SCC File No. 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 RESPONDENT

(AWET MEHARI, RESPONDENT)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I - STATEMENT OF FACTS

A. Overview

1. The complainant, A.K., testified that while attending a party at the Respondent's residence she went upstairs to a bedroom. From the point when she arrived at the bedroom door, her recollection of the events that occurred thereafter ceased. She did not recall anything further until she realized that she was having intercourse with the Respondent. The Respondent testified and stated that consensual intercourse had taken place.

2. The trial judge committed numerous errors rejecting the evidence of the Respondent, and finding him guilty of sexual assault. The majority of the Court of Appeal (the "**Majority**") found that the trial judge applied a level of scrutiny of the Respondent's evidence that was unreasonable and far different from the level of scrutiny the trial judge applied in assessing the credibility and reliability of A.K. This resulted in a miscarriage of justice and the conviction was quashed and a new trial was ordered.

3. The Honourable Mr. Justice R.A. Leurer in dissent (the "**Dissent**") took no issue with the applicable law on the issue of uneven scrutiny but, based on the evidence, would not have allowed this ground of appeal. The Crown appeals to this Honourable Court as a matter of right.

4. The fundamental error of the Crown on this appeal is found at paragraphs 3 and 4 of its Factum. The Crown argues that the Majority resorted to a "trial by transcript"[1] and relied on the "lifeless transcript" in coming to its conclusion.[2] The fact is that the "lifeless transcript" displayed in cold, hard terms the errors that were made by the trial judge in how she conducted her credibility analysis. Credibility is not determined solely by observation and demeanour. There are at times pieces of evidence that have to be addressed and if the Court applies an uneven level of scrutiny to that evidence it is an error of law and an appellate court is obligated to intervene.

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[1] Appellant's Factum at para. 3

[2] *Ibid* at para. 72

5. Moreover, the trial judge's errors did not relate solely to "peripheral factual errors".[3] There were significant pieces of evidence that the trial judge was obligated to consider. Conversely, concerning the testimony of the Respondent, there were inconsequential matters to which the trial judge attached great weight. The manner in which the trial judge reviewed that evidence displayed uneven scrutiny. Contrary to the Crown's position, the Respondent's argument in the court below was not based on an argument of unreasonable verdict. It was not based on a failure to give reasons.[4] It was not based on a palpable and overriding error on credibility assessment. The Majority decision was based on a conclusion of uneven scrutiny, amounting to an error of law, and therefore both the evidence and the trial judge's reasons had to be examined.

6. The Crown in this appeal has gone to painstakingly lengths to review the evidence, in an effort to establish that there was some evidence on which a Court could convict, or in other words that it was not an unreasonable verdict. That is not the issue on this appeal. While there is a strong argument that the trial decision was an unreasonable verdict, the issue on this appeal is whether or not the trial judge applied a level of scrutiny of the Respondent's evidence that was unreasonable and far different from the level of scrutiny the trial judge applied in assessing the credibility and reliability of A.K., which is an error of law.

7. The Majority found that the trial judge's analysis and decision was fundamentally flawed. They correctly stated the law and then identified numerous significant problems in the Trial Judgment. The Crown has attempted on this appeal to conceal those fundamental flaws by blanketing them with pages of submissions about how the Respondent could have been guilty. That was not the issue before the Court of Appeal and it is not the issue now.

8. The decision of the Majority was correct in law and well supported by the record. It should not be interfered with by this Honourable Court.

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[3] *Ibid* at para. 4

[4] *Ibid* at para. 75

B. The Evidence

9. The Respondent was 26 years of age at the time of the alleged offence. He lived in Regina where he operated a number of businesses primarily centered around the promotion of a rap music artist ("**Pimpton**") and a related clothing line.[5]

10. On or about September 29, 2015, Pimpton was to perform at a nightclub in Regina. The Respondent had invited some friends to his house prior to the show, with the intention that they would travel from his house to the show and return thereafter for a party.

11. A.K. testified that she did not want to have anything to do with the Respondent at any time. She said she had met the Respondent on one occasion about three weeks earlier when she had attended at his residence. They had exchanged SnapChat contact information.[6]

12. On the day in question, A.K. drove to the Respondent's residence to go to a pre party, attend the nightclub where the show was taking place, and then returned to the Respondent's residence for an after party. Her friend, Kayden Seon-Tomlin ("K.S.") attended as well. At the pre-party she had taken a bottle of rum with her and had some drinks.[7] She asked the Respondent if he had some lotion and he directed her to the washroom.[8] The Respondent acknowledged on cross-examination that she may have asked him for some lotion but he didn't recall.[9]

13. AK testified that the Respondent asked her to sit beside him in the vehicle when they went to the club. At the club she said he put his arm around her. She said she did not know him, did not want to talk to him, "snubbed him off" and continued on walking. She said this was the only interaction she had with him at the club.[10] This was not corroborated by any other

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[5] Appellant's Record [A.R.], Volume II, Tab 5 at p. 121, lines 1-21
[6] Trial Decision, A.R., Volume I, Tab 1B, p. 5
[7] *Ibid*, p. 5, lines 25-29
[8] A.R., Volume II, Tab 5, p. 11, lines 38-41
[9] *Ibid*, p. 144, line 40 – p. 145, line 1
[10] *Ibid*, p. 14, line 3 – p. 15, line 9, p. 37, line 26, and p. 38, line 3

witnesses and was directly contradicted by K.S., who testified that he had seen them talking together at the club, and later touching the Respondent while dancing with him. Specifically, he testified:

A "But I remember, like Awet and Alexis talking though" [11]

A "Seen them around each other" [12]

Q Okay. So did you see any interaction between Mr. Mehari and Alexis at Club Noir?

A Yeah. Yeah, I did.

Q Okay. Describe it to us, what you saw.

A Like – like from my, like viewing?

Q Yeah

A It kind of looked like she was like on him, like kind of dancing on him, around him, whatnot.

Q Okay.

A And –

Q And was that when Pimpton's performing or just music playing, or whatever?

A I'm not even too sure

Q A lot of people were dancing?

A Yeah, yeah, yeah.

Q Right? And she was specifically dancing with Mr. Mehari?

A Yeah

Q A lot or just a bit?

A I'm – I'm not even sure.

Q Do you recall in what manner she was dancing with Mr. Mehari?

A It was kind of like a touchy like vibe feeling look.

Q Right?

A Yeah.

Q Grinding? Does that –

A No

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[11] *Ibid,* p. 84, line 36

[12] *Ibid,* p. 85, line 1

Q No?

A I don't recall seeing grinding.

Q But she was touching him?

A Yeah." [13]

14. When the show was over A.K., travelled back to the Respondent's residence to go to the after party. A.K. testified that K.S. told her at the club that it was time to leave at around 2:30am or 3:00am.[14]

15. A.K. testified that when she arrived at the Respondent's residence other people came and there may have been 30 people there. She stated that notwithstanding that normally if she was at a party with 30-40 people she would not feel overwhelmed, on this occasion for some unexplained reason she was "overwhelmed" by the number of people.[15] Nevertheless, she did not travel home (even though she had her own vehicle), call for a ride or a taxi, or even suggest to K.S. that they should leave. She states that it just didn't cross her mind to take a cab, to go home or to suggest to K.S. that they leave.[16]

16. By contrast, K.S. recalled that when they first arrived at the house for the post-party there was about 10 people there and there ended up being about 15-20 people in total.[17]

17. A.K. stated that she was hungry so she ordered a pizza because no one would let her eat any of the pizza that had been ordered for the party, a fact that was contradicted by other witnesses and not corroborated by anyone.[18] K.S. recalled everyone just grabbing a piece of the pizza, although he had no specific recollection of A.K. having done so.[19]

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[13] *Ibid,* p. 106, line 31 – p. 107, line 32
[14] *Ibid,* p. 17, lines 1-4
[15] *Ibid,* p. 54, line 18 – p. 55, line 3
[16] *Ibid,* p. 46, line 40 – p. 47, line 25
[17] *Ibid,* p. 90, lines 31-36
[18] *Ibid,* p. 17, line 19 – p. 18, line 17
[19] *Ibid,* p. 90, lines 13-29, p. 113, line 14 – p. 114, line 8

18. Notwithstanding that A.K. would have to wait outside for the pizza to arrive she instead went upstairs to a bedroom with the Respondent. A.K.'s evidence was that the Respondent asked her if she wanted to wait for the food upstairs. The Respondent testified he saw A.K. standing alone and she asked him if there was someplace that they could go which was quiet or private.[20]

19. A.K. testified that she was not intoxicated.[21] She states that she went upstairs and was about to enter the bedroom when her memory blacked out. She has no recollection of what happened thereafter, until she realized that the Respondent was having intercourse with her.

20. A.K. described what happened as follows:

> "So I followed Awet to the room. I remember walking into the room. After that, to this day, I do not remember anything that happened in that room. I do not remember the door being shut. I do not remember the light being on or off. I do not remember having a conversation with him. I do not remember sitting on the bed, falling asleep. I don't remember anything to this day." [22]
>
> [emphasis added]

21. A.K. confirmed in cross-examination that she did not recall going to bed, she did not recall going to sleep and she did not recall a conversation with the Respondent.[23] She maintains that she did fall asleep because she says she woke up and that is when her memory began to kick in.[24] However, she acknowledged she had no idea at what time she fell asleep.[25]

22. A.K. acknowledged that it was possible that she voluntarily laid on the bed herself, it was possible that the Respondent laid down beside her, and that it was possible that they had a

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[20] *Ibid,* p. 130, lines 16-32
[21] *Ibid,* p. 16, lines 24-37, p. 58, lines 4-15
[22] *Ibid,* p. 18, lines 29-33
[23] *Ibid,* p. 47, line 35 – p. 48, line 16
[24] *Ibid,* p. 48, lines 18-37
[25] *Ibid,* p. 48, lines 39-40

conversation. She states that she would not have responded to the Respondent kissing her because she was not attracted to him.[26]

23. The first thing A.K. testified that she said was "it hurts, it hurts, it hurts so bad, it hurts". The Respondent asked her what hurts and she stated "my vagina, it hurts so fucking bad". The second thing she said was she wanted a charger for her phone. She then wanted K.S., who the Respondent located.[27] A.K. testified that the Respondent followed her outside and asked her why she was acting like this. She stated that she didn't want this, she didn't ask for this and didn't say "yes". She states that the Respondent said "You are dumb. You were horny and you wanted it. I can't have this on me. I can't have this on my name". She said that the Respondent then went inside and K.S. came out and tried to calm her down.[28]

24. K.S. testified that he had gone outside with A.K. and that he remained outside with her for approximately 15 minutes. At no point did the Respondent come outside, nor did he hear the conversation that A.K. attributes to the Respondent.[29]

25. A.K. did not ask for a ride home or any other assistance from K.S. K.S. went back into the party and she called an acquaintance who gave her a ride, not home but rather to K.S.'s house where she went to sleep. She got up at about noon the next day. She later complained to her mother that she had been sexually assaulted by the Respondent. Her mother called the police and the Respondent was arrested. A small tear in her vagina was identified, although no evidence was lead as to what caused it or the extent or severity of it.

26. A.K. testified in chief that while she has no recollection of what happened after she entered the bedroom she would not have had sex with the Respondent because she did not find him attractive in any way, a position she maintained in cross-examination.[30]

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[26] *Ibid,* p. 50, line 41 – p. 51, line 14
[27] *Ibid,* p. 60, lines 15-19
[28] Trial Decision, A.R., Volume I, Tab 1B, p. 9, lines 1-13; p. 23, lines 8-28
[29] *Ibid,* p. 10, lines 22-25, p. 116, line 20 – p. 117, line 41
[30] A.R., Volume II, Tab 5, p. 28, lines 11-23; p. 51, lines 10-14

27. As already suggested in the overview of the evidence, the testimony by A.K. as to what happened was contradicted by the testimony of her friend, K.S., in a number of instances. For example, A.K. testified that after she woke up, the Respondent said that he would have everyone leave. He then exited the room and she could hear him hollering at people to leave.[31] The Respondent denied this and K.S. testified that he did not hear the Respondent or anyone directing people to leave the party.[32] The trial judge found that K.S. was a credible witness.[33]

28. The Respondent testified that he believed A.K. consented to the sexual activity and that she was not asleep when they engaged in it.

29. The Respondent did not testify in chief that A.K. was lying, nor did he offer any reason why she would lie. The Crown on cross-examination raised the issue and asked the Respondent why he believed A.K. was lying.[34] The following exchange took place:

> Q: Is there anything you can think of based on what you know and what you've seen for why Ms. Kolody would falsely make this allegation against you?
>
> A: Personally, I feel like it was something was deliberately planned, in looking back from all the evidence. I feel like she felt like there would be some sort of monetary gain, something that I would try and keep on the hush, because I was concerned of it tarnishing my reputation.
>
> Q: Interesting. So your perspective today is that this was actually a plan that had been in the works?
>
> A: I believe it may have been something along those lines. After our first court appearance, I came to the realization that her family knows my artist, Pimpton, Kyriel Roberts, and her – her mother was threatening her outside of the courtroom, or threatening him, my artist, outside the courtroom, saying that you're going to pay for this and just a lot of ludicrous threats.
>
> Q: So you took that to mean, Ms. Kolody did all of this with a plan to get money out of you?

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[31] Trial Decision, A.R., Volume I, Tab 1B, p. 8 lines 21-26; p, 21, lines 25-39

[32] A.R., Volume II, Tab 5, p. 134, lines 10-13; p. 115, lines 28-33; p. 117, lines 29-36

[33] Trial Decision, A.R., Volume I, Tab 1B, p. 13, lines 11-13

[34] A.R., Volume II, Tab 5, p. 162, lines 1-25; p. 163, lines 8-10

A: I feel like after that, looking at all the information; correct.

Q: Okay. That's the only thing that makes sense to you?

A: That's the only thing that made sense. That's the only thing that I can think of.

Q: So I assume you think Mr. Seon was in on that plan as well?

A: I don't see it to be – I don't – I can't see that. It's possible, but – I don't –

…

Q: Right. And what is that? You say you-re – this is your conclusion now, based on all the information you have?

A: M-hm.[35]

30. On re-examination the Respondent confirmed that he did not know this to be true, but that he was speculating and that he did not think about the motivation until after he heard the evidence at the preliminary inquiry.[36]

31. The Crown argued in its closing submissions at trial that the evidence of the Respondent as to why A.K. was lying should be rejected, and that it supported his argument that he was not a credible witness.[37] Counsel for the Crown opened his argument by stating the following:

> "So first of all, speak to Ms. Kolody's evidence on why we believe she is credible. First of all, I would suggest <u>there was no proffered plausible motivation to lie</u>. You heard what Mr. Mehari said at the end of his testimony, I will touch on that when I speak about his evidence …" [38]
>
> [emphasis added]

32. The following submission was then made by Crown counsel:

> "Similarly, I think something that illustrates Mr. Mehari's disconnect from the truth and a pursuit of self-interest beyond all else, is this surmising at the end that he now believes that this was somehow a fabrication made by Ms. Kolody with the end goal of some sort of cash windfall. And he stated this, I thought rather

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[35] A.R., Volume II, Tab 5, p. 162, lines 1-25; p. 163, lines 8-10

[36] *Ibid*, p. 163, line 34 – p. 164, line 2

[37] A.R., Volume II, Tab 5, p. 175, lines 21-23; p. 181, lines 23-38

[38] *Ibid*, p. 175, lines 21-23

> forcefully, that on review of all that's gone on here, he's now come to this conclusion, and it's the only thing he can think of, but he was, I thought rather assertive in that point. And I found it disconnected from what went on here. There's never been a suggestion of some sort of after the fact request for hush money or anything of the sort. We heard Ms. Kolody, within hours of this, telling her mother, and then going to the hospital, getting her blood drawn, providing samples of her urine, allowing her body to be swabbed, taking a preventative cocktail of anti-retroviral drugs for 30 days. Where in that do we come to some conclusion that this was some preconceived set-up? I found it rather difficult to listen to, I must say. And I submit that that shows, along with all these other factors, such a lack of credibility in recounting this night. It should lead the Court to disbelieve his evidence in its entirety." [39]

33. The trial judge did not appreciate that there was no onus on the Respondent to "proffer" a plausible motivation for A.K. to lie. The trial judge did not stop the Crown from conducting this improper cross-examination, nor did she advise the Crown that it was not to be considered in final argument or in her decision.

34. The trial judge rejected the Respondent's testimony. The trial judge did not make any direct reference to the cross-examination of the Respondent as to why A.K. was lying in her decision. However, at the sentence hearing, the trial judge in her sentencing decision stated the following:

> "The aggravating factors include the fact Mr. Mehari was on conditions of release when he committed this offence, <u>but far from showing remorse Mr. Mehari suggests the victim is trying to extort him, although he provided no evidence to back up his assertion</u>." [40]
>
> [emphasis added]

35. In short, the learned trial judge placed an onus upon the Respondent to prove his innocence by proffering an explanation as to why A.K. was lying. The trial judge similarly placed an onus upon the Respondent to explain why A.K. was not crying when she left the bedroom, as she testified, but would have left the bedroom in a hysterical state, which he testified to. The trial judge stated as follows:

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[39] *Ibid*, p. 181, lines 23-38

[40] Respondent's Record, p. 8, lines 21-24

> "Mr. Mehari's description of Ms. Kolody after the incident does not make sense. He disagreed that Ms. Kolody was crying; however, he described her storming out of the room hysterically. He did not explain why she stormed out or why she was hysterical. This description does not follow from his story of consensual sex nor is it explained by an injury suffered by consensual sex." [41]

36. The trial judge in her analysis of the evidence first of all noted that A.K. "provided significant detail in her testimony, whether related to the incident or not".[42] This ignored the evidence that A.K. had no recollection from the point when she went upstairs to the bedroom until the point when she said she was having intercourse with the Respondent. The trial judge mistakenly treated her evidence as being, unequivocally, that she had gone upstairs, went to sleep, and then woke up to the Respondent engaging in sexual activity with her.

37. The trial judge concluded that A.K.'s demeanour after the incident "was consistent with non-consensual sex".[43]

C. The Submissions at Trial

38. The Crown argued that A.K.'s evidence should be accepted and that the Respondent's evidence should be rejected in large part because his explanation for why A.K. may have been lying should have been rejected. By contrast, the defence argued at trial that the complete lack of recollection of A.K., the Crown evidence which contradicted A.K., combined with the Respondent's testimony, which was not shaken in cross-examination, at the very least raised a reasonable doubt.

D. The Trial Decision

39. The trial judge, after applying an uneven level of scrutiny of the evidence of A.K. and the Respondent accepted the testimony of A.K. and rejected the testimony of the Respondent.

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[41] Trial Decision, A.R., Volume I, Tab 1B, p. 14, lines 11-15

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

[43] Trial Decision, A.R., Volume I, Tab 1B, p. 15, lines 1-2

E. The Appeal

40. The Respondent appealed on a number of grounds, including that:

i) The trial judge erred by allowing the Crown Prosecutor to cross-examine the Respondent about whether he thought A.K. was lying and, if so, why, and then relying on this cross-examination in assessing the Respondent's credibility;

ii) The trial judge erred in law by placing an onus upon the Respondent to:

a) Explain why A.K. was lying; and

b) Explain why A.K. was not crying when she left the bedroom but would have left the room in a hysterical state;

iii) The trial judge erred by applying a level of scrutiny of the Respondent's evidence that was unreasonable and far different from the level of scrutiny that she applied in assessing the credibility of A.K., resulting in a miscarriage of justice;

iv) The trial judge erred in her assessment of the circumstantial evidence and failed to consider other plausible reasons why A.K. would not have remembered the period from when she entered the bedroom to when she remembered having intercourse, other than that she had been asleep;

v) The trial judge erred in law by failing to consider whether the Respondent had an honest but mistaken belief as to the consent of A.K.; and

vi) In the further alternative, the decision of the learned trial judge was unreasonable and not supported by the evidence.

41. The Majority set out the principles to be considered in arguing a trial judge has applied a stricter level of scrutiny to defence evidence than to the evidence of the Crown.[44] Having properly instructed itself, the Majority then reviewed the evidence given at trial, including not only the unfair scrutiny of the Respondent's evidence set out above, but more significantly the

[44] Court of Appeal Reasons, A.R., Volume I, Tab 1C, paras. 28-34

frailties of the complainant's evidence, including where it was directly contradicted by the evidence of K.S., the Crown's main witness.[45]

42. The Majority, having been persuaded on this ground of appeal, allowed the appeal, quashed the conviction, and ordered a new trial.

43. The Majority did not find that the decision was unreasonable and not supported by the evidence. They did not consider any of the other grounds of appeal.

44. The Dissent found that the trial judge had not applied a level of scrutiny of the Respondent's evidence that was unreasonable and different from the level of scrutiny of her assessment of the evidence of A.K. and would have dismissed the appeal.

PART II – POSITION ON APPELLANT'S QUESTIONS

45. Did the Court of Appeal err by holding the trial judge applied a different standard of scrutiny to the complainant's evidence than was applied to the Respondent's evidence? No.

PART III – STATEMENT OF ARGUMENT

A. Summary of the Applicable Law

46. The argument that the trial judge erred by applying a different level of scrutiny to the Respondent's testimony than to A.K.'s should not be confused with an argument of an unreasonable verdict. The submission of the Respondent was that the reasoning process of the trial judge was significantly flawed and reflected legal error, to the extent that the verdict could not stand.

47. The Majority identified the applicable legal principles governing its analysis.

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[45] *Ibid,* paras. 35-45

48. The Majority noted at the outset that findings of credibility are the realm of the trier of fact and it is often difficult for a trial judge to articulate with precision all of the "complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events".[46]

49. The Majority noted accordingly that great deference must be shown to credibility assessments. However, if in making credibility assessments the trial judge applied a stricter level of scrutiny to the defence evidence than to the Crown evidence, then that is an error of law. This results in an unfair trial and a miscarriage of justice, even if the evidence is capable of supporting a conviction.[47]

50. The Majority held accordingly because this was a question of law the standard of review on the issue was one of correctness.[48] No deference needed to be afforded to the analysis of this ground of appeal.

51. The Majority recognized that the "uneven scrutiny" claim is not easily established. In this regard it quoted the summary by the Ontario Court of Appeal in *R v Radcliffe* where Watt J.A. describes the basic principles that apply to appellate assessment of a claim of uneven scrutiny:

i) It is a difficult argument to make because findings of credibility are the province of the trial judge and attract significant appellate deference. The appellate courts are concerned that the argument is nothing more than a thinly veiled invitation to re-assess the trial judge's credibility determinations and to re-try the case;

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[46] *Ibid,* para. 28; *R. v. Gagnon,* 2006 SCC 17 at para. 20, [2006] 1 SCR 221 [*Gagnon*], see also *R v W(H),* 2013 SCC 22 at para. 39, [2013] 2 SCR 180

[47] *Ibid,* paras. 28 and 29, *R v Gravesande,* 2015 ONCA 774 at paras. 18 and 43, 330 CCC (3d) 497 [*Gravesande*]; and *R v Quartey,* 2018 ABCA 12 at para. 42, 430 DLR (4th) 381 [*Quartey*] (aff'd 2018 SCC 59, [2018] 3 SCR 687)

[48] *Ibid,* para. 30; *Quartey* at para. 15; *R v SMC,* 2020 ABCA 19 at para. 20; *R v CAM,* 2017 MBCA 70 at para. 33, 254 CCC (3d) 100 [*CAM*]

ii) To succeed the appellant must do more than show that a different trial judge assigned the same task on the same evidence could have assessed the credibility differently. Also, it is not enough to show that the trial judge failed to say something that she or he could have said in assessing credibility or gauging the reliability of the evidence;

iii) The appellant must point to something, whether in the reasons of the trial judge or elsewhere in the trial record, that makes it clear that the trial judge actually applied different standards of scrutiny in assessing the evidence of the appellant and complainant; and

iv) In the absence of palpable and overriding error, and thereby no claim of unreasonable verdict, an appellate court is disentitled to re-assess and re-weigh evidence.[49]

52. The Majority also referred to the Court of Appeal decision in *R v Wanihadie*, which reiterated that in order to succeed on the uneven scrutiny ground, an appellant is required to identify something sufficiently significant in the reasons or record to establish that the trial judge employed a faulty methodology in deciding credibility.[50]

53. The Majority also cautioned itself that, while significant inconsistencies in the evidence should be addressed, a trial judge is not required to resolve every inconsistency raised by the defence before accepting the evidence of a complainant and basing a conviction upon it.[51]

54. The Majority stated that accepting the evidence of a complainant, even in the face of inconsistencies, and rejecting the evidence of the Respondent, does not generally provide a basis for appellate intervention on the ground of uneven scrutiny. But the Court noted that the use which a trial judge makes of minor or collateral inconsistencies or contradictions may be

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[49] *Ibid*, para. 31; *R v Radcliffe*, 2017 ONCA 176 at paras. 22-26 [*Radcliffe*]

[50] *Ibid*, para. 32; *R v Wanihadie*, 2019 ABCA 402 at paras. 36, 39, 41-43, 99 Alta LR (6th) 56 [*Wanihadie*]

[51] *Ibid*, para. 33; *R v RA*, 2017 ONCA 714 at paras. 44-46, 421 DLR (4th) 100 (aff'd 2018 SCC 13, [2018] 1 SCR 307)

significant. Uneven scrutiny may be revealed where a trial judge fails to conduct a critical assessment of inconsistencies which could undermine the Crown evidence, or where inconsistencies that are used to undermine the credibility of defence evidence are ignored or diminished in relation to Crown evidence.[52]

55. Finally, the Majority observed that the absence of reasons as to why evidence on a critical fact in dispute is accepted, despite obvious frailties, can be a sign of uncritical analysis by a trial judge that justifies appellate interference.[53] The Majority's articulation of the applicable legal principles is consistent with the jurisprudence, and reflects no legal error.

56. For example, in *R v Howe*[54] the Court found that the trial judge had erred in his assessment of the accused's evidence versus the complainant's. The Court looked at the reasoning of the trial judge and found that the trial judge had failed in his assessment of credibility by failing to account for the fact that the complainant had deliberately lied on some important matters in the course of testifying in reply. The failure of the trial judge to consider that, especially in light of the fact that he had rejected the appellant's evidence because he had lied in certain instances, was an error. The Court concluded that these errors resulted in the appellant being convicted as a result of a seriously flawed analysis of the credibility of his accuser. This constituted a miscarriage of justice and the convictions were quashed.[55]

57. In *R v Roth,*[56] the British Columbia Court of Appeal also found that the trial judge had treated the accused's evidence with uneven scrutiny, for three reasons:

i) The trial judge adversely assessed the appellant's evidence using speculative reasoning;

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[52] *Ibid*, para. 34; *R v Willis,* 2019 NSCA 64 at paras. 43-44, 379 CCC (3d) 30; *Gravesande* at para. 42

[53] *Ibid,* para. 34; *R v Jovel,* 2019 MBCA 116 at para. 43, citing *R v Burke,* [1996] 1 SCR 474 at para. 53 [*Burke*]

[54] *R v Howe,* [2005] OJ No 39, 192 CCC (3d) 480 (Ont CA) [*Howe*]

[55] *Howe,* at paras. 63-65

[56] *R v. Roth,* 2020 BCCA 240

ii) The trial judge's credibility assessment relied upon the fruits of improper cross-examination; and

iii) The trial judge failed to appreciate significant inconsistencies and contradictions involving the complainant's evidence and to resolve them before accepting the complainant's evidence as proving non-consent.

58. These cases and the principles that they stand for are consistent with the fundamental role of an appellate court in looking to see if a trial court has properly directed itself to all of the evidence bearing on the relevant issues. The words of Estey J in *Harper v The Queen*[57] still are applicable:

> "An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

59. The Crown effectively acknowledged the above when it states in its Factum, "To be sure, trial judges must act fairly and must consider all relevant evidence when assessing credibility".[58]

B. <u>The Trial Judge Applied a Different Level of Scrutiny</u>

60. The Majority correctly concluded that the trial judge applied a different, more strict level of scrutiny to the Respondent's evidence. Examples of the errors of the trial judge in the analysis of the evidence of A.K. include the following, numerous issues with her own evidence:

i) First and foremost was the description of the contact between the Respondent and A.K. K.S., who was found to be a credible and careful witness, observed the two of them dancing together, which included touching, and A.K. being "on" the

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[57] *Harper v The Queen*, [1982] 1 SCR 2 at page 14

[58] Appellant's Factum, para. 69

Respondent's body. The trial judge, contrary to the evidence, described this as a "brief interaction" which could have been perceived differently by K.S. than A.K.[59] This ignores A.K.'s testimony, *which was that there was no contact whatsoever* and that, in fact, when the Respondent approached her she immediately snubbed him off and kept on walking. A.K. maintained that she did not dance with the Respondent, even briefly.[60]

ii) A.K. attributed statements to the Respondent after she was outside in her car that she "wanted it". Contrary to the Crown's submission, this was not a peripheral matter. The trial judge relied on this alleged statement in her finding that the Respondent was not credible and that A.K. had not consented to what took place.[61] The basis for finding the Respondent made these statements was that the trial judge found that the actions described were consistent with the self-image he projected of a successful record producer or manager.[62] (Is a successful record producer or manager more likely to commit a sexual assault?) The trial judge did not identify what actions those were (asking if she was okay and locating her friend for her would seem to be consistent with someone who was concerned for her). However, the bigger problem was that K.S. testified that he had gone with her from the bedroom directly out to the car and remained with her for 15 minutes, *a direct contradiction of what A.K. said*. K.S. stated that at no point in time did the Respondent come outside, and nor did he hear any such statements being made by the Respondent. This obvious contradiction between a Crown witness who was found to be careful and credible and the complainant, A.K., on what the trial judge considered to be a significant factor, was never addressed by the trial judge;

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[59] Trial Decision, A.R., Volume 1, Tab 1B, p. 12, lines 35-38.

[60] A.R., Volume II, Tab 5, p. 39, line 36 – p. T40, line 2; p. 14, lines 3-9; p. 45, line 38 – p. 46, line 1

[61] Trial Decision, A.R., Volume 1, Tab 1B, p. 14, lines 17-23

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

iii) A.K. stated that the Respondent exited the bedroom hollering at everyone to get out of the house and leave the party. No one testified to that and, to the contrary, K.S. stated that he did not hear the Respondent or anyone saying that;

iv) A.K. stated that when she got to the house she was overwhelmed and told both K.S. and the Respondent "I am overwhelmed, I didn't expect this".[63] Neither the Respondent nor K.S. corroborated that she told them that she was overwhelmed;

v) The trial judge found that there was no evidence to contradict A.K.'s claim that she was asleep for most of the time between the call to Triple 8 Pizza at 3:39am and when she called K.S. at 5:25am.[64] In point of fact, what A.K. *did say* was that she had no recollection whatsoever from the point that she arrived at the bedroom. This was not a situation where she stated she went into the bedroom and immediately laid down and went to sleep and did not remember until the intercourse was occurring. This was a situation where she had no memory of what happened and of even going into the bedroom at all, let alone going to sleep; and

vi) A.K. stated that when she got back to the Respondent's residence she was "overwhelmed" by the estimated 20 to 30 people there. This was her excuse for agreeing to go upstairs to wait in the Respondent's bedroom. It is difficult to imagine that she attended the pre party, went to a large gathering at a nightclub, and then returned to the Respondent's residence where there was 20 or 30 people, and would have felt "overwhelmed". She had never been overwhelmed before. If she was overwhelmed, one would have again expected that she would have gone home, or called for a ride, or at the very least spoke to K.S. about it or hung out with him instead. She did not do any of these things. What the trial judge failed to consider was whether or not her explanation of being overwhelmed was simply the excuse she came up with to justify her going to the Respondent's bedroom;

vii) A.K. stated that for whatever reason she and K.S. had seen each other almost daily through the month of September, 2017. In point of fact, K.S. had been on

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[63] A.R., Volume II, Tab 5, p. 17, lines 25-26

[64] Trial Decision, A.R., Volume 1, Tab 1B, p. 14, lines 36-40

the road throughout the month of September and they had not had any contact since September 8th when A.K. and the Respondent exchanged Snapchat information;[65]

viii) A.K. stated that after the assault she found K.S.'s jacket and wrapped it around her waist. K.S. stated that she had been given the jacket earlier in the evening and had been wearing it with the hood up.[66] The trial judge resolved this obvious discrepancy by saying A.K. would have little reason to remember when she received it. The point was that it was not just when she received it, but she had been wearing it when they left the club and had not wrapped it around her waist after the alleged assault.

61. By contrast, the trial judge was extremely critical of the Respondent's testimony, even though it was objectively far more internally consistent. The following is illustrative:

i) The trial judge found that the Respondent was a "poor witness". However, this is not based on an observation as to his demeanour or anything of that nature in which substantial deference would normally be owed to the trial judge. Rather, it was based on the actual answers that were given by the Respondent,[67] In other words, the transcript is the only record that is needed to review that finding by the trial judge;

ii) The trial judge begins by saying that the Respondent volunteered no information while testifying but simply answered the questions put to him. The trial judge stated he never provided "extraneous detail people often use when relating an event". The trial judge then refers to an exchange that took place and states that the Respondent did not explain anything, "he simply answered the questions asked with a minimum of detail".[68] It is difficult to imagine that an accused

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[65] *Ibid,* p. 14, line 40 – p. 15, line 2

[66] *Ibid,* p. 13, lines 4-6; A.R., Volume II, Tab 5, p. 45, lines 20-29; p. 111, line 34 – p. 112, line 25; p. 93, lines 1-16

[67] Trial Decision, A.R., Volume 1, Tab 1B, p. 13, line 23 – p. 14, line 23

[68] *Ibid,* p. 13, line 23 – p. 14, line 2

would be held to lack credibility because he simply answered the questions put to him;

iii) The trial judge noted that when the Respondent was asked about using a condom in cross-examination, he recalled that he had. The police had found a condom by the side of the bed. This somewhat incredibly led the trial judge to the following conclusion:

> "In my view, had he testified from recollection, he would have remembered this detail and if he honestly forgot this detail when presented with it, he would have acknowledged how and why he forgot it".

With respect, the learned trial judge ignores the fact that no one asked the Respondent if he had forgotten this detail and, if so, why. The Respondent's answer to the question raised no issues whatsoever.[69] There was no inherent conflict in the description of A.K.'s emotional state when she left the bedroom compared to the description provided by the Respondent and there was no onus on the Respondent to explain the contradictions. Significantly, this issue played a significant role in the trial judge's assessment of the credibility of the parties.[70] The reality is that his use of a condom had nothing to do with the case. Similarly, while A.K. stated that she had asked for lotion at the Respondent's house and he directed her to the washroom, his testimony that she may have and just did not recall was not relevant but did show that he was not professing to have an exact memory of everything that took place;[71]

iv) As already noted, the apparent contradiction perceived by the trial judge of the Respondent's evidence that A.K. was not crying but that she stormed out of the room in a hysterical state. The trial judge failed to appreciate that the Respondent was acknowledging that A.K. was upset and stated she could have been crying;

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[69] A.R., Volume II, Tab 5, p. 155, lines 23-40

[70] Trial Decision, A.R., Volume 1, Tab 1B, p. 14, lines 11-17

[71] A.R., Volume II, Tab 5, p. 144, line 40 – p. 145, line 1

v) The trial judge did not appreciate that A.K. did not testify that she had laid down and slept from the point she entered the room until she woke up having intercourse, but rather stated that she had *no recollection* of anything after reaching the bedroom door. A.K. acknowledged that she did not know what she said or did or what the Respondent did after she entered the bedroom. This raises the possibility that she did engage in consensual sexual activity; and

vi) The trial judge found that the sexual activity was non-consensual because she accepted what A.K. said the Respondent said about having sex with A.K.[72] The Respondent denied making these statements. Significantly, K.S., who had gone outside with A.K. and was outside with her for 15 minutes, never observed the Respondent come outside, and nor did he hear the Respondent make these statements.

62. The trial judge molded the testimony of both A.K. and the Respondent to her own version of what happened as opposed to considering what actually had been said. For example, as noted in the sentencing decision, the trial judge states that after A.K. ordered the pizza "At Mr. Mehari's suggestion, she went upstairs to lie down to get away from the crowd of people at the house".[73] What A.K. *actually* testified to was that the Respondent asked her if she wanted to go inside and wait for the food upstairs. The Respondent testified that he was walking upstairs, that he noticed A.K. standing by herself, and that A.K. asked him if there was somewhere that they could go that was quiet and private, and so they went upstairs. The Respondent's evidence was that A.K. did not say anything to him about being overwhelmed by the number of people in the house. (Similarly, K.S. did not recall her indicating she was overwhelmed by the number of people at the party.) The point being that neither A.K. nor the Respondent said that the Respondent asked A.K. to go upstairs and lay down.

63. Where A.K.'s evidence lacked detail or she did not recall events, or where, frankly, her evidence was contradicted by the main Crown witness, the trial judge found that this pointed *towards* her credibility. On the other hand, where the Respondent's evidence lacked detail or

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[72] Trial Decision, A.R., Volume 1, Tab 1B, p. 14, lines 17-23

[73] Respondent's Record, p. 2, lines 24-26

was contradicted or he did not recall certain events, this pointed to *his* lack of veracity. The double standard applied by the trial judge was manifest and clear, and an error of law.

64. Finally, the uneven scrutiny by the trial judge is illustrated as well by her failure to curtail the Crown's questioning at trial of the Respondent as to why he thought A.K. was lying or to stop the Crown from arguing this point in its summation.

65. The British Columbia Court of Appeal in *R v Kusk*,[74] set out in detail the reasons why the cross-examination of an accused asking him to speculate as to why a complainant would be lying can create such mischief. After outlining the numerous times that "high authority" has said such cross-examination is improper the Court stated the following:

> [11] Fourth, the illegal cross-examination here is dangerous because it is so beguiling, and because it so seamlessly melds many things which should be kept poles apart:
>
> (a) As the High Court of Australia recently explained, this cross-examination question subtly reverses the onus of proof in a number of ways, and puts various aspects of the onus on the accused. It puts them not merely on the defence, but on the accused himself: ***R. v. Palmer*** (20 Jan. 1998). That violates the most basic canons of criminal law, but under camouflage.
>
> (b) This cross-examination wrongly suggests that a complainant who is not deliberately lying must be correct, and that a complainant without an obvious motive to lie must be sincere. Neither thing need be true, still less true beyond a reasonable doubt: ***R. v. Palmer, supra***. Cf. ***R. v. L.B.*** (1993), 64 O.A.C. 15, 82 C.C.C. (3d) 189 (C.A.).
>
> (c) This mischievous cross-examination wrongly suggests that the witness is advocating a certain view, indeed advocating corollaries of that view. See ***R. v. Baldwin*** [1925] All E.R. Rep. 402, 18 Cr. App. R. 175, 178-79 (C.C.A.).That runs together the three roles of witness, accused, and defence counsel. When the accused testifies, he is a witness, not an advocate. The accused may try to cooperate in answering the forbidden question, or he may vaguely feel that something is wrong with it, but not one lawyer in 10,000, let alone a lay person, could say on the spot what that wrong thing was: ***R. v. Baldwin***. Here the accused vaguely saw the point, and his answer (quoted above) stumbled toward what the Court of Criminal Appeal said in 1925. Yet counsel and the trial judge missed the

[74] *R v Kusk*, 1999 ABCA 49 [*Kusk*]

> valid point which he was groping to express, albeit incompletely. And the jury may have felt, as the Court of Criminal Appeal points out, that inability to answer substantively indicated concealment.

66. The principles enunciated in *Kusk* were followed in *R v Horton*.[75] In *Horton* the Court made the point that it does not logically follow that because there is no apparent reason for a witness to lie, that the witness must be telling the truth. *Horton* was referred to with approval in *R v Thomas*.[76]

67. More recently, the Albert Court of Appeal in *R v B(MJ),*[77] reaffirmed the prohibition against cross-examination of an accused in such a manner. The Court quoted with approval *McWilliams; Canadian Criminal Evidence,* 4th ed, at 18-118, noting that such cross-examination undermines the presumption of innocence and the principle of reasonable doubt, and forces an accused who takes the stand to be an advocate rather than his proper role as a witness.[78]

68. In *B(MJ)* the Court stated that if the accused raises a motive for lying in his evidence in chief he can be subject to cross-examination, as was the situation on the facts before them. The Court however went on to observe that the accused was expressly asked on two occasions to speculate on the truth of his father's evidence.[79]

69. The Court noted at paragraph 50 that the prejudice caused by the improper cross-examination "… was exacerbated by Crown counsel, who suggested to the court, in final argument, that the father's evidence should be accepted because he did not have a motive to lie".[80] That very same argument was made by Crown counsel in the case at bar.[81]

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[75] *R v Horton,* [1999] 133 CCC (3d) 340 (BCCA) at paras. 14-20

[76] *R v Thomas,* 2006 BCCA 411 at para. 23

[77] *R v B(MJ),* 2012 ABCA 119 at para. 32 [*B(MJ)*]

[78] *B(MJ),* at para. 33

[79] *B(MJ),* at paras. 47, 48

[80] *B(MJ),* at para. 50

[81] A.R., Volume II, Tab 5, p. 175, lines 21-23; p. 181, lines 23-38

70. Challenging a witness on what they recall, whether due to credibility or reliability issues, is not the same as suggesting that they have a motive to lie. In this case, the Respondent never suggested a motive to lie on the part of the complainant. This was an issue raised solely by the Crown.

71. The failure on the part of the trial judge to curtail both the cross-examination at trial and argument about the significance of the cross-examination leads to the conclusion that the trial judge did not appreciate the improper nature of the cross-examination and argument and, significantly, that it should not have been considered by her in reaching her decision. While the trial judge did not specifically say that she relied on it in finding the Respondent guilty, there can be no question about the significance she attached to that evidence when she stated in her sentencing decision "… Mr. Mehari suggests the victim is trying to extort him, although he provided no evidence to back up his assertion".[82]

72. The trial judge did the very thing which appellate courts have repeatedly admonished trial judges to avoid, which is to subtly place an onus upon the accused to prove his innocence. This was both an error of law but also illustrated the uneven scrutiny by the trial judge.

73. It is not open to the Respondent to argue that A.K.'s exchange of Snapchat information with the Appellant at his residence three weeks earlier, her attending at his place for the pre and post parties, her riding with him in his vehicle, her dancing with him in a touching manner on the dance floor, or her acceptance of an invitation to go upstairs to his bedroom would lead to a conclusion that she was consenting to the sexual activity, and it is not referenced for that reason. This evidence however was significant and had to be considered in response to A.K.'s testimony in chief that she would never have engaged in sexual activity with the Respondent because she did not find him attractive, and did not talk to him and "snubbed him off" when he approached her. This evidence raised questions about her credibility and had to be at least considered by the trial judge in her analysis. It is clear that the trial judge did not appreciate the significance of this evidence.

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[82] Respondent's Record, p. 8, lines 21-24

74. Finally, the trial judge erred in her assessment of credibility because it was tainted by impermissible reliance on stereotypes and assumptions which is an error of law, an error brought about by her uneven scrutiny.

75. The courts have recognized that there are myths of expected behaviour of sexual assault victims that the criminal law seeks to eradicate. The courts have also recognized that, while these myths have operated to undermine a complainant's testimony in the past, they also can operate in reverse to artificially bolster a complainant's credibility on the basis that "no young woman would consensually engage in the alleged behaviour".[83]

76. The Ontario Court of Appeal in *Cepic* noted that the trial judge's use of those unacceptable assumptions about female behaviour as the basis for accepting the complainant's testimony and that the assumptions about what a woman would or would not do also unfairly undermines an accused's credibility.

77. In *Cepic* the Court found that the use by the trial judge of words like "implausible" and "nonsensical" to characterize various aspects of the appellant's testimony was "untethered" to the evidentiary base.[84]

78. Similarly, in this case, when the trial judge stated that A.K.'s "demeanour after the incident was consistent with non-consensual sex",[85] this is an error. When the trial judge rejected the testimony of the Respondent that A.K. was hysterical and said "this description does not follow from the story of consensual sex, nor is it explained by the injury suffered during consensual sex", the trial judge again is making the same mistake.

79. The trial judge's error was similar to that in *Howe*. The trial judge found that A.K. provided significant detail about her testimony, whether related to the incident or not, and that A.K. related things as she remembered them happening and that her testimony was

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[83] *R v Cepic,* 2019 ONCA 541 at paras. 11-14 [*Cepic*]
[84] *Cepic,* at para. 23
[85] Trial Decision, A.R., Volume 1, Tab 1B, p. 15, lines 1-2

chronologically consistent and flowed logically from one event to the next.[86] The trial judge's reasoning in this regard was flawed, and A.K.'s evidence was not consistent, and nor did it flow logically from one event to the next.

80. The Majority cited the examples of the errors made by the trial judge in her analysis:

i) Paragraph 36 and 37: the Respondent's testimony about wearing a condom. It was frankly an inconsequential fact and it is difficult to understand how the trial judge could have attached such significance to it;

ii) Paragraph 38: uneven scrutiny in relation to the trial judge's assessment of the description of what happened before and after A.K. left the Respondent's bedroom:

a) Whether the Respondent was yelling at people to leave (para. 39);

b) The trial judge accepted A.K.'s version of what allegedly was said outside and she relied heavily on this in convicting the Respondent. It was an error for the trial judge to rely on A.K.'s evidence on this point without addressing the contradictory evidence of K.S., evidence which corroborated the Respondent's testimony;

c) The trial judge found K.S. to be a careful witness and generally accepted his evidence. The trial judge addressed other areas of conflict between A.K. and the evidence of K.S.; however, the trial judge did not resolve or even mention the clear inconsistencies between A.K.'s account of what occurred outside and the description of K.S. To the extent that K.S.'s testimony could not be resolved with A.K. it constituted a frailty capable of undermining her evidence on that point and the trial judge failed to conduct any critical analysis of that contradiction;

d) The trial judge also rejected the Respondent's denial because she found his actions to be consistent with those words, an argument which the

[86] *Ibid,* p. 12, lines 25-28

Crown repeats.[87] However, neither the Crown nor the trial judge elaborate on what actions they are referring to, nor is it apparent from the record what those actions might be;

iii) The trial judge observed the Respondent to be a poor witness, in part because he volunteered no information while testifying and provided testimony that sounded rehearsed when describing the incident and failed to provide extraneous detail, which she said people often use when relating an event. The Majority found that it is difficult to understand what sort of explanation or extra detail the Respondent could have been expected to provide. One can reasonably conclude that the trial judge drew a negative inference of the Respondent's testimony was because he simply answered the questions he was asked. This is a further indication that the trial judge used a faulty methodology in assessing credibility and when measured against the way in which the trial judge resolved A.K.'s acknowledgment of the many gaps in recollection and how it did not impact on her credibility is another factor that suggests uneven scrutiny was applied.

81. In allowing the appeal, the Majority did not say that the trial judge's conclusion on credibility was necessarily wrong. The Court recognized that the jurisprudence is clear that an appellate court is not entitled to reassess credibility findings absent palpable and overriding error, and that uneven scrutiny of the evidence is not the same as palpable and overriding error. Rather, if the trial judge had applied the same exacting standard of scrutiny to the evidence of A.K. as she applied to the Respondent, the trial judge may well have been left with a reasonable doubt about his guilt. As a result, the Majority was persuaded that this ground of appeal must succeed and that a new trial should be ordered.

82. The Majority did not address the remaining grounds of appeal, except the issue of unreasonable verdict, which they rejected.

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[87] Appellant's Factum at para. 50

83. The Crown on this appeal simply repeats the same errors made by the trial judge in its analysis of the evidence, and relies heavily on the Dissent, which itself repeats the same errors made by the trial judge.

84. At paragraph 91, the Dissent holds that when the Respondent argued that the trial judge glossed over or failed to consider a number of significant inconsistencies in contradiction of the evidence of A.K. that this really was a request of the Court to conduct its own credibility assessment, which is not allowed under this line of argument. With respect, that was not the argument at all. The Respondent's submission was that while the trial judge carefully scrutinized the Respondent's evidence, the trial judge did not apply the same level of scrutiny to the inconsistencies and contradictions of the evidence of A.K.

85. The Dissent held that there is nothing identified as an inherent inconsistency in the trial judge's reasoning. Rather, at most it amounted to a complaint with respect to how the trial judge weighed and considered the evidence. With respect, that is exactly what constitutes uneven scrutiny.

86. The Dissent rejects the argument of insufficient reasons even though that argument was never made by the Respondent on appeal.[88]

87. The Crown's reliance on the reasoning in the Dissent we respectfully submit provides no assistance to it on appeal. The trial judge did rely on the statement impugned to the Respondent outside after the alleged assault as an admission of guilt on his part. This significant piece of evidence had to be carefully reviewed and to completely ignore the contradictory testimony of K.S. was an error.

88. The testimony about the interaction between A.K. and the Respondent at the bar was not tendered to show she was more likely to have consented. It was tendered as a direct contradiction of her evidence that she did not want to have anything to do with the Respondent and she would not have engaged in sexual activity with him because she did not find him

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[88] *Ibid*, para. 102

attractive. That was directly contradicted by the evidence of K.S. who observed A.K. dancing with the Respondent in extremely close quarters while at the club. This is a direct contradiction to her testimony that when the Respondent approached her she snubbed him and walked away.

89. A review of the Trial Judgment and the facts found in the transcript illustrates the uneven scrutiny that took place. It was a miscarriage of justice and the Majority had ample grounds to intervene.

90. The Appellant's extensive review of the evidence in an effort to establish that there was some evidence on which the Respondent could have been convicted is of no assistance on this appeal. This is not an appeal from the finding of the Majority that this was an unreasonable verdict, or that there was a failure to give reasoning, or that the credibility finding was a palpable and overriding error. The issue was whether uneven scrutiny was applied.

91. The Majority correctly instructed itself to the law and no error of law has been established by the Crown in this appeal. There was ample evidence on the record that allowed the Majority to come to the conclusion that the trial judge had applied uneven scrutiny in her analysis of the evidence. It is respectfully submitted that no basis has been established for interfering with the Court of Appeal decision.

PART IV – SUBMISSION ON COSTS

92. The Respondent makes no submission as to costs.

PART V – NATURE OF THE ORDER SOUGHT

93. The Respondent respectfully submits that the appeal of the Attorney General should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of October, 2020.

McDOUGALL GAULEY LLP
Per: as agent for

AARON A. FOX, Q.C.
Counsel for the Respondent,
Awet Mehari

PART VI - IMPACT OF PUBLICATION BAN ORDER ON REASONS

94. 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