File Number: 39109

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF SASKATCHEWAN)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT (RESPONDENT)

- and -

AWET MEHARI

RESPONDENT (APPELLANT)

FACTUM OF THE APPELLANT

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I

STATEMENT OF FACTS

Overview

1. The respondent was charged with sexually assaulting the complainant after she reported that he had sexual intercourse with her while she was sleeping. The respondent admitted to having sex with the complainant but he claimed that she was an active, conscious and enthusiastic participant in everything that happened. The only issue at trial was whether the complainant consented to the sexual activity in question. The trial judge was satisfied she did not. She explained why she accepted the complainant's testimony as fact. She explained why she rejected the respondent's testimony. She found the respondent guilty as charged.

2. The respondent appealed. One of his arguments on appeal was that the trial judge applied a different level of scrutiny to his evidence than to the complainant's evidence. In a split decision, a majority of the Court allowed the appeal on this ground.

3. The Attorney General respectfully submits the majority judges erred in several respects. The majority judges lost sight of the legal test to be applied when assessing the merits of an uneven scrutiny argument. Their decision to resort to a "trial by transcript" process to question the trial judge's reasonable findings failed to respect the unique advantage the trial judge enjoyed to assess witness demeanour and credibility. They misinterpreted the trial judge's reasons for judgment and misapprehended the trial record. As a consequence, they failed to appreciate that the trial judge applied precisely the same standards of scrutiny to the evidence of each witness.

The Evidence

4. Witness credibility was the primary issue in this case. The respondent attacked the complainant's credibility by arguing that her testimony on peripheral factual issues was not identical to the testimony of other witnesses. Most of these alleged inconsistencies were more

apparent than real. The vast majority of the complainant's testimony as it related to material and non-material issues of fact was actually corroborated by independent evidence. To appreciate the superficial nature of the respondent's credibility arguments at trial and on appeal, the Attorney General must provide a detailed summary of the evidence.

5. The factual narrative of this case begins with an invitation. On September 29, 2017, Kayden Seon-Tomlin [Kayden] sent a text message to the complainant inviting her to a social function. The complainant was 19 years old. She and Kayden were good friends who had known each other from childhood. Kayden told her that the plan was to meet at the respondent's house for a few drinks before going to a nightclub to watch a music show. The complainant accepted the invitation.[1]

6. Kayden was a 19 year-old amateur photographer. He had known the respondent for a few years and considered the respondent to be his friend. The respondent was managing the budding career of a Rap singer whose stage name was "Pimpton." Kayden had been asked to take photographs of Pimpton's stage performances. Pimpton was going to perform at the Noir nightclub on September 29 and Kayden planned on being there to record the performance.[2]

7. The complainant did not know the respondent but she had met him through Kayden three weeks earlier. On September 8, 2017, she and Kayden saw one of Pimpton's performances and went to the respondent's house afterwards. They did not stay at the respondent's house for long but, according to the complainant, Kayden told her the respondent wanted to meet her just before they left. She spoke to the respondent briefly and they exchanged Snapchat contact information. Although the respondent admitted meeting the complainant and

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[1] Appellant's Record [A.R.], Volume II, Tab 5, at pp 8-9

[2] *Ibid*., at pp 77-78 and 106-107

exchanging Snapchat information with her, he denied asking Kayden to introduce them.[3]

8. The complainant arrived at the respondent's house on September 29 at about 9:30 PM. She did not know anyone at the house other than Kayden so she sent a text message to Kayden asking him to meet her at the front door. There were approximately 10 other people at the house. She had three drinks of rum before leaving for the Noir nightclub at approximately 10:45 PM. She did not speak to the respondent other than to ask if he had some hand lotion. However, just as she was leaving the house, the respondent asked her to sit with him in the vehicle. The complainant did not reply. She sat beside Kayden when she got into the vehicle.[4] The respondent denied inviting the complainant to sit with him on the way to the nightclub.[5]

9. A table had been reserved for the respondent's party at the nightclub. The complainant testified that she had a couple of drinks at the club as the night wore on. She spent most of her time in the DJ booth because she and the DJ were friends. She could recall only one brief interaction with the respondent. She said that at some point, the respondent put his arm on her shoulder and was trying to say something to her. She could not make out what he was saying and continued on her way.[6]

10. The complainant was asked in cross-examination whether she remembered having a shot of tequila with the respondent at the nightclub. She said she did not remember that happening. She was asked if she remembered dancing at the club. She said she danced with two friends. She was asked if she danced with the respondent and she said she did not.[7]

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[3] *Ibid*., at pp 10, 122 and 144

[4] *Ibid*., at pp 9-11

[5] *Ibid*., at p 144

[6] *Ibid*., at pp 13-15

[7] *Ibid*., at p 39

11. The respondent testified that he had recently started dating a woman named Vanessa who was with him at the club that night. He said he spent most of his time at his table with Vanessa. He said that he went to the DJ booth a few times when Pimpton was performing. He said Vanessa had to leave early because she had an engagement early the next morning. He described two brief interactions with the complainant at the nightclub. He claimed at some point the complainant "just briefly" danced with him by bumping and grinding against him. He also claimed that he took the complainant to the bar to consume a shot of tequila. He denied putting his arm on the complainant's shoulder.[8]

12. Kayden testified that he saw the respondent and the complainant talking at the club. He also testified that at one point it looked like the complainant was dancing "on" or "around" the respondent. He said he saw the complainant touching the respondent but denied defence counsel's suggestion that she was "grinding" on the respondent.[9]

13. The complainant testified that sometime around 2:30 or 3:00 AM Kayden told her it was time to go. The respondent, the complainant and Kayden went back to the respondent's house. There were a large number of people at the house when they arrived. The complainant said she felt somewhat overwhelmed by the crowd so she did not enter the house. She told Kayden and the respondent that she was feeling overwhelmed. She also told them she was hungry and wanted to order a pizza.[10]

14. The complainant testified that the respondent told her there was food in the house. She followed him as he led her to the fridge. She lost track of Kayden as soon as they walked in the front door. There was no food in the fridge. The complainant saw a man eating a slice of pizza and she asked him if she could have some. He told her she could not. She decided

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[8] *Ibid*., at pp 126-127 and 143

[9] *Ibid*., at pp 84-85 and 111

[10] *Ibid*., at p 17

to order her own pizza. She spoke briefly to Kayden who was in the basement. Then she walked outside and used her cell phone to order a pizza. The complainant testified the respondent followed her and was with her when she made the call. In fact, she testified that he offered to pay for the pizza.[11] The complainant's cell phone records confirmed that she made a call to Triple 8 Pizza at 3:39 AM.[12]

15. It is at this point in the narrative that the respondent's and complainant's evidence begin to diverge in more material ways. Although the respondent admitted the complainant phoned for a pizza at 3:39 AM, he denied following her outside or being with her when she made the call. He testified that they arrived at the house sometime between 3:00 and 3:15 AM.[13] He remembered the complainant saying she was hungry but he denied leading the complainant to the fridge. He said he walked into the house and spent the next hour or more socializing with other people. He testified as if he did not see or speak to the complainant for more than an hour after they arrived at the house.[14]

16. The respondent initially testified that sometime between 4:00 and 4:30 AM he saw the complainant standing by herself on the main floor of the house. He approached the complainant. She asked him if there was somewhere private they could go. He said he took her upstairs to his bedroom.[15]

17. The complainant testified that immediately after she phoned for a pizza, the respondent asked her if she would like to go upstairs to wait for the food. She agreed and followed the respondent to an upstairs bedroom. She remembered walking into the bedroom. That was

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[11] *Ibid*.

[12] A.R., Volume I, Tab 4, Agreed Statement of Facts, at para 3

[13] A.R., Volume II, Tab 5, at p 152

[14] *Ibid.,* at pp 129-130

[15] *Ibid*., at p 130

the last memory she had before waking up to find someone raping her.[16]

18. Kayden testified the complainant talked to him about ordering a pizza around the time they were leaving the club. When they arrived at the respondent's house, she told him that she was tired, hungry and wanted to go home. Kayden did not want to leave and he told her he was going to stay at the party. He lost track of the complainant shortly after they got to the house. He did not see her again until shortly after 5:25 AM when he found her crying and alone with the respondent in an upstairs bedroom.[17]

19. The complainant testified the respondent led her to the bedroom within minutes of ordering the pizza at 3:39 AM. She had no memory of anything happening in the bedroom until she woke up more than an hour and one half later. It was a matter of admitted fact that she did not try to call anyone on her cell phone between 3:39 and 5:25 AM. It was also a matter of admitted fact that someone tried to phone her at 4:04 AM and she did not answer that call.[18]

20. Although she had been drinking that night, and although Kayden said that she "seemed drunk,"[19] the complainant maintained she did not feel drunk. The respondent testified the complainant did not appear to be intoxicated.[20]

21. The respondent was asked to describe what happened in the bedroom. He testified the complainant jumped onto his bed and he sat down beside her. After a brief conversation, he leaned in for a kiss. She reciprocated and they started "making out." She touched his groin and helped him remove his pants. She performed oral sex on him. Then she took her pants

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[16] *Ibid*., at p 18

[17] *Ibid*., at pp 88-89 and 91

[18] A.R., Volume I, Tab 4, Agreed Statement of Facts, at para 3

[19] A.R., Volume II, Tab 5, at p 89

[20] *Ibid*., at pp 30 and 153

off. He testified they had sex in the missionary position, with the complainant laying on her back.[21]

22. The complainant testified that the first memory she had after walking into the bedroom was waking up on the bed. She was laying flat on her stomach. Her pants had been pulled down to the middle of her thighs. She said it took her several seconds to realize what was happening to her. She finally realized the respondent was having sex with her from behind. She could not remember the respondent getting off her body but testified he must have done so because she remembered getting out of bed. She could feel pain in her vaginal area. She said she cupped her vagina with her hands and repeatedly said that her vagina hurt. She realized that her body suit had been unsnapped at the crotch. She could not say if the respondent was wearing pants when she first woke up.[22]

23. The respondent testified the complainant told him she was feeling pain when they were having intercourse. He denied the complainant was on her stomach when he was having intercourse with her.[23] When she complained about feeling pain, he asked her, "What hurts?" She told him that her vagina hurt and felt like it was on fire. He got off the complainant. She stood up, with no pants on, and went to the window. He said she was holding her vagina. He said he was trying to comfort her and asked if there was anything he could do. She told him she wanted to talk to Kayden so he put on his pants and went to look for him. He testified the complainant was not crying when he left. He said she might have asked him for a charging device for her phone but he could not recall. He said he looked everywhere in the house for Kayden but could not find him. He went back to the bedroom. A moment later, Kayden walked in behind him.[24]

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[21] *Ibid*., at p 131

[22] *Ibid*., at pp 19-21 and 26

[23] *Ibid*., at p 154-155

[24] *Ibid*., at pp 132-133

24. The complainant remembered things differently. She testified that after she got off the bed, she saw her cell phone on the floor. She could not turn it on and thought the battery was dead. She started to cry. She told the respondent she needed a phone charger. He told her he would get her one. He also told her to lay back down on the bed and that she could stay with him. The complainant told him she did not want to lay down and that she needed a phone charger immediately. The respondent said he would kick everyone out of the house. The complainant testified the respondent stepped outside the bedroom, closed the door and began yelling at people to leave.[25]

25. According to the complainant, the respondent stepped back into the room moments later. He asked if he had hurt her. She told him she needed to talk to Kayden. By then, she had managed to get her phone working. She tried to phone Kayden at 5:25 AM but could not say whether Kayden answered. She tried phoning another friend but the call did not go through. At 5:28 AM she phoned Kayden again. This time Kayden answered the call and she started crying as soon as he did. The complainant testified that seconds later Kayden opened the door and walked into the bedroom.[26]

26. As already stated, the respondent testified he left the bedroom to find Kayden and that he looked everywhere in the house for Kayden without success. He said he did not "recall" yelling at people to leave the party but he acknowledged that he "may have" quietly asked people to leave as the night progressed .[27] He said that when he walked back into the bedroom the complainant was fully dressed and Kayden walked in right behind him.[28]

27. Kayden testified that he was on the main floor of the house when the complainant called him

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[25] *Ibid*., at p 21

[26] *Ibid*., at p 22

[27] *Ibid*., at p 134

[28] *Ibid*., at p 133

on the phone. He said she was crying when he answered the call and that she told him to "come here." Kayden did not know where she was but he walked upstairs to find her. He checked the bathroom and then the bedroom beside it. When he opened the bedroom door, he found the complainant alone with the respondent. She was standing in a corner crying. He asked what was going on. He heard the complainant say she "did not want this."[29]

28. Kayden testified before the respondent did. No one asked Kayden if he saw or heard the respondent searching for him moments before the complainant's call. Kayden was asked if he recalled hearing the respondent shouting at people to leave the house before he walked into the bedroom and he said that he did not.[30]

29. The complainant testified that she ran from the bedroom right after Kayden walked in. She heard Kayden asking the respondent what was going on and why she was crying. She did not hear what the respondent said to Kayden before she left the bedroom.[31] As already noted, Kayden testified that he heard the complainant saying she "did not want this" after he entered the bedroom. He initially testified that he could not remember anything else that was said. After refreshing his memory from his statement to the police, Kayden testified that he remembered hearing the respondent say that they were "making out and it led to sex."[32]

30. The respondent testified that he told Kayden they had been making out and it led to sex. He said the complainant left the bedroom "hysterically" and claimed that Kayden followed her. He testified that he did not follow the complainant and did not leave the house to speak to her.[33]

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[29] *Ibid.,* at pp 91-92

[30] *Ibid*., at p 115

[31] *Ibid*., at p 22

[32] *Ibid*., at pp 93-94 and 96

[33] *Ibid*., at p 134

31. The respondent contradicted himself on several factual issues when he testified. For example, when he testified in-chief, he said the complainant seemed upset, left the room "hysterically" and that he could not remember if she was crying. However, in cross-examination, he said he did not see the complainant crying at any point.[34]

32. He also contradicted himself when he was asked to explain his state of mind at the time. In cross-examination, he testified that he heard the complainant saying "I didn't want this" after Kayden entered the bedroom. He said the statement shocked him because he interpreted it as an accusation that he had sexually assaulted the complainant. Until then, he thought she was upset because she was in pain. He said that he decided the best course of action would be for him to go back downstairs, socialize with the people who were partying and pretend like nothing had happened.[35]

33. By way of contrast, when he testified in-chief, he did not say the complainant accused him of assaulting her before she left the room. On his initial telling of events, he had no reason to suspect the complainant was upset about anything other than the fact she was experiencing vaginal pain. He attempted to highlight this state of mind by claiming that he sent a Snapchat message to the complainant after she left the bedroom asking if she was "okay."[36]

34. There was another material internal contradiction in the respondent's testimony. As already noted, when he testified in-chief, he claimed he took the complainant to the bedroom sometime between 4:00 and 4:30 AM. He testified they had a brief conversation before he leaned in for a kiss. In cross-examination, he was asked how much time went by before he leaned in for a kiss and when the complainant started asking for Kayden. He testified those events were separated only by 20 or 25 minutes. That testimony was inconsistent with the

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[34] *Ibid*.

[35] *Ibid*., at pp 158-159

[36] *Ibid*., at pp 134-135

admitted fact that the complainant initially tried to phone Kayden at 5:25 AM. When the discrepancy was pointed out to him, the respondent modified his testimony to say that they would not have entered the bedroom before 4:30 AM. Notably, even that modification did not make his testimony consistent with the admitted facts of the case.[37]

35. The complainant said she ran from the room right after Kayden walked in. As she was going down the stairs to the main floor, she was accosted by another man. She did not know him but believed he lived at the house. The man grabbed her arm and tried to hold her. He asked her what was wrong, told her that he could help her and that he could "fix this." The complainant broke away from him, put her shoes on and ran outside to the city sidewalk.[38]

36. The complainant testified that the respondent followed her outside, approached her on the sidewalk, threw his arms up in the air and asked why she was acting this way. She told him that she "didn't want this" and that she had not said "yes." He responded by saying she was "dumb," "horny" and "you wanted it." He told her that he could not have "this" on him or his name. He walked back into the house.[39]

37. The respondent denied leaving the house to confront the complainant. He also denied telling her that she was "dumb," "horny" or that she "wanted it."[40]

38. The complainant testified that Kayden came out of the house afterwards. She said she was still crying and he tried to calm her down. She kept telling him that she did not want this. Although she had not made any arrangements for someone to pick her up, she told Kayden that someone was coming to give her a ride home. Kayden told her he was going to go back

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[37] *Ibid*., at p 152

[38] *Ibid*., at pp 22-23

[39] *Ibid*., at p 23

[40] *Ibid*., at p 134-135

into the house. Kayden's parting comment to the complainant was that "Pimpton's going to find out about this."[41]

39. The complainant eventually made arrangements with a man named Dwight Doxilly to pick her up. She waited in her car for him to arrive and fell asleep as she was waiting.[42] Mr. Doxilly was called as a Crown witness.

40. Kayden testified that he left the house to speak to the complainant after she ran from the bedroom. He said he spoke to her when she was sitting in her car. He said he offered to give her a ride home but she told him she already had someone coming to pick her up.[43] Kayden was asked about what the respondent did or where the respondent went after the complainant left the bedroom. When he testified in-chief, Kayden said he did not know where the respondent went and did not remember the respondent following him outside.[44] When he was cross-examined, Kayden said he went outside with the complainant, the respondent did not follow them and he did not hear the respondent telling the complainant she was “dumb,” “horny” and “wanted it.”[45]

41. The complainant had arranged to sleep at Kayden’s house. When Mr. Doxilly dropped her off, the complainant set the alarm for 11:00 AM. Kayden was home when she woke up. He gave her a ride to pick up her car. The complainant testified that Kayden spoke to her as if nothing had happened. The complainant drove home. She told her mother what had happened and her mother called the police. The complainant decided to go with her mother

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[41] *Ibid*.

[42] *Ibid*., at pp 23-24

[43] *Ibid*., at p 96

[44] *Ibid*., at p 97, lines 4-21

[45] *Ibid*., at p 116, lines 20-35

to the hospital for a forensic medical examination.[46]

42. The respondent admitted the following facts relating to the forensic medical examination: a) the complainant was calm and cooperative but tearful at the time the examination was conducted; b) the examination revealed the complainant suffered a two centimetre vertical laceration to the her perineum at the base of her vaginal orifice; c) the complainant said she was experiencing tenderness in that location; d) a trace amount of alcohol (less than 10 mgs percent) was detected in her urine; and e) other than acetaminophen, no drugs were detected in her urine.[47]

43. It was also a matter of admitted fact that the respondent's semen was found on the complainant's underwear.[48] Notably, the respondent made no mention of using a condom when he testified in-chief. He testified he used a condom when he was asked a direct question in cross-examination. He was then asked to explain how his semen ended up on the complainant's underwear. The respondent could not answer that question.[49]

The Submissions at Trial

44. Both parties agreed the case turned on the question of witness credibility and referred to the decision in *R v W. (D.)* in their closing submissions.[50] The respondent argued the complainant's testimony was contrived and that the Court should accept his testimony as fact.[51] In making that argument, the respondent did not suggest there were any internal

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[46] *Ibid*., at pp 24-25

[47] A.R., Volume I, Tab 4, Agreed Statement of Facts, at para 1

[48] *Ibid*., at para 2

[49] A.R., Volume II, Tab 5, at pp 155-156

[50] *R v W. (D.)*, [1991] 1 SCR 742

[51] A.R., Volume II, Tab 5, at p 168, lines 19-21; p 169, lines 17-20; p 170, lines 20-24; and p 173, lines 5-7

contradictions in the complainant's testimony. Instead, he mounted an indirect attack on the complainant's credibility by arguing that her testimony was not entirely consistent with the testimony provided by other witnesses.

45. The respondent was particularly focussed on how Kayden's testimony compared to the complainant's testimony on peripheral factual details. He argued as if Kayden's testimony ought to be preferred despite acknowledging that Kayden's memory on at least some details was inaccurate.[52] So, for example, he argued the complainant was not credible because her testimony that she did not dance with the respondent was contradicted by Kayden.[53] He argued the complainant was not credible because her evidence the respondent yelled at people to leave the house immediately after the sexual activity in question was "contradicted" by Kayden.[54] He submitted Kayden also contradicted the complainant about whether the respondent told the complainant she was "dumb," "horny" and "wanted it."[55]

46. In developing this line of attack on the complainant's credibility, the respondent argued as if the mere failure to confirm the complainant's testimony amounted to a contradiction. For example, he argued as if Kayden's evidence that he did not hear the respondent yelling at people to leave proved the respondent did not yell at people to leave. Similarly, he argued that the fact Kayden did not hear the respondent telling the complainant she was "dumb" and "horny" was evidence proving the respondent did not make those statements.

47. The respondent submitted that Kayden's failure to confirm the complainant's evidence that she felt overwhelmed when they arrived at the respondent's house was another reason to

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[52] A.R., Volume II, Tab 5, at p 167, lines 12-17 and p 168, lines 6-9

[53] *Ibid*., at p 167, lines 22-27

[54] *Ibid*., at p 170, lines 20-24

[55] *Ibid*., at p 170, lines 26-36

disbelieve the complainant.[56] In making that argument he ignored Kayden's evidence that the complainant told him she was tired, hungry and wanted to go home as soon as they got to the respondent's house.

48. Crown counsel submitted the complainant was a credible witness and the material parts of her testimony were actually corroborated by Kayden and the agreed statement of facts. For example, the complainant and the respondent provided widely divergent testimonies about when they entered the bedroom. The complainant testified it was shortly after 3:39 AM. The respondent testified they did not enter the bedroom before 4:30 AM. Crown counsel noted that Kayden testified he did not see the complainant at all from the time they first arrived until approximately 5:30 AM when he found the complainant alone in the bedroom with the respondent. Therefore, Kayden's testimony actually corroborated the complainant's testimony and contradicted the respondent on this important and material fact.[57]

49. Crown counsel pointed out that Kayden corroborated the complainant's evidence and contradicted the respondent's evidence about whether the bedroom door was open or closed when Kayden found them.[58]

50. As for the complainant's evidence that the respondent told her she was "dumb," "horny" and "wanted it," Crown counsel argued her evidence should be accepted because it was credible. The statements attributed to the respondent were admittedly demeaning and coarse, but they expressed a sentiment that was generally consistent with the respondent's portrayal of the events. As for the submission that Kayden's testimony, if accurate, proved the respondent did not utter the statements, Crown counsel disagreed. He pointed out that Kayden did not and could not say the respondent never uttered those statements and that it was possible the

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[56] *Ibid*., at p 168, lines 11-13

[57] *Ibid*., at p 178, lines 30-41

[58] *Ibid*., at p 180, lines 13-15

respondent made the comments when Kayden was not present.[59]

51. The trial judge reserved decision. She said that in cases like this one, where every detail can be important, it was her practice to listen to the evidence again. She informed counsel she would do that by listening to the audio recording of the trial.[60]

The Trial Decision

52. The trial judge did not provide a written decision. Her reasons were given orally about two weeks after she heard counsels' closing submissions. She accurately summarized the evidence and the agreed statement of facts before she reviewed the essential elements of the offence. She instructed herself that the primary issue at stake was whether the complainant consented to the sexual activity in question.[61]

53. The trial judge observed that the complainant provided significant factual detail in her testimony and related events as she remembered them happening. She found the complainant's testimony to be chronological and consistent, flowing logically from one event to the next. She observed that if the complainant could not remember something she said so.[62]

54. The trial judge expressly referred to some of the "apparent" inconsistencies between the complainant's evidence and the evidence provided by other witnesses. She did not accept there was a real inconsistency in the evidence about whether the complainant danced with the respondent at the nightclub. She did not consider the apparent inconsistency about how often the complainant and Kayden saw each other in September 2017 to be of any significance. She took the same view of the peripheral factual issue relating to when Kayden gave the

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[59] *Ibid*., at p 180, line 24 to p 181, line 3

[60] *Ibid.,* at p 182, line 31 to p 183, line 1

[61] A.R., Volume 1, Tab 1B, Trial decision, at pp 4-12

[62] *Ibid*., at p 12, lines 25-33

complainant his jacket. She concluded by stating that she found the complainant to be an honest witness who was anxious to tell the truth about everything she remembered.[63]

55. The trial judge found Kayden to be a "careful witness" who did not speculate but testified only to what he saw and heard. By way of contrast, the trial judge was not impressed with the testimony of the last Crown witness, Dwight Doxilly. She stated Mr. Doxilly was a "confused and careless" witness.[64]

56. The trial judge stated the respondent was a "poor witness." Although he answered the questions put to him, he testified in a manner that sounded rehearsed and not as though he were testifying from a memory of the event. She noted that he volunteered no information when he testified. The trial judge provided examples of what she meant. She noted that when he was asked to describe what happened in the bedroom, he used almost exactly the same words when he testified in-chief that he used in cross-examination and did not provide the kind of extraneous detail that witnesses usually provide when describing an event.[65]

57. The trial judge was undoubtably referring to two specific portions of the respondent's testimony when she made this observation. When the respondent testified in-chief, his lawyer asked the respondent a series of leading questions until the trial judge intervened and told him to stop leading the witness. That prompted counsel to ask the respondent a general question about what happened after he entered the bedroom with the complainant. This is how the respondent answered that question:

> [The complainant] jumps onto the bed. I get onto the bed beside her. We have a brief conversation. I lean in for a kiss. She meets me for a kiss. We start making out. Things got heavier, we started touching, groping. She was touching my groin area. At that point, she started to take my pants off. She started to perform fellatio. And after that,

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[63] *Ibid*., at p 12, line 35 to p 13, line 9

[64] *Ibid*., at p 13, lines 11-21

[65] *Ibid*., at p 13, lines 23-28

> she took her pants off, and then we started to have intercourse.[66]

58. Crown counsel asked the same open-ended question in cross-examination. This is how the respondent answered it:

> I leaned in for a kiss, she met me for the kiss. We started to make out. It started to get heavier, we started to be touching, groping. She then started touching my groin area. I assisted her in taking off my pants. She performed fellatio. She took her pants off and we had intercourse.[67]

59. The trial judge gave another example of the respondent's testimony that supported her impression it was rehearsed. This example concerned evidence about the complainant's body suit and how it came to be unsnapped, a factual matter the respondent did not mention at all when he was asked open-ended questions to describe what happened in the bedroom.[68] The trial judge also observed that despite having been asked open-ended questions about what happened in the bedroom when he testified in-chief and in cross-examination, the respondent said nothing about using a condom until Crown counsel directly put that question to the respondent. Even then, the respondent's claim that he used a condom was immediately followed by a rather curious statement that the police found used condoms by his bed.[69]

60. The trial judge stated that the respondent's description of the complainant's condition and behaviour after the sexual activity did not make sense. To be precise, she noted that his description of the complainant's "hysterical" emotional reaction was inconsistent with his story of a consensual sexual encounter.[70]

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[66] A.R., Volume II, Tab 5, at p 131, lines 28-37

[67] *Ibid*., at p 154, lines 26-29

[68] A.R., Volume 1, Tab 1B, Trial decision, at p 13, line 28 to p 14, line 2

[69] A.R., Volume 1, Tab 1B, Trial decision, at p 14, lines 4-9
A.R., Volume II, Tab 5, at p 155, lines 23-25

[70] A.R., Volume 1, Tab 1B, Trial decision, at p 14, lines 11-15

61. The trial judge found as a fact that the respondent told the complainant she was "dumb" and "horny." She accepted Crown counsel's argument that those comments were consistent with the respondent's testimonial portrayal of the complainant's conduct.[71]

62. The trial judge stated that even though she did not believe the respondent's testimony, she had to consider whether the evidence she did accept proved guilt. She referred to the complainant's testimony that they went to the bedroom shortly after 3:39AM to wait for the pizza and observed that there was no evidence contradicting her claim that she was asleep for most of the time between then and 5:25 AM when she tried to phone Kayden. She found that the complainant's demeanour after the sexual activity was consistent with her allegation of non-consensual sex. She also noted the complainant subjected herself to an invasive forensic medical examination after making the complaint. The trial judge found as a fact the complainant was sleeping when the respondent had sex with her and stated that she had no reasonable doubt about the respondent's guilt.[72]

The Appeal

63. The respondent appealed from conviction. Among other things, he claimed the trial judge erred by applying uneven standards of scrutiny to the evidence when she assessed credibility. He also claimed the verdict was unreasonable and not supported by the evidence.[73]

64. The majority judges considered only two of the respondent's grounds of appeal. They found the verdict was reasonable and supported by the evidence. However, they concluded the trial judge erred in law by applying different standards of scrutiny when assessing the complainant's and respondent's credibility. The majority judges found it unnecessary to

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[71] *Ibid*., at p 14, lines 17-23

[72] *Ibid*., at p 14, line 31 to p 15, line 8

[73] A.R., Volume I, Tab 2, Notice of Appeal in the Court of Appeal

consider the other grounds of appeal. They ordered a new trial.[74]

65. Leurer, J.A. dissented. He concluded the trial judge applied the same standard of scrutiny to the evidence of each witness. He agreed the verdict was reasonable and supported by the evidence. He also explained why none of the other grounds of appeal warranted appellate intervention. He would have dismissed the appeal.[75]

66. For reasons that will be provided in Part III of this factum, the Attorney General respectfully submits the majority judges erred by finding the trial judge applied different levels of scrutiny to the complainant's and respondent's evidence.

PART II
POINTS IN ISSUE

67. Did the Court of Appeal err by holding the trial judge applied a different standard of scrutiny to the complainant's evidence than she did to the respondent's evidence? Yes.

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[74] A.R., Volume I, Tab 1C, Court of Appeal Reasons, at paras 17 and 51-53

[75] *Ibid*., at paras 128 and 136-137

PART III

ARGUMENT

Summary of the Applicable Law

68. At its core, an allegation that a trial judge has applied uneven standards of scrutiny when assessing credibility is an allegation a judge acted unfairly by using "different measuring sticks."[76] It is an attack on the judge's credibility assessment methodology and, for that reason, amounts to a claim of legal error.[77]

69. Claims of this kind assume or at least imply that credibility assessment is more science than art and is governed by objective rules of general application. But the law is clear – assessing credibility is not a science and the process is not governed by mandatory objective rules or criteria. To be sure, trial judges must act fairly and must consider all relevant evidence when assessing credibility. However, beyond that, the process is and always has been an inherently subjective exercise that is not governed by any hard and fast rules. From the perspective of a trial judge, it is about resolving a "complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."[78]

70. The rather amorphous nature of uneven scrutiny arguments recently caused the Ontario Court of Appeal to make the following pertinent observation:

> [14] As for the argument about uneven scrutiny, it is rooted, as are many of similar kind, in the following path of reasoning. The trial judge believed the complainant, despite inconsistencies or frailties in her evidence. The trial judge did not believe the appellant, despite inconsistencies or frailties in his evidence. Therefore, the trial judge erred in applying an uneven standard of scrutiny to the evidence. As this court has said

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[76] *R v Gilbert*, 2015 ONCA 927, at para 41, 343 OAC 199; *R v Phan*, 2013 ONCA 787, at para 74, 313 OAC 352, [*Phan*]

[77] *R v Owen* (2001), 150 OAC 378 (Ont CA), at para 3

[78] *R v Gagnon*, 2006 SCC 17, at para 20, 1 SCR 621, [*Gagnon*]

> on many other occasions, this argument moves in a circle. It fails as matter of logic. The conclusion does not follow from the premises.[79]

71. Credibility findings are findings of fact and, like all factual findings, they are subject to appellate review only if they are the product of palpable and overriding error.[80] An appellant who alleges a trial judge acted unfairly by applying uneven levels of scrutiny to the evidence must discharge a heavy burden.[81] There are two reasons why the threshold is necessarily high:

> [39] The "different standards of scrutiny" argument is a difficult argument to succeed on in an appellate court. It is difficult for two related reasons: credibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge's credibility determinations.[82]

72. There is no controversy about the legal test to be applied when assessing the merits of an uneven scrutiny argument. First, Courts have consistently held that an appellant must do more than show it would have been reasonable to make different credibility findings.[83] Appellate courts considering an uneven scrutiny argument must take care not to overstep their role and retry the case on a lifeless transcript.[84] Trial judges enjoy an advantage when assessing witness credibility that cannot be replicated in a "trial by transcript" process. To be precise, in addition to hearing what a witness says, a trial judge can see how the witness said it.[85] As

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[79] *R v B-D.N.*, 2018 ONCA 248, at para 14

[80] *Gagnon*, at para 20; *R v M. (R.E.)*, 2008 SCC 51, at para 28, 3 SCR 3, [*M. (R.E.)*]

[81] *R v Quartey,* 2018 ABCA 12, at para 42, 430 DLR (4th) 381, affirmed 2018 SCC 59, 3 SCR 687, [*Quartey,* ABCA]; *R v Howe* (2005), 192 CCC (3d) 480 (Ont CA), at para 59, [*Howe*]

[82] *R v Aird*, 2013 ONCA 447, at para 39, 307 OAC 183

[83] *Howe*, at para 59; *Quartey*, ABCA, at para 42; *R v M. (C.A.)*, 2017 MBCA 70, at para 36, 354 CCC (3d) 100, [*M. (C.A.)*]

[84] *M. (C.A.)*, at para 36;

[85] *R v Cloutier*, 2011 ONCA 484, at para 86, 272 CCC (3d) 291

stated in *R v Howe*:

> [46] In arriving at his ultimate credibility findings, the trial judge doubtless paid careful attention not only to what was said, but to how it was said. A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial. Nor can oral argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations...[86]

73. The assessment of witness credibility generally involves a consideration of both witness demeanour and testimonial plausibility.[87] Trial judges are permitted to consider witness demeanour when assessing credibility. In fact, the opportunity for a trier of fact to consider witness demeanour is a fundamental component of the right to a fair trial. It is one of the main reasons appellate courts defer to a trial judge's credibility findings.[88]

74. Secondly, an appellant who advances an uneven scrutiny argument must do more than show the trial judge failed to say something that could have been said when assessing the respective credibility of the complainant and the accused.[89] This principle is important because uneven scrutiny arguments often masquerade in the form of criticisms of what a trial judge did not say.[90] Appellants who seek to substantiate uneven scrutiny complaints by criticising a trial judge for not mentioning a piece of evidence or an argument of counsel tend to ignore the large body of settled law that speaks directly to how an appellate court should assess the sufficiency of reasons for judgment.[91] For that reason, it is necessary to briefly summarize that body of law to ensure that the respondent's uneven scrutiny claim is more than an

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[86] *Howe*, at para 46

[87] *R v DEZ*, 2018 ABCA 99, at para 38, 359 CCC (3d) 443

[88] *R v S. (N.)*, 2012 SCC 72, at para 27, 3 SCR 726

[89] *R v Wanihadie*, 2019 ABCA 402, at para 35, 99 Alta LR (6th) 56, [*Wanihadie*]; *R v Radcliffe*, 2017 ONCA 176, at para 24, 347 CCC (3d) 3, [*Radcliffe*]; *Howe*, at para 59

[90] See for example, *R v Brownlee*, 2018 ONCA 99, at para 37, [*Brownlee*]

[91] *Brownlee*, at para 37

unwarranted criticism of the sufficiency of the trial judge's reasons for judgment.

75. One must begin with the observation that an appellate court's assessment of the sufficiency of reasons involves a functional context-specific approach.[92] In general terms, reasons must show why the trial judge made the finding in issue, not how the finding was made. Trial judges are not required to craft their reasons in accordance with a "watch me think" template.[93]

76. Nor is a trial judge required to set out every finding or conclusion in the process of arriving at a verdict. A trial judge is not required to detail his or her finding on each piece of evidence or controverted fact.[94] Trial judges are presumed to have considered the evidence and arguments of counsel and are not required to fashion their reasons to demonstrate they did so. In simple terms, a failure to mention an argument or an item of evidence is not proof the judge failed to consider the argument or item of evidence.[95]

77. The sufficiency of reasons on credibility findings must be assessed with certain key principles in mind. First, as already stated, assessing credibility is not a science. Second, it may be 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. Third, the credibility assessment process is not a purely intellectual exercise and may involve factors that are difficult to verbalize. As emphasized by this Court in *R v M. (R.E.)*, assessing credibility is a "difficult and delicate matter that does not always lend itself to precise and complete verbalization."[96]

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[92] *M. (R.E.)*, at para 15

[93] *Ibid*., at para 17

[94] *Ibid*., at paras 18 and 20

[95] *M. (R.E.)*, at paras 32 and 45; *Brownlee*, at para 37

[96] *M. (R.E.)*, at paras 48-49; *Gagnon*, at para 53

78. Therefore, trial judges are not required to describe every consideration relating to a credibility finding. Nor are they required to reconcile every frailty in the evidence.[97] Finally, an appellate court will not intervene simply because the trial judge did a poor job of expressing herself.[98]

79. To summarize, an allegation of uneven scrutiny requires more than a demonstration that different credibility findings could have been made. It also requires more than a demonstration the trial judge failed to say something that could have been said. To succeed on this ground of appeal, an appellant must point to something in the reasons or elsewhere in the record that make it clear the trial judge actually applied different standards in assessing the evidence of the appellant and the complainant.[99] There must be something "clear and sufficiently significant" in the reasons or the record to support the claim of uneven scrutiny.[100] Moreover, such claims must be assessed in accordance with the fundamental rule that if a trial judge's credibility assessment can be reasonably supported by the record, it cannot be interfered with on appeal.[101]

The Trial Judge Applied the Same Standards of Scrutiny

80. The validity of a complaint of uneven scrutiny necessarily depends on a fair appraisal of what the witnesses actually said when they testified, what the trial judge actually said in giving reasons for judgment and proper recognition of the deference owed to a trial judge's reasonable perceptions of witness demeanour and credibility. When he appeared in the Court of Appeal, the respondent argued that the trial judge "glossed over" or failed to consider a number of significant contradictions or inconsistencies in the complainant's evidence and

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[97] *M. (R.E.)*, at para 56

[98] *Ibid.*, at para 53

[99] *Radcliffe*, at para 25; *Howe*, at para 59

[100] *Phan,* at para 34; *M. (C.A.)*, at para 34;

[101] *Gagnon,* at paras 10 and 20; *M. (C.A.)*, at para 37

forgave the frailties in her evidence.[102] This argument ignored both what the complainant actually said in her testimony and the trial judge's reasons for judgment.

81. A fair and objective review of the complainant's testimony demonstrates there were no internal contradictions or inconsistencies in her evidence at all. Her testimony was consistent on all material facts. It was consistent on all non-material facts. It was consistent when she testified in-chief and consistent when she was cross-examined. The respondent failed to identify any material or non-material contradictions or inconsistencies in her testimony when he argued this case at trial or on appeal.

82. To be sure, the complainant did not have a memory of everything that happened. However, a witness's inability to remember every detail cannot reasonably be described as a "contradiction" or an "inconsistency." Nor does an inability to remember every factual detail necessarily amount to a "frailty" in a witness's evidence. In fact, one may reasonably conclude that truthful witnesses are unlikely to have a perfect recall of events, especially if they concern non-material or peripheral factual matters.

83. When he argued this case in the Court of Appeal, the respondent's claim that the complainant's testimony was flawed was primarily based on an assertion that her version of events did not precisely match the testimony of other witnesses. In particular, he focussed on perceived differences between Kayden's testimony and the complainant's testimony relating to peripheral factual details. This indirect attack on the complainant's credibility was flawed in several respects.

84. To start, most if not all of the perceived differences were more apparent than real. The respondent erred by arguing as if Kayden's failure to confirm the complainant's testimony on a peripheral factual detail amounted to a contradiction of the complainant's testimony. Secondly, this line of attack was founded on two assumptions: a) Kayden's recollection of

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[102] A.R., Volume I, Tab 1C, Court of Appeal Reasons, at para 24

peripheral details was accurate; and b) the trial judge accepted Kayden's testimony in preference to the complainant's evidence where their evidence differed.

85. The trial record did not support either assumption. It was a matter of admitted fact that Kayden's memory was not completely reliable. For example, Kayden erred when he testified that he drove his own vehicle from the respondent's house to the nightclub. He also erred by significantly underestimating the number of people at the respondent's house after they returned from the nightclub. Although the trial judge found that Kayden was a "careful" witness, she did not say that his memory of events was accurate in all respects.

86. Nor did she say that Kayden's testimony should be accepted as fact where it differed from the complainant. In fact, she obviously accepted the complainant's evidence on at least one factual issue (ie. whether the respondent told the complainant she was "dumb," "horny" and "wanted it") even though the complainant's testimony was not confirmed by Kayden.

87. A trial judge's reasons for judgment cannot be ignored when responding to a claim of uneven scrutiny. The trial judge in this case explained why she accepted the complainant's testimony and why she rejected the respondent's testimony. In doing so, she expressly referred to some of the differences in Kayden's and the complainant's testimony on peripheral factual matters and made it clear that those minor variations did not detract from her perception that the complainant was an honest witness who was telling the truth.

88. The trial judge considered what the witnesses said and how they said it when she assessed credibility. There was nothing improper about considering witness demeanour. In fact, the respondent submitted she should do so.[103] The judge found the complainant provided significant detail on material and non-material factual issues. In contrast, she found the respondent did not provide the same extraneous detail when he testified. She observed that the complainant's testimony was consistent, chronological and flowed logically from one

[103] A.R., Volume II, Tab 5, at p 166, lines 18-20

event to the next. She was impressed by the fact that if the complainant could not remember something she said so. In contrast, she perceived the respondent's testimony to be rehearsed and given in a manner that suggested he was not testifying from an actual memory of events.

89. By comparing and contrasting the demeanour of each witness, it is clear the trial judge applied precisely the same measuring stick to the testimony of each witness before concluding that only one was telling the truth.

90. The trial judge also considered evidence relating to the complainant's emotional condition immediately after the sexual activity to find the complainant was a credible witness and the respondent was not. She stated that the respondent's evidence that she hysterically stormed out of the bedroom did not make sense if the complainant consented to having sex. As a corollary, the complainant's demeanour was consistent with her allegation of non-consensual intercourse. That analysis involves the application of precisely the same measuring stick to assess the credibility of each witness.

91. The trial judge went on to consider the respondent's denial that he told the complainant she was "dumb, horny and wanted it." After considering the arguments of counsel on this issue, she accepted Crown counsel's submissions that these statements were entirely consistent with the respondent's testimonial portrayal of events between he and the complainant. She found as a fact that the respondent uttered the statements. The trial judge did not apply an uneven level of scrutiny to make this finding of fact. She did nothing more than accept the testimony of one witness and reject the testimony of another.

92. The trial judge gave two additional reasons for rejecting the respondent's submission that the complainant's testimony was contrived. She noted the complainant subjected herself to an invasive forensic medical examination. She also noted that the complainant's evidence was thoroughly challenged but not weakened in cross-examination. Her analysis was sound, it was supported by the evidence and it did not involve the application of uneven standards of

scrutiny to the evidence. In summary, a fair and objective review of what the trial judge actually said in her reasons for judgment demonstrates that she applied the very same standard of scrutiny to the evidence of each witness.

The Court of Appeal's Errors

93. The majority judges stated the trial judge applied a level of scrutiny of the complainant's evidence that was "tolerant and relaxed" when compared to the level of scrutiny applied to the respondent's evidence. They offered two general reasons for that observation. First, they criticized the trial judge for reasoning as if the gaps in the complainant's memory enhanced her credibility and, at the same time, reasoning that the respondent's failure to provide extraneous detail detracted from his credibility. Second, they criticized the trial judge for accepting the complainant's evidence "on certain material points in the face of clear contradictory evidence that she did not reject, reconcile, or otherwise explain."[104] For the reasons that follow, the majority judges erred on both counts.

94. By stating that the trial judge reasoned as if gaps in the complainant's memory enhanced her credibility while reasoning that the respondent's failure to provide extraneous detail detracted from his credibility, the majority judges misapprehended what the trial judge actually said. The trial judge did not say the complainant's credibility was enhanced by gaps in her memory. She said that in considering what the complainant said and how the complainant said it, including the complainant's willingness to admit there were details she could not remember, she perceived the complainant to be an honest witness who was testifying from an actual memory of events. The trial judge did not say the respondent's mere failure to provide extraneous detail detracted from his credibility. What she actually said was that in considering what the respondent said and how he said it, she formed the impression that his testimony was rehearsed and that he was not testifying from an actual memory of events.

95. These observations were concerned, at least in part, with the trial judge's subjective

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[104] A.R., Volume I, Tab 1C, Court of Appeal Reasons, at para 35

perceptions of witness demeanour. The majority judges questioned those perceptions using nothing more than their interpretation of the words in a lifeless transcript and, in doing so, erred in law by applying the wrong standard of review. There are obvious reasons why the Court of Appeal was not permitted to question the trial judge's perceptions of witness demeanour in the absence of palpable and overriding error. The trial judge saw and heard the witnesses testify. The Court of Appeal did not. The trial judge was in a position to assess witness demeanour. The Court of Appeal was not.

96. The appeal on the uneven scrutiny ground could only succeed if there was something in the trial record that made it clear the trial judge actually applied different standards of scrutiny to the evidence. When the trial judge compared and contrasted witness demeanour she applied the very same standard to assess credibility. Her observations about <u>how</u> the witnesses testified explain why she found that one witness appeared to be telling the truth from an actual memory of events while another witness appeared to be testifying in a rehearsed manner that was not based on an actual memory of events. The majority judges never acknowledged that simple fact.

97. The trial judge attempted to explain why she formed the perception that the respondent's testimony sounded rehearsed. For example, she considered the fact that when the respondent was asked an open-ended question in cross-examination to describe what happened in the bedroom he used almost exactly the same words to answer the question as he did when he answered the same open-ended question in-chief.

98. The fact the respondent used almost precisely the same words to answer general and open-ended questions was only one feature of his testimony causing the trial judge to perceive his testimony as rehearsed. For the trial judge, it was just as significant that both answers lacked the kind of extraneous detail that witnesses usually provide when they are asked to explain what they saw, heard and did. The trial judge attempted to explain what she meant by referring to two examples.

99. She noted that the respondent did not say he had used a condom until Crown counsel asked a direct question about whether he had used a condom. She stated that had he been testifying from an actual memory of events, she would have expected him to say something about using a condom without being asked.[105] The majority judges criticized this portion of the trial judge's reasoning by stating the trial judge appeared to have overlooked the fact that the respondent was not asked if he had used a condom when he testified in examination-in-chief.[106]

100. With respect, the majority judges completely missed the trial judge's point. The trial judge obviously knew the respondent never said anything about using a condom until he was asked a direct question about using a condom. The point she made was that a person who was testifying from an actual memory of events would likely have mentioned using a condom when he was asked open-ended questions to describe what happened in the bedroom. For the trial judge, the respondent's failure to mention this extraneous detail without being asked was an example supporting her perception that his testimony was rehearsed.

101. By suggesting the trial judge overlooked the fact that the respondent was not asked a direct question about condom use, the majority judges misunderstood or misapprehended the trial judge's reasons for judgment. They could not fairly or properly find she applied uneven levels of scrutiny to the evidence without respecting what the trial judge actually said.

102. The trial judge's second example concerned the manner in which the respondent answered questions about the complainant's body suit. The respondent did not mention this detail either until he was asked a direct question about it. The majority judges had difficulty understanding the trial judge's concern about this portion of the respondent's testimony. They went so far as to suggest that one could reasonably conclude the trial judge drew a negative inference

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[105] A.R., Volume 1, Tab 1B, Trial decision, at p 13, line 25 to p 14, line 9

[106] A.R., Volume I, Tab 1C, Court of Appeal Reasons, at paras 36-37

about the respondent's credibility simply because he answered questions that were put to him.[107] That comment was unfair and it completely distorted what the trial judge actually said.

103. To repeat, the trial judge was trying to explain why she perceived the respondent's testimony sounded as if it was rehearsed and untethered to an actual memory of events. She made it clear that she was concerned with how the respondent answered the questions that were put to him and not whether he answered them. Therefore, it was wrong for the majority judges to infer the trial judge likely drew a negative inference about the respondent's credibility simply because he answered the questions that were put to him. In fact, it was wholly inappropriate to presume or assume the trial judge engaged in that kind of illogical or irrational reasoning.

104. The majority judges lost sight of the fact that it is sometimes difficult for trial judges to verbalize or precisely articulate the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.[108] Assessing credibility is not purely an intellectual exercise. The respondent had to do much more than demonstrate the trial judge could have done a better job of expressing herself to substantiate his claim that she applied uneven levels of scrutiny to the evidence.

105. The second reason offered by the majority judges to support their finding of uneven scrutiny was that the trial judge erred by accepting the complainant's evidence on "certain material points in the face of clear contradictory evidence that she did not reject, reconcile, or otherwise explain." The majority judges said they were concerned with two "material points."

106. The first so-called material point was whether the respondent yelled at everyone to leave the

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[107] *Ibid*., at para 44

[108] *M. (R.E.)*, at paras 48-49; *Gagnon*, at para 53

house immediately after the sexual activity ended. The complainant testified he did. According to the majority judges, her testimony was "clearly contradicted" by Kayden's testimony that he did not hear the respondent yelling at people to leave the house and the trial judge erred by failing to expressly resolve that so-called clear contradiction.[109]

107. The majority judges erred in several ways in reasoning as they did. First, this issue concerned nothing more than a peripheral factual detail. To be fair, the majority judges conceded this when they later acknowledged the factual detail in question was merely a "collateral fact."[110]

108. Second, they erred by stating that Kayden "clearly contradicted" the complainant on this issue. As already stated, there is a difference between a "clear contradiction" and a failure to confirm a factual detail. Kayden said he did not hear the respondent yelling for people to leave but even if his memory was accurate, his testimony did not necessarily contradict the complainant's evidence on this point. No one asked Kayden where he was or what he was doing two or three minutes before the complainant called him at 5:28 AM. There was no evidence about whether loud music was playing or if people were making a lot of noise that may have interfered with Kayden's ability to hear what was happening upstairs even if he had been in a position to hear the respondent yelling. To find there was a clear contradiction, a trier of fact would have to draw an inference that involved speculating about matters not in evidence.

109. The trial judge did not draw that inference even though she expressly referred to all of the relevant evidence concerning this peripheral factual detail. She did not find Kayden's evidence "clearly contradicted" the complainant. That fact highlights the majority judges' most serious and obvious error. The majority judges erred by: a) modifying the trial judge's perception of the facts in the absence of palpable and overriding error: and b) using that

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[109] A.R., Volume I, Tab 1C, Court of Appeal Reasons, at para 39

[110] *Ibid.*, at para 42

modification of the facts to criticize the trial judge for failing to resolve a factual controversy they manufactured.

110. They made the same error when they considered the second so-called "clear contradiction". The point in issue was whether the respondent told the complainant she was "dumb," "horny" and that she "wanted it." The respondent denied making those statements and he argued that Kayden's testimony clearly contradicted the complainant's evidence on this point. So what did Kayden actually say?

111. When he testified in-chief, Kayden was asked about where everyone went after the complainant left the bedroom:

> Q Okay. What happened after she left the room? Where did you go? Where did Mr. Mehari go?
>
> A I went outside.
>
> Q Okay. To where she was?
>
> A Yeah, yeah.
>
> Q Okay.
>
> A Yeah, I sat in her car with her.
>
> Q What about Mr. Mehari, where did he go? Did you see?
>
> A No, I don't recall where he went.
>
> Q Okay. Do you remember whether he was -- had also come outside?
>
> A No.
>
> Q No, you don't remember, or no, he didn't?
>
> A I don't remember him like coming right after me.
>
> Q Okay.
>
> A No.
>
> Q How long were you -- how long were you outside for?
>
> A Maybe like 15 minutes.
>
> Q And how was her demeanor outside, once you saw her and talked to her outside

the house?

A She was -- she was still scared and crying.[111]

112. Kayden was cross-examined on the same issue as follows:

Q You go outside with her when she leaves?

A M-hm.

Q Did Mr. Mehari follow you and her?

A No.

Q Okay. Did you hear Mr. Mehari say to her at any time while you were outside, You're stupid, you were horny, you wanted it?

A No, I don't.

Q Okay. Did you hear him say, I can't have this hanging over me?

A No.

Q Okay. So, just so I'm clear on the timeline here. You exit the building with her, right?

A Yeah.[112]

113. This evidence makes it clear that while Kayden could not confirm the complainant's evidence about whether the respondent uttered the statements in question, he most certainly did not "clearly contradict" it either. Kayden could not say where the respondent went after the complainant left the bedroom. Although Kayden said that he left the house "with" the complainant, it is impossible to know if he meant that they left the house together at precisely the same time. Indeed, his evidence that he spoke to the complainant when she was sitting in her car and not as they were leaving the house or when she was standing on the sidewalk tends to confirm the complainant's testimony that Kayden came outside after the respondent confronted her on the sidewalk and before she sat in her car.

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[111] A.R., Volume II, Tab 5, at p 96, line 35 to p 97, line 21

[112] *Ibid*., at p 116, lines 20-35

114. There was no "clear contradiction" even if one interprets Kayden's evidence as a categorical assertion that he and the complainant walked outside at precisely the same time. If the complainant was mistaken and the statements were uttered in the bedroom before Kayden walked in, there was no contradiction. If the complainant was mistaken and the statements were uttered outside the house after Kayden went back inside, there was no contradiction. If Kayden was mistaken about leaving the house "with" the complainant, there was no contradiction. In short, this was a point in issue that could not be resolved without drawing inferences and interpreting uncertain evidence.

115. At trial, the respondent argued there was a clear contradiction between Kayden and the complainant on this point.[113] Crown counsel argued there was no clear contradiction in the evidence.[114] Although the trial judge referred to all of the evidence on this factual issue in her reasons for judgment, she did not conclude there was a clear contradiction.[115] In fact, she suggested that the alleged contradictions were more apparent than real.[116] She also made it clear that despite the alleged inconsistencies, she found the complainant to be a credible witness who was telling the truth.

116. The majority judges failed to accord proper deference to the trial judge's perceptions concerning this factual issue. The applicable standard of review did not permit the Court of Appeal to supplement the record with factual findings that had not been made and then use those manufactured findings to criticize the content of the trial judge's reasons for judgment.

117. The majority judges erred in another way. Even if they were correct in stating Kayden

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[113] *Ibid*., at p 170, lines 26-36

[114] *Ibid*., at p 180, line 17 to p 181, line 3

[115] A.R., Volume 1, Tab 1B, Trial decision, p 9, lines 9-13, p 10, lines 5-10 and lines 22-25

[116] *Ibid*., at p 12, line 35 to p 13, line 6

"clearly contradicted" the complainant on these so-called "material points", they erred by holding the trial judge was required to specifically refer to every contradiction or inconsistency in the evidence and explain how she resolved that contradiction or inconsistency. As already stated, a trial judge is not required to set out every finding or conclusion in the process of arriving at a verdict or detail his or her finding on each piece of evidence or controverted fact.[117] A trial judge is not required to describe every consideration relating to a credibility finding. A trial judge is not required to address every argument of counsel or reconcile every "frailty" in the evidence, particularly when an alleged frailty is more apparent than real.[118]

118. Further, as noted by Leurer J.A. in the dissenting reasons for judgment, the majority judges lost sight of the test to be applied when assessing a claim of uneven scrutiny when they criticized the trial judge for failing to explain how she resolved the so-called "clear contradictions" in the evidence.[119] As already noted, senior appellate courts have consistently held that a trial judge's failure to say something that could have been said will not be enough to substantiate a claim of uneven scrutiny. The trial judge was aware of the evidence and the arguments of counsel. She was not required to refer to all of the evidence or all of the arguments to demonstrate the methodology she employed was fair and balanced. In the absence of any evidence that the trial judge actually used different standards to assess credibility, the uneven scrutiny argument could not succeed.

119. There is one final important point that must be addressed. The trial judge provided several reasons in support of her credibility findings. The majority judges found no error in most of those reasons. For example, they did not suggest the trial judge erred by holding that the complainant's emotional condition immediately after the sexual activity supported the finding

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[117] *M. (R.E.)*, at paras 32 and 45; *Brownlee*, at para 37

[118] *M. (R.E.)*, at para 56

[119] A.R., Volume I, Tab 1C, Court of Appeal Reasons, at para 116

that she was a credible witness and the respondent was not. They did not suggest the trial judge erred by reasoning that Kayden's testimony supported the complainant's testimony and contradicted the respondent's testimony about when the respondent led the complainant to his bedroom. They did not suggest the trial judge was wrong to find the respondent's testimony sounded rehearsed because he used almost precisely the same words to answer open-ended questions about what happened in the bedroom. They did not suggest she erred in relying on the complainant's decision to undergo an invasive forensic medical examination to find the complainant was a credible witness. They did not suggest she erred by relying on the fact the complainant's testimony did not vary in cross-examination either.

120. Instead, they focussed on matters that might be fairly described as trivial, insignificant and concerned with nothing more than peripheral factual details. They had difficulty understanding the point the trial judge was trying to make when she referred to the respondent's testimony about using a condom and the complainant's body suit. They criticized the trial judge for failing to resolve a so-called "clear contradiction" on an unimportant "collateral fact." They criticized the trial judge for failing to resolve another so-called "clear contradiction" relating to whether the respondent uttered statements denying his guilt immediately after the sexual activity in question. In reasoning as they did, the majority judges permitted form to triumph over substance. That error should not be permitted to stand.

PART IV

SUBMISSIONS AS TO COSTS

121. The Attorney General makes no submission as to costs.

PART V

NATURE OF THE ORDER SOUGHT

122. The Attorney General respectfully submits the appeal from the decision of the Court of Appeal for Saskatchewan should be allowed. The Court of Appeal did not fully consider all of the respondent's grounds of appeal. Therefore, in the event the appeal is allowed, the Court should order the case be remitted back to the Court of Appeal to consider and decide the grounds of appeal the majority judges did not address.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of July, A.D. 2020.

W. DEAN SINCLAIR, Q.C.
Agent of the Attorney General for the
Province of Saskatchewan.

PART VI

IMPACT OF PUBLICATION BAN ORDER ON REASONS

123. The trial judge made an order pursuant to s. 486.4(1) of the *Criminal Code* banning publication of any information that could identify the complainant. Therefore, the Court's published reasons should not refer to any information that could identify the complainant.

PART VII

TABLE OF AUTHORITIES