NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. I.E.B.***, 2013 NSCA 98

Date: 20130910
Docket: CAC 369580
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

I.E.B.

Respondent

Restriction on Publication:
Pursuant to s. 486 of the *Criminal Code of Canada*

Judges:	Saunders, Oland, and Bryson, JJ.A.
Appeal Heard:	May 27, 2013, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial is ordered per reasons for judgment of Oland, J.A.; Saunders and Bryson, JJ.A., concurring
Counsel:	Mark Scott, for the appellant
	Kevin A. Burke, Q.C., 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

Reasons for judgment:

[1] This appeal raises issues which pertain to the Crown's right to appeal from acquittal, and to consent, absence of consent, and an honest but mistaken belief in consent in relation to sexual assault.

[2] The respondent was acquitted at trial of sexual assault (s. 271(1)(a) of the *Criminal Code*). In its appeal, the Crown argues that the judge's reasons reveal stereotypical thinking, there was no air of reality to the defence of honest but mistaken belief in consent, and the judge failed to consider certain statutory provisions. The respondent submits that this court has no jurisdiction to hear the Crown's appeal and, alternatively, the judge committed no error that would permit appellant intervention.

[3] For the reasons which I will develop, I would allow the appeal and order a new trial.

Background

[4] At trial, the judge heard the evidence of two witnesses: the complainant, and a friend with whom she spoke after the alleged assault. The respondent did not testify. The Crown argued that it had met its burden to prove all the elements of sexual assault beyond a reasonable doubt. According to the respondent, the Crown had failed to prove both the *actus reus* and the *mens rea*.

[5] In his decision, Justice Gerald R.P. Moir set out the facts which led to the charge of sexual assault:

> [6] Ms. [G] testified that she, her one-time boyfriend, Mr. [RC], Mr. [B], and his girlfriend were friends. The two couples socialized together frequently after Ms. [G] came to Greenwood in the summer of 2009. Even after Ms. [G] and Mr. [C] split up around Christmas 2009, the four remained friends.
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> [7] In the early morning hours of that Saturday in March 2010 a crowd of people gathered at the Top Hat tavern behind a mall in Greenwood. The crowd included Ms. [G], Ms. [B], and Mr. [B]. It did not include Ms. [G]'s former boyfriend, or Mr. [B]'s girlfriend.
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> [8] For Ms. [G], that night included a fair bit of drinking at events that were celebratory. She had recently been accepted into the full-time forces and ... There was that to celebrate and goodbyes to be said. Also, she joined a celebration for Ms. [PF] who had just completed a course of studies.

> [9] Ms. [G] testified that she had had dinner in the CFB Greenwood mess. It included a drink. She said she later took a quart of wine to Ms. [F]'s house, and had had a couple of glasses from it. Mr. [B] was there and she offered the bottle for him and others to help themselves.
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> [10] Ms. [G] said that around midnight she, Ms. [B], two other girlfriends, and possibly Mr. [B] went together to the Top Hat. She said she had maybe three vodka and cranberry drinks. Ms. [B] made it clear that these were shooters purchased from a shooter bar and consumed in one gulp each.
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> [11] Ms. [G] testified that at about one o'clock when Mr. [B] led her to a secluded place she was drunk but able to walk. For her, that meant that she was fine. In cross-examination, she agreed that her judgment may have been impaired "but I still knew what I was doing".
>
> [12] Ms. [G] said that Mr. [B] approached her at the edge of the dance floor in the tavern. He asked whether she would go with him. She said "yes". She did not ask where they were going or why at that time. They were friends and she trusted him.
>
> [13] Outside the tavern, she asked "Where are we going?" and Mr. [B] only said "Follow me." She thought he was gong [*sic*] to tell her she had had too much to drink and to go home.
>
> [14] In any case, they found themselves behind the tavern at a dumpster. Ms. [G] described the details of Mr. [B] exposing himself, guiding her hand to him, pulling her down by the hair, and obtaining oral sex.
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> [15] According to Ms. [G], after ejaculation, Mr. [B] said "This never happened" and they parted. She vomited. She went back into the tavern and to the women's washroom, where she found her good friend, Ms. [B], to whom she described what had been done to her.
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> [16] Ms. [G] testified that she never said yes or no to Mr. [B]. The only outward sign that she disagreed would have been her crying when Mr. [B] pulled her hair to direct her to himself. The place was dark and there is no evidence that Mr. [B] saw or heard crying.
>
> [17] In cross-examination, Ms. [G] said she had no idea what Mr. [B] was doing until he exposed himself. She was in shock after that. Therefore, she did not walk away although she could have done. She was not compelled by a threat, and nothing, except the shock, prevented her from saying "Don't do this" or "I'm leaving".

[6] After recounting the evidence of the complainant's friend and the defence argument that lack of consent had not been proven beyond a reasonable doubt, the judge found that the complainant was a credible witness. He also determined that the Crown had proved lack of consent beyond a reasonable doubt. No appeal has been brought against his conclusion that the complainant did <u>not</u> consent.

[7] The judge then considered the *mens rea*. He concluded that this essential element of the offence of sexual assault had not been satisfied. Here is his reasoning:

> [24] However, it has not been proved beyond reasonable doubt that Mr. [B] knew Ms. [G] was not consenting or that he was reckless about her consent.
>
> [25] The events have to be seen from [B]'s perspective when assessing this issue.
>
> [26] At the dance floor, Ms. [G] agrees to go outside with him for no explicit purpose. A pleasant walk with a friend, a warning about drunkenness and directions home, or other things are possibilities.
>
> [27] The situation is unchanged outside the main door. "Where are we going?" does not get a direct or honest answer. Just "follow me". He intends on sex and keeps that to himself either because he seeks no consent or he is reckless about it.
>
> [28] Then they go along the side of the tavern. Then into the dimly lit rear. Then to a dumpster. It is almost a private place. Mr. [B] opens his pants.
>
> [29] After that he is entitled to think, absent complete drunkenness, that Ms. [G] knows his intent and is going along with it. There is no evidence he saw tears, or heard cries. In all the circumstances, the absence of a protest is significant.
>
> [30] I am not satisfied beyond a reasonable doubt that Mr. [B] knew that Ms. [G] was not consenting to the sexual activity or that he was reckless about it.
>
> [31] Consequently, I will enter an acquittal.

Issues

[8] In appealing the acquittal, the Crown submits that the judge erred in law:

(a) in giving effect to the defence of honest but mistaken belief in consent in the absence of evidence giving the defence an air of reality, and
(b) in his interpretation of consent under ss. 265, 273.1 and 273.2 of the *Criminal Code*.

[9] In his submissions, the respondent raises an issue of jurisdiction, namely, whether in the circumstances of this case this court can even entertain the Crown's appeal. If his argument is accepted, there would be no need to consider the merits of the Crown's appeal. Consequently, I will begin with this preliminary issue.

The Jurisdictional Issue

[10] The respondent characterizes the Crown's appeal as an attempt to impugn a key inference of fact made by the judge. He argues at length that the appeal does

not raise a question of law alone and, consequently, the Crown has no right to appeal and this court lacks the jurisdiction to hear the appeal.

[11] In urging that the Crown can only appeal an acquittal based on "a question of law alone," the respondent is correct. Section 676 of the *Criminal Code* stipulates that:

> **676.** (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> *(a)* against a judgment or verdict of acquittal ... of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

[12] The respondent submits that the judge had a reasonable doubt on *mens rea* which, he says, is a question of fact and not a question of law. His argument relies on *Lampard v. The Queen*, [1969] S.C.R. 373.

[13] *Lampard* was not a sexual assault case. There the accused had been acquitted of a securities offence under the *Criminal Code*. To be found guilty of that offence, the Crown had to prove not only that the accused had effected a certain type of transaction, but also that he did so with the specific "intent to create a false or misleading appearance of active public trading in securities". There was no dispute that the transactions had been carried out. The trial judge had a reasonable doubt as to whether the accused had the requisite specific intention and acquitted him. The Court of Appeal set aside the acquittal, holding that the only inference that could be drawn from the undisputed facts in the record was that the accused had the requisite intention, and this raised a question of law which gave the Crown a right of appeal. The Crown appealed.

[14] The respondent relies on a passage from the decision of the Supreme Court of Canada. Chief Justice Cartwright for the majority stated at p. 379-380:

> With the greatest respect I am unable to agree that a question of law was raised. It is not correct to say that the facts are not in dispute. There is dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section.
>
> To determine whether an act, admittedly done, was done with a certain intention it is necessary to inquire into the state of mind of the doer. That such an inquiry is as to a matter of fact has often been held.

[15] However, unlike that in *Lampard*, the mental element in issue on this appeal is not the specific intention of the respondent. Rather, as will be further

explained, it is whether he knew the complainant was not consenting, or was wilfully blind or reckless about her lack of consent.

[16] Moreover, it is significant that, since its decision in *Lampard*, the Supreme Court of Canada has refined the meaning of a "question of law." In *R. v. Ewanchuk*, [1999] 1S.C.R. 330, it considered the defense of implied consent to a charge of sexual assault. The trial judge found that the complainant had not consented to any of the sexual touching and had been fearful throughout the encounter; however, she had not communicated her fear. He accepted the defence of implied consent and acquitted the accused. The majority of the Alberta Court of Appeal dismissed the Crown's appeal, on the basis that the acquittal was fact-driven and thus the Crown could not properly appeal. Furthermore, in its view, the Crown had failed to prove beyond a reasonable doubt that the accused had intended to commit an assault upon the complaint.

[17] The Supreme Court of Canada allowed the appeal. Major J. writing for the majority addressed whether an appealable question of law had been raised:

> 21 The majority of the Court of Appeal dismissed the appeal on the ground that the Crown raised no question of law but sought to overturn the trial judge's finding of fact that reasonable doubt existed as to the presence or absence of consent. If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. See *Belyea v. The King*, [1932] S.C.R. 279, *per* Anglin C.J., at p. 296:
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> The right of appeal by the Attorney-General, conferred by [the *Criminal Code*] is, no doubt, confined to "questions of law". . . . But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the <u>legal effect of certain findings of fact</u> made by the judge or the jury . . . to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law, -- especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge. [Major, J.'s emphasis]
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> 22 It properly falls to this Court to determine whether the trial judge erred in his understanding of consent in sexual assault, and to determine whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

[18] In addition, recent case law indicates that an appeal court can intervene where "reasonable doubt is tainted by legal error". In *R. v. J.M.H.*, 2011 SCC 45, which involved a sexual assault, the Supreme Court of Canada considered the circumstances under which a trial judge's alleged mishandling of the evidence constitutes an error of law giving rise to a Crown appeal of an acquittal. Cromwell, J. writing for the court identified several situations, one being an assessment of the evidence based on a wrong legal principle. The appellant there relied on *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, for the proposition that where the error of law is an alleged defect in the judge's assessment of the evidence, a reviewable error only arises when there has been a shift in the legal burden to the accused. Cromwell J. rejected this argument:

> [39] Respectfully, I do not accept either of these submissions. As I explained earlier, the principle set out in *Schuldt* (and many other cases) is that a reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt. The Court has twice, in *Schuldt and B. (G.)*, explained the proper basis of the decision in *Wild* [*Wild v. The Queen*, [1971] S.C.R. 101]. <u>It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted</u>. [Emphasis added]

[19] See also *R. v. R.G.B.*, 2012 MBCA 5, where the Manitoba Court of Appeal considered whether the Crown has a right of appeal. After reviewing the jurisprudence including *J.M.H*, it stated:

> [16] … while it would be an error in law to convict in the absence of an evidentiary foundation on any essential element of the offence, it would not be an error in law to acquit in the absence of an evidentiary foundation for the reasonable doubt. It can also be said that, while appellate intervention in an acquittal is not permitted when the alleged error relates to whether the evidence is sufficient to raise a reasonable doubt (as that is not a question of law alone), <u>it is permitted when it is alleged that the reasonable doubt is tainted by legal error (as that is a question of law).</u> [Emphasis added]

[20] Accordingly, contrary to the arguments of the respondent, a trial judge's determination that he has a reasonable doubt does not entirely preclude the Crown from bringing an appeal from an acquittal. If the judge has misdirected himself as to the legal meaning or definition of consent, or the reasonable doubt is tainted by legal error, then his conclusion regarding reasonable doubt becomes a question of law and thus reviewable by an appellate court.

[21] As will be seen, in the circumstances of this appeal, it is not necessary to closely examine the judge's appreciation of the legal meaning of consent or his conclusion regarding reasonable doubt in order to dispose of this appeal.

Analysis

[22] I turn then to the merits of the Crown's appeal.

(a) Consent

[23] The Crown argues that the judge erred in law in giving effect to the defence of honest but mistaken belief in consent in the absence of evidence giving the defence an air of reality. At trial, defence counsel did not raise this defence. The respondent argues that since his argument before the trial judge was simply based on the Crown's failure to prove all the elements of sexual assault beyond a reasonable doubt, the air of reality test was not applicable.

[24] Because it is central to the Crown's argument on appeal, I am bound to deal with it but only to the extent necessary, and making it clear that my comments are confined to this record and are not in any way intended to express a view about this or any other defence that might arise from the evidence in the new trial I have ordered.

[25] I will begin my analysis with a brief review of the *actus reus* and *mens rea* of sexual assault. In doing so, I will relate and consider the judge's findings in regard to these elements, and how the defence of honest but mistaken belief is applicable in this case.

[26] The Supreme Court of Canada explained the *actus reus* and *mens rea* of sexual assault thus in *R. v. J.A.*, 2011 SCC 28:

> [23] A conviction for sexual assault under s. 271(1) of the *Criminal Code* requires proof beyond a reasonable doubt of the *actus reus* and the *mens rea* of the offence. A person commits the *actus reus* if he touches another person in a sexual way without her consent. Consent for this purpose is actual subjective consent in the mind of the complainant at the time of the sexual activity in question: *Ewanchuk*. As discussed below, the *Criminal Code*, s. 273.1(2), limits this definition by stipulating circumstances where consent is not obtained.
>
> [24] A person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. However, as discussed below, ss. 273.1(2) and 273.2 limit the cases in which the accused may rely on this defence. For instance, the accused cannot argue that he misinterpreted the complainant saying "no" as meaning "yes" (*Ewanchuk*, at para. 51).

[27] The *actus reus* of sexual assault requires proof of the absence of consent, an element which is subjective in nature and "determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred": *Ewanchuk* at ¶ 25-26. At trial, counsel for the respondent focussed on the absence of consent aspect of the *actus reus*. He urged that it was not clear in the complainant's own mind whether or not she had consented. In doing so, defence counsel emphasized this exchange between the Crown and the complainant:

> **Q.** Okay. Can you tell us whether you consented to the, to this activity?
>
> **A.** Well, I didn't say yes but I didn't say no either.

He correctly submitted that if the *actus reus* was not proven, there was no need to go on and consider the *mens rea*.

[28] The judge rejected the defence submissions on the *actus reus*. He found that the Crown had proved the no-consent element:

> [20] For Mr. [B], it is submitted that lack of consent has not been proved beyond a reasonable doubt. It is argued that Ms. [G]'s answer to the direct question "Did you consent?" is ambiguous. She said "I did not say yes and I did not say no either." I do not find that ambiguous. There is a close connection between consent and the communication of it. To consent is to say yes.

Having found that the *actus reus* had been proven, the judge proceeded to consider the *mens rea*.

[29] As with the *actus reus*, consent is an integral part of the *mens rea*. However, while the absence of consent for the *actus reus* is subjective and considered from the perspective of the complainant, in the context of the *mens rea*, consent "is considered from the perspective of the accused": *Ewanchuk* at ¶ 45.

[30] At trial, the appellant did not testify and defence counsel did not make extensive arguments with respect to *mens rea*. Rather, after reiterating that the Crown in proving *mens rea* must establish that the accused knew there was no consent or was reckless of or wilfully blind to its absence, defence counsel again directed the judge to the same evidence about the complainant's "ambivalence" – namely, her statement that "I didn't say yes but I didn't say no either" - that he had argued to support his position that the Crown had not proven the absence of consent necessary for the *actus reus*.

[31] In his decision, perhaps because of the heavy emphasis on the *actus reus* and the light attention paid to the *mens rea*, the judge did not conduct a detailed analysis of *mens rea*. But in order to acquit, he had to have received evidence that could raise a reasonable doubt as to *mens rea*. As the majority of the Supreme Court of Canada stated in its *Ewanchuk* decision:

> 56 … All that is required is for the accused to adduce some evidence, or refer to evidence already adduced, upon which a properly instructed trier of fact could form a reasonable doubt as to his *mens rea*: …

[32] In ¶ 27 of his decision, the trial judge described the respondent, when leading the complainant outside and behind the tavern, as "intends on sex" and keeping his intention to himself "either because he seeks no consent or he is reckless about it." Yet, from the events that transpired in the few minutes thereafter, he was not satisfied beyond a reasonable doubt that the respondent knew that the complainant was not consenting to the sexual activity or that he was reckless about it. How did he come to that conclusion?

[33] Since the respondent did not testify at trial, the only evidence as to the interaction between him and the complainant, whom the judge found to be credible, was her testimony. Here is what the complainant testified happened after the appellant led her from the tavern to the dumpster behind the building:

> **Q.** Okay, and what, what happened once you got back there?
>
> **A.** Um, as I said he, he opened his pants, he put his penis out, he put it in my hand. He asked me if it was big and ....
>
> **Q.** Did you say anything at that point?
>
> **A.** I don't recall saying anything.
>
> **Q.** Okay.
>
> **A.** And then he grabbed my hair and he pulled my head down.
>
> **Q.** Okay, and do you recall if he, if he said anything other than, than what you've told us?
>
> **A.** He asked me if it tasted good, if I liked it, and ....
>
> **Q.** What did you do at this point?
>
> **A.** Um, well I had his penis in my mouth so I didn't, I was ... yeah.
>
> **Q.** Okay. Can you tell us whether you consented to the, to this activity?
>
> **A.** Well, I didn't say yes but I didn't say no either.
>
> **Q.** Okay. Did, did you say anything at all either before or during?

A. No.

Q. Can you recall whether you were asked by Mr. [B] whether you wanted to participate in this?

A. No.

Q. Can you, can you give us an estimate of, of how long you were back behind the club with Mr. [B] for?

A. Not very long.

Q. Okay.

A. I would say five minutes maybe.

Q. Okay. What, what brought it to an end?

A. Um, well he came. I should say he ejaculated and then he put up his pants and he left and he told me nothing, none of this ever happened, Corporal. He left.

[34] Under cross-examination, the complainant admitted that she did not leave although she was free to do so. However, she also explained that she neither said "yes" nor "no" or anything else because she was in shock, was crying, and had not expected any of this.

[35] It is evident from his decision that what the judge found supportive of an acquittal was what he saw as the complainant's failure to object or resist. The short passage immediately after his description of the respondent as intent on sex and seeking no consent or being reckless about it when leading the complainant away from the tavern and friends, and before the judge's conclusion to acquit, reads:

> [28] Then they go along the side of the tavern. Then into the dimly lit rear. Then to a dumpster. It is almost a private place. Mr. [B] opens his pants.
>
> [29] After that he is entitled to think, absent complete drunkenness, that Ms. [G] knows his intent and is going along with it. There is no evidence he saw tears, or heard cries. In all the circumstances, the absence of a protest is significant.

It is implicit from his reasons that the judge was of the view that the absence of a protest led to an honest but mistaken belief on the part of the respondent that the complainant consented to engaging in sexual activity in question. This is reinforced by the judge's description of the case before him at ¶ 2 of his decision as one "about consent and belief in consent" (Emphasis added).

[36] The trial judge had already found that the complainant did not consent. In her dissenting opinion in *R. v. Ewanchuk*, 1998 ABCA 52, Chief Justice Fraser

pointed out that once the Crown proves beyond a reasonable doubt that the complainant did not consent, the defences available to an accused quickly reduce:

> **102** Once the Crown proves beyond a reasonable doubt that no consent was given by the complainant, what this means from the point of view of what the accused knew or thought narrows quickly. Analyzing each of the options in turn, on either of the first two, the accused's actions attract a finding of guilt. On the first, either the accused knew or was wilfully blind to the fact that the complainant did not consent -- and criminal culpability properly follows. On the second option, the accused knew that he was unsure while committing the sexual acts whether the complainant was consenting to his actions and chose to take the risk (that is he was reckless) -- and again criminal culpability properly attaches to his actions. On the third option, once the Crown has proven beyond a reasonable doubt that the complainant did not consent, only one alternative is then open in terms of the accused's mental state. That alternative is the defence of mistake of fact. There are no other options available.

[37] In the jurisprudence on sexual assault, the defence of an honest but mistaken belief that the complainant had consented is treated as a synonym of the Crown's failure to provide *mens rea*. In *R. v. Robertson*, [1987] 1 S.C.R. 918, in determining that the trial judge should instruct the jury to consider whether the accused had an honest, though mistaken, belief in consent only when certain criteria are met, Wilson J. for the court stated at p. 933:

> Although there has been some difference of view on the Court as to whether the accused's knowledge of lack of consent is to be described as an element of the offence or as a defence of mistake of fact, the Court has been unanimous in its agreement on one proposition – there must be evidence that gives an air of reality to the accused's argument that he believed the complainant was consenting before the issue goes to the jury. In addition, I believe that previous case law establishes the proposition that, where there is sufficient evidence for the issue to go to the jury, the Crown bears the burden of persuading the jury beyond a reasonable doubt that the accused knew the complainant was not consenting or was reckless as to whether she was consenting or not. Using the language of Glanville Williams in *Criminal Law: The General Part*, (2nd ed. 1961), at pp. 871-910, there are two separate burdens in relation to the issue of honest but mistaken belief – the evidentiary burden and the burden of persuasion. Evidence must be introduced that satisfies the judge that the issue should be put to the jury. This evidence may be introduced by the Crown or by the defence. The accused bears the evidentiary burden only in the limited sense that, if there is nothing in the Crown's case to indicate that the accused honestly believed in the complainant's consent, then the accused will have to introduce evidence if he wishes the issue to reach the jury. Once the issue is put to the jury, the Crown bears the risk of not being able to persuade the jury of the accused's guilt.

[38] Honest but mistaken belief in consent is a way of negating *mens rea*. As is evident from this passage in *Robertson*, the defence does not place a positive

burden on the accused to call evidence. It can be satisfied by evidence from the Crown, including that of the complainant: see also *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 686-687. However, as a practical matter, in the absence of other evidence in support, the defence of honest but mistaken belief in consent may be difficult to put into play when an accused does not testify: *R. v. Park*, [1995] 2 S.C.R., at ¶ 21.

[39] As I have indicated, the judge's decision to acquit clearly relied on this defence. The air of reality test applies to all defences, including honest but mistaken belief in consent: *R. v. Cinous*, 2002 SCC 29, at ¶ 57. Whether an air of reality to a defence exists is a question of law, and subject to the standard of correctness: *Cinous* at ¶ 55.

[40] In applying that test, a trial judge considers the totality of the evidence: *Cinous* at ¶ 53. When reviewing the totality of the evidence to determine whether an air of reality exists for an honest but mistaken belief in consent, a judge must ask whether there is sufficient evidence to show that the accused honestly believed that the complainant communicated consent by words or conduct to engage in the sexual activity in question: *Ewanchuk* at ¶ 46 – 49; *R. v. J.A.* at ¶ 48. A belief based solely on silence, passivity or ambiguous conduct will not provide a defence: *Ewanchuck* at ¶ 51; *R. v. Dippel*, 2011 ABCA 129, at ¶ 13. There must be evidence that the accused held an honest belief at the outset of the sexual activity: *Dippel* at ¶ 17. The absence of resistance is only one of the factors to be considered: *R. v. Esau*, [1997] 2 S.C.R. 777, at ¶ 22.

[41] It appears from his decision to acquit that the trial judge decided that there was an air of reality to the defence of honest or mistaken belief in consent. In order to dispose of this appeal, it is not necessary that I determine whether or not, based on the evidence before him, such an air of reality existed. As will be seen, even assuming that it did, the judge erred in law.

(b) Statutory Definitions of Consent

[42] The appellant was charged with sexual assault contrary to s. 271 of the *Criminal Code*. The Crown submits that the judge erred in law in his interpretation of consent under ss. 265, 273.1 and 273.2 of the *Criminal* Code. In order to dispose of this ground of appeal, I need consider only the last of these:

> **273.2** 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

> *(a)* the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or
>
> (ii) recklessness or wilful blindness; or
>
> *(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.

[43] In *R. v. Cornejo* (2003), 179 O.A.C. 182, Abella, J.A. (as she then was) described the purpose of s. 273.2:

> **21** The purpose of these provisions is to ensure that there is clarity on the part of the participants to the consent of the other partner to sexual activity. The legislative scheme replaces the assumptions traditionally – and inappropriately – associated with passivity and silence. Someone in Mr. Cornejo's circumstances takes a serious risk by founding an assumption of consent on passivity and non-verbal responses as justification for assuming that consent exists.

[44] Even if the judge could be taken to have properly found an air of reality in this case, he failed to consider the limitation in s. 273.2(b) that the accused must have taken "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". It is an error of law to fail to conduct the reasonable steps analysis. See *Dippel* at ¶ 15; *R. v. Malcolm*, 2000 MBCA 77, at ¶ 8 and ¶ 31-36; leave to appeal to SCC refused, [2000] S.C.C.A. No. 473; and *Cornejo* at ¶ 18-19, 30 and 35.

[45] With respect, the judge's reasons do not include any analysis of the evidence to establish that the respondent took reasonable steps, based on what he subjectively knew at the time, to ascertain consent. His failure to conduct such as an analysis amounts to an error of law.

Disposition

[46] Assuming without determining that the judge properly found an air of reality to the defence of honest but mistaken belief in consent, he failed to conduct the requisite reasonable steps analysis stipulated by s. 273.2 of the *Code* and so erred in law.

[47] The Crown argues that nothing in the record is ambiguous and it satisfied the burden with respect to both the *actus reus* and the *mens rea* of sexual assault. It asks that this court allow its appeal, enter a conviction and, pursuant to s. 686(4)(b)(i), remit the matter to the trial court to impose sentence.

[48] Whether or not the respondent had the requisite *mens rea* for sexual assault is a fact that remains to be determined. In these circumstances, the appropriate remedy is a new trial: *R. v. Cassidy*, [1989] 2 S.C.R. 345, at pp. 354-355; *R. v. Cogger*, [1997] 2 S.C.R. 845, at ¶ 5-7, 26 and 33-34; *R. v. Tookanachiak*, 2007 NUCA 1, at ¶ 12-13.

[49] I would allow the appeal and order a new trial.

Oland, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.