appeals. He says the trial judge committed legal error in the application of the law of honest but mistaken belief in communicated consent.

[7] Only Counts 1 and 2 are in issue on this appeal relating to the sexual assaults. The appellant does not appeal his conviction on Count 4 for assault.

[8] The Crown cross-appeals, on the basis that the trial judge erred in his application of sentencing principles.

[9] For the reasons that follow, I would allow the appeal and set aside the convictions on Counts 1 and 2. It is, therefore, not necessary to address the Crown's cross-appeal on sentence.

[10] In these circumstances, it is in the interests of justice to order a stay of proceedings pursuant to s. 686(8) of the *Criminal Code*, RSC 1985, c C-46.

Facts

[11] The allegations of sexual assault arose during the parties' marriage. The trial was conducted as a blended *voir dire* in which the complainant provided extensive evidence about both the criminal allegations and the appellant's non-criminal conduct which she considered disreputable.

[12] The complainant alleged there were incidents of non-consensual sexual activity throughout the relationship. As noted by the trial judge, she mostly described these incidents in general terms² and was non-committal about the period of time over which they occurred.³

[13] However, she was able to provide detailed descriptions of two incidents: an allegation of forced oral sex, which formed the basis of Count 2, in which she claimed that the appellant pressed his penis against her mouth and persisted despite her repeated refusals;⁴ and an allegation that the appellant pulled down her pants

² Reasons for Decision, paras. 66, 80, 87.

³ *Ibid.*, para. 141.

⁴ *Ibid.*, para. 57.

while she was sleeping and had intercourse with her while she was protesting and crying.⁵

[14] The appellant testified the couple had experienced difficulties with vaginal penetration from the outset of the relationship and that there was continual discussion and negotiation about how they would engage in sexually intimate acts. He said intercourse was rare.⁶ In regard to the incident of oral sex, he denied the complainant's account and described the encounter as consensual.⁷ In cross-examination he said that more often than not he had to "persist" to obtain consent.⁸

[15] The trial judge had concerns about the credibility of both the appellant and the complainant. With respect to the appellant he found:

[228] S.F.M. presents as an intelligent and well-spoken individual. He has a tendency to speak in jargon and often overstates or over describes his position. The level of detail that he provides suggests that he was trying too hard, which by itself does not undermine credibility. However, when, as he did, provide minute detail on an event but then claim not to recall a material fact about the same event, it came across as or it appeared evasive. This type of testimony did undermine his credibility.

[...]

[231] Overall, my assessment was that S.F.M. was strategic and evasive on key points, using long narrative answers that were not directly responsive to the questions asked and used as a means to deflect difficult questions.

[16] In regard to the complainant, he said:

[233] First, I found that there were internal inconsistencies in her evidence. She was, at best, a poor historian for detail.

[234] Some of her allegations lack detail, were vague and amounted to sweeping assertions of the accused's wrongdoing. She was prone to using absolutes such as a particular thing happened "every time" without demonstrating any ability to distinguish the material events or to place them in any type of timeline. She frequently indicated that she could not recall material facts.

[235] She acknowledged that she added prejudicial allegations as time went on from her letter for Family Court in December 2017 up to and including at the preliminary hearing and in the trial.

⁵ *Ibid*, para. 70.

⁶ *Ibid*, paras. 183-184.

⁷ *Ibid*, para. 194.

⁸ *Ibid*, para. 221.

[236] Her acknowledgement that counselling changed her perspective on the issue of consent to sexual activity with the accused was both an honest answer but also left open the question of how much it did influence her subjective assessment of consent to the conduct at the time of the activity.

[237] She minimized her own part in the arguments – not conceding her own apparent volatility as part of those arguments.

[17] The trial judge did not accept that the sexual assaults unfolded in the manner alleged by the complainant. He found, with respect to both the allegations of forced intercourse and the allegation of forced oral sex, there was tension caused by the appellant’s desire for an active sex life and the difficulties and pain experienced by the complainant during intercourse. He found there was a pattern of the appellant trying to talk her into having sex until he overcame her resistance by his persistence.

[18] The trial judge ultimately convicted the appellant because the complainant’s consent to sexual activity was obtained after she had “given in.”⁹

Issue

[19] The appellant is proceeding on only the fifth ground in the Notice of Appeal as follows:

The trial judge erred in law by failing to properly apply the test for honest but mistaken belief in consent.

Standard of Review

[20] Whether the trial judge erred in applying the test for the defence of honest but mistaken belief in communicated consent or in applying the requirements of s. 273.2 of the *Criminal Code*, is a question of law subject to the correctness standard of review.¹⁰ Section 273.2 provides:

Aggravated sexual assault

273.2. Where belief in consent not a defence

It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

⁹ Decision, para. 285.

¹⁰ *R. v. I.E.B.*, 2013 NSCA 98, paras. 39 and 46.

- (a) the accused's belief arose from
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or wilful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

Analysis

[21] With respect to the allegations of intercourse that formed the basis of Count 1, the trial judge did not make distinct factual findings about any specific incident. He concluded that the evidence established there had been multiple instances of the complainant "refusing and then yielding" to the appellant's persistent pleadings, begging, incentivizing and invoking religious obligations:

[281] The parties differ as to the number of times they had or attempted intercourse over the span of the four years they were together, but I have concluded that it was not frequent by either of their estimates. It may have been that it was twice a month in some months but it also, given the pattern I have heard of their living together and being separated and other things that were going on in life, there were months it was likely that there was no attempt at intercourse. To some extent S.F.M., I think, is closer to the truth of this matter than perhaps S.K.

[282] S.K. says that she consistently said "No" to S.F.M.'s approaches to her for intercourse. *They both agreed that there was a pattern of him trying to talk her into it, whether it was, as he said, a negotiation, or by pleading or begging or incentivizing I think was a word that was used. Essentially, he overcame her resistance by being persistent and sometimes invoking what he saw as her religious obligations to provide him with sex.*

[283] I have previously spoken to the evidence to suggest that he was controlling her. The prosecution would say that it was to the point that it made any expressed consent she gave invalid as not being true consent. I accept that S.F.M. is a person who seeks more to guide than to be guided by others. *I am not convinced that S.K., however, was as overwhelmed by his efforts to be directed or guided or controlled in her everyday aspects of life as she would portray.* My perception is that she was frustrated and annoyed by his interference with her life and lifestyle and did not want to tolerate it and did not do so well. In listening to her mother's evidence, it seemed that S.K. was quite independent prior to

marrying S.F.M. *It seems unlikely from my observations and the evidence that she was naturally disposed to be subservient to him.*

[284] *So, it is difficult to say then exactly how many times sexual activities were engaged in by the parties and what percentage of those involved the described pattern of the complainant refusing and then yielding to his wants over her objections.*

[Emphasis added]

[22] The trial judge did not clearly set out his factual findings with respect to any of the Count 1 incidents. As noted, he described the complainant as “a poor historian for detail” and internally inconsistent.¹¹ Therefore her testimony cannot reliably be used to infer controverted factual findings that were not explicitly resolved by the trial judge.

[23] The trial judge does not describe, and does not seem to find, that there was any instance of intercourse in which the appellant persisted in having physical contact without an expression of agreement by the complainant. The trial judge repeatedly describes the pattern, across all the instances, of the appellant responding verbally to the complainant’s refusal by imploring her to consent until she gave in. This was the central focus of his analysis of honest but mistaken belief in consent.

[24] With respect to the allegation of oral sex that forms the basis of Count 2, the trial judge again does not make any clear findings of fact in regard to how the incident unfolded. He does, however, treat this allegation as involving the same issues as the Count 1 intercourse allegations. He states:

[279] My conclusion with respect to these two counts – there is common ground and why I have dealt with them together. [...]

[25] The trial judge viewing the Count 2 oral sex as having “common ground” with the Count 1 intercourse incidents could only mean that he did not accept the complainant’s version of how the oral sex incident occurred. By the complainant’s account, the sexual assault would have been committed prior to any imploring by the appellant. She described the appellant thrusting his penis against her lips and clenched jaw while she repeatedly uttered words of non-consent:

Q: So where is N at this time?

¹¹ Decision at para. 233.

- A: In his arms.
- Q: You said that he unzipped his pants?
- A: He did. He unzipped his pants and he pulled his penis out and he pressed it against my lips and then he kept, he kept pressing it and I kept saying “no just give me N, I’ll feed her. Just give me N and I’ll do whatever you want afterwards.”
- Q: So, you told him no?
- A: Yes.
- Q: Did you tell him no more than once?
- A: Yes, I did.
- Q: Are you able to say how many times?
- A: I, I can’t remember how many times.
- Q: You said that he was, you’re kinda motioning he was putting his penis against your mouth?
- A: yes, that’s correct.
- Q: And how did you react when he did that?
- A: I was clenching my jaw and I was, I was desperate to get N to feed her.
- Q: And when you said no, did he stop putting his penis against your mouth?
- A: No, he did not.

[26] If the events had unfolded as the complainant described, the sexual assault would have occurred the instant the appellant thrust his penis against her lips without consent. Rather than rely on this testimony, the trial judge outlines a version of events where the complainant only consented to the activity to get the appellant to give her their infant child:

[291] In relation to Count #2. Again all of the essential elements of the offence of sexual assault have been proven beyond a reasonable doubt with the only real question being whether or not the Crown has proven a lack of consent on the part of the complainant. There has been evidence that the complainant engaged in oral sex consensually on a number of occasions and so obviously saw this in a different light than the act of intercourse which was physically painful. However, the complainant says that this particular incident took place shortly after having delivered a baby. Having regard to her physical state and the circumstances described, she did not want to perform oral sex on S.F.M.. ***She said that she had expressly stated this to him and only agreed in order to get N.K. back from him.*** She left the home the next day to live with her mother which lasted for three months. Again, I am satisfied it has been proven beyond a reasonable doubt that

she did not subjectively consent to this act. Further, I conclude that, notwithstanding other examples of consensual oral sex, in all of the circumstances that have been presented around this one particular incident, S.F.M. again, I believe, ignored the clear signs that there was a lack of consent. He rationalized his conduct and whatever steps he might have taken to satisfy himself that there was consent were not reasonable steps. Therefore, I find there is no support for a defence of an honest but mistaken belief in consent and so I find S.F.M. guilty in relation to Count #2 of the Indictment.

[Emphasis added]

[27] In her testimony, quoted at paragraph 25, the complainant says she refused to engage in oral sex but told the appellant she would do what he wanted after their daughter was given to her and fed. She did not testify that she agreed to perform oral sex in order to obtain the return of the child. On her version, she never consented to the sexual contact on this occasion.

[28] The common ground between Count 1 and Count 2 is the complainant consenting only after being badgered into agreement. This is reiterated in the Reasons for Sentence,¹² where the trial judge states:

In my assessment he rationalized that the conversations they had provided him the right to proceed [...]

[29] It is also made clear when the trial judge proceeds to his analysis of the defence of honest but mistaken belief in consent. He determines that the defence is not available to an accused who knows that consent was obtained as a result of a person “giving in”:

[285] The problem for S.F.M. is that Canadian law as it relates to the requirement to have a valid consent is very strict in its interpretation, as I laid out earlier in my recitation from other cases. S.F.M.'s own testimony, and in particular some of his answers in reply to the prosecutor's questions, make it clear that he knew that S.K. was, on many occasions, communicating clearly that she did not want to have intercourse with him and that her ultimate consent was obtained not as a willing partner but as a person who had given in. ***Language such as "let's get it over" or negotiating to perform a different sex act are consistent with a lack of a valid consent to intercourse.***

[Emphasis added]

¹² R. v. S.F.M., 2022 NSSC 90.

[30] The trial judge found that the mistaken belief defence is statutorily barred once the complainant expresses non-consent:

[287] There is evidence that S.K. would tell him how much penetration was hurting and to stop. S.F.M.'s response to being told to stop was, frequently, to ask whether he could continue until he was finished and that in some instances, in fact, he would do so. This in my mind is the scenario that is contemplated in 273.1(2)(e) which I have just quoted.

[31] Section 273.1(2)(e) states that the defence is disallowed where:

The complainant, having consented to engage in sexual activity, expresses by words or conduct, a lack of agreement to continue to engage in the activity.

[32] The trial judge further explained his reliance on the appellant's knowledge that the complainant did not want to engage in sexual activity:

[289] I am satisfied that the Crown has proven beyond a reasonable doubt that during the time alleged in Count #1 ***there were a number of instances in which S.F.M. ignored the clear communication of a lack of consent or was reckless or wilfully blind to the lack of consent by S.K.*** I accept her evidence that sexual intercourse was so painful for her that in her mind as the sexual activity was occurring, she was not voluntarily agreeing to engage in the activity. I am satisfied therefore that the evidence proves beyond a reasonable doubt that at least some of the complained of incidents that were testified to were cases where the complainant was not consenting to the sexual intercourse and that she had communicated this to S.F.M. both before and during intercourse. Notwithstanding the accused's testimony, I do not accept that he took reasonable steps to ensure that consent was present and valid during the course of the act of penetration. There is ample evidence of his desire to override her objections through, as he says, negotiation. The bottom line is that in general it was his view that he had the right and she had the obligation to engage in this. I do not accept that he took the reasonable steps necessary to find an honest but mistaken belief in consent. In making this conclusion I also refer to his email statements and his own testimony that he knew she did not want to engage in the intercourse. In my assessment he chose to rationalize at the time that the conversations they were having justified and provided him the right to proceed.

[Emphasis added]

[33] The lack of detailed factual findings creates challenges in understanding the pathway to criminal liability that was followed by the trial judge.

[34] He refers to the appellant as having had actual knowledge of non-consent (“ignored” and “wilfully blind”) which would entirely preclude relying on the defence of mistaken belief; but he also refers to the objective standard (“reckless”) which leaves open the possibility that the trial judge may have accepted that the appellant possessed an honest belief in consent.

[35] Adding further confusion, in the Reasons for Sentence the trial judge states that the appellant engaged in “a form of coercive intimidation”.¹³ It is unclear what is intended from the use of this term.

[36] The trial judge appeared to conclude that the appellant overcame the complainant’s resistance only by persistent begging and pleading. For ease of reference, I will repeat those portions of his decision:

[282] S.K. says that she consistently said "No" to S.F.M.'s approaches to her for intercourse. They both agreed that there was a pattern of him trying to talk her into it, whether it was, as he said, a negotiation, or by pleading or begging or incentivizing I think was a word that was used. *Essentially, he overcame her resistance by being persistent and sometimes invoking what he saw as her religious obligations to provide him with sex.*

[Emphasis added]

[37] A finding of coercion and intimidation would have completely changed the analysis, since consent is statutorily vitiated by threats and fears under s. 265(3)(b) of the *Criminal Code*:

Consent

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

[...]

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

[...]

[38] The trial judge made no reference to this provision, nor was there any suggestion the appellant had unlawfully coerced or intimidated the complainant.

¹³ Paras. 7, 61 and 95.

To the contrary, he found the complainant was not as subservient to S.M. as she portrayed. Again, I repeat for ease of reference his decision on this issue:

[283] I have previously spoken to the evidence to suggest that he was controlling her. ***The prosecution would say that it was to the point that it made any expressed consent she gave invalid as not being true consent.*** I accept that S.F.M. is a person who seeks more to guide than to be guided by others. ***I am not convinced that S.K., however, was as overwhelmed by his efforts to be directed or guided or controlled in her everyday aspects of life as she would portray.*** My perception is that she was frustrated and annoyed by his interference with her life and lifestyle and did not want to tolerate it and did not do so well. In listening to her mother's evidence, it seemed that S.K. was quite independent prior to marrying S.F.M. ***It seems unlikely from my observations and the evidence that she was naturally disposed to be subservient to him.***

[Emphasis added]

[39] The common theme and driving force of the trial judge's decision is the concept that the appellant could not claim to be honestly mistaken about consent after he badgered the complainant into saying yes, even though he knew she suffered pain and plainly indicated that she did not want to engage in sexual activity. This is most clearly set out where the trial judge states the appellant:

[283] [...] knew that S.K. was, on many occasions, communicating clearly that she did not want to have intercourse with him and that her ultimate consent was obtained not as a willing partner but as a person who had given in. Language such as "let's get it over" or negotiating to perform a different sex act are consistent with a lack of a valid consent to intercourse.

[40] The trial judge failed to separate the factual question of whether the complainant wanted to engage in sexual activity from the factual question of whether she voluntarily agreed to do so. Consent is not determined by the complainant's wanting to engage in the activity, but by whether she voluntarily agreed to engage in it. That should have been the focus of the trial judge. He should have assessed whether the conduct of the appellant crossed a line such that her agreement was prevented or vitiated, for instance by duress or threats (s. 265(3)(b)).

[41] Instead, the trial judge chose to focus on the appellant's knowledge that the complainant did not want to engage in sexual activity and that he knew she was only acquiescing to his wishes as a result of his pleading.

[42] This represents an expansion of criminal liability for sexual assault. Communicated consent is invalid if it is not voluntary or is forcibly coerced or is obtained when the complainant is incapable of consenting. In those situations, the complainant has involuntarily submitted to the will of the accused. Here, the trial judge did not find any such factors were present. At the risk of being repetitious, he made a legally incorrect determination that consent is also invalid if “ultimate consent was obtained not as a willing partner but as a person who had given in.”¹⁴

[43] Although courts often describe consent in terms of whether the complainant “wanted” sexual contact, this is not a problem if there is no factual foundation for differentiating between what the complainant wanted and what she voluntarily agreed to do. As discussed in *R. v. Walsh*, 2021 ONCA 43:

[113] Next, as the accused acknowledges, a jury instruction equating consent with "wanting" is common. In this regard, two things are worthy of note. First, in the seminal case of *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, [1999] S.C.J. No. 10, at paras. 23 and 48, the court described the actus reus of the offence of sexual assault as "unwanted sexual touching" and said that, for the purposes of the actus reus, consent means that the complainant in her mind "wanted the sexual touching to take place". Second, the charge in this case tracked the language in *Watt's Manual of Criminal Jury Instruction*, 2nd ed. (Toronto: Carswell, 2015, Final 271), at p. 599. [page 290]

[114] With these considerations in mind, I ask whether the impugned instruction might have prejudiced the accused. In my view, it could not have: ***there was nothing in the evidence upon which the jury could conclude that the complainant did not want to perform oral sex but she nonetheless voluntarily agreed to do so*** nor did defence counsel ever suggest that the complainant engaged in the sexual activity for any purpose other than subjective desire. The accused's version of events was that the complainant initiated oral sex and that intercourse never took place.

[115] The evidence only permitted the jury to make one of two findings: ***that the complainant did not want to perform oral sex and did not agree to do so or that she agreed to perform oral sex and wanted to do so***. Accordingly, the jury could not have concluded that the Crown had proven the complainant did not want sexual contact but had not proven that there was no voluntary agreement to sexual contact.

[116] The cases of *M. (S.)* and *Shimizu*, relied on by the accused, are readily distinguishable from the present case. In both those cases, ***the trial judge found that there was a possibility that the complainant agreed to the sexual activity for a reason other than pleasure or affection***. In *M. (S.)*, the reason was money

¹⁴ Decision at para. 285.

and in Shimizu, it was career advancement. In this case, there was no evidence that the complainant consented to engage in sexual activity for a reason other than a subjective desire nor was there a theory of the case presented to the jury that she consented for any reason other than subjective desire.

[Emphasis added]

[44] Consent is not invalidated by the fact that a complainant was convinced or persuaded to engage in sexual activity.

[45] Criminal liability flows from the accused's persistence not only in trying to convince the complainant, but sexually touching her without having obtained consent. As discussed in *R. v. TR*, 2016 ABCA 355:

[27] The final ground of appeal is that the trial judge determined that persuading someone to have sex was itself criminal conduct. This argument overlooks the key findings of the trial judge. The appellant was not convicted of pressuring the complainant. He was convicted of persisting in sexual touching after the complainant had expressed her unwillingness to engage in the activity, and without making certain that she had changed her mind. As the trial judge noted, capitulation is not consent. Trying to convince someone to engage in sexual activity does not remove the requirement to ensure that the other person is actually consenting to the activity.

[46] An initial refusal by a complainant to continue engaging in sexual activity does not constitute an absolute bar to the defence of honest but mistaken belief in communicated consent. A complainant is entitled to change her mind. To properly assess whether the defence had been made out, the trial judge needed to examine what occurred after the complainant expressed refusal: (a) whether the appellant took reasonable steps to ascertain that the complainant was consenting when sexual activity resumed; (b) whether he honestly believed she was consenting to resume; and (c) whether there was any common law or statutory bar that made her consent ineffective.

[47] The trial judge's only reason for finding that the conversations did not constitute reasonable steps was, in essence, that the appellant was knowingly seeking permission to engage in unwanted sexual activity. This conflated consent with desire, and it confused the test for reasonable steps with the various tests for ineffective consent. As a result, the trial judge failed to assess whether the complainant's ultimate consent amounted to a voluntary agreement to engage in further sexual activity; and whether her ultimate consent was rendered ineffective

due to duress, threats, or other factors recognized in the common law and s. 265(3) or s. 273.1.

[48] The trial judge did not find that the appellant deprived the complainant of the ability to make a voluntary decision. Nor did he foreclose the possibility that the appellant held an honest belief in the complainant's voluntary agreement to continue the sexual activity.

[49] The trial judge failed to apply the correct test in concluding the defence of honest but mistaken belief in communicated consent was not available. I would set aside the conviction.

Disposition

[50] Section 686(8) of the *Criminal Code* provides:

Additional powers

686 (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

[51] The Crown requested a new trial should this Court allow the appeal.

[52] While not diminishing the nature of the charges that are the subject matter of this appeal date from 2013 to 2017. The appellant was convicted on July 6, 2021 and sentenced on March 2, 2022. He has served his complete sentence for his convictions. His Warrant of Committal expired in June 2025. This is not a case where there is a societal interest in the effective prosecution of a criminal case. That has occurred and the sentence has been served. It is not in the interest of justice to order a new trial.

[53] In *R. v. Conway*,¹⁵ Justice L'Heureux-Dubé writing for the majority held there are times when the affront to fair play and decency outweighs society's interest in the effective prosecution of criminal cases:

[...] The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and

¹⁵ [1989], 1 SCR. 1659 at p. 1667.

support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[54] This is one of those cases where a stay is warranted.

Conclusion

[55] I would allow the appeal and stay the charges.

Farrar, J.A.

Concurred in:

Wood, C.J.N.S.

Gogan, J.A.