SCC No.: 40095

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HIS MAJESTY THE KING

APPELLANT
(Respondent)

AND:

CHRISTOPHER JAMES KRUK

RESPONDENT
(Appellant)

APPELLANT'S FACTUM
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In *R. v. Kruk,* 2022 BCCA 18,[1] the Court of Appeal for British Columbia (BCCA) overturned the respondent's conviction for sexually assaulting an intoxicated woman by inserting his penis inside her vagina while she was asleep.[2] The BCCA took issue with the trial judge's reasons for rejecting the defence theory that the complainant, though sincere, was mistaken about feeling the physical sensation of vaginal penetration. The trial judge rejected the defence theory because, among other reasons, he accepted her testimony that she was certain she felt the respondent's penis in her vagina and it was extremely unlikely a woman would be mistaken about that feeling.

2. The BCCA determined that the trial judge's assessment of the inherent improbability of the defence hypothesis rested on speculative reasoning not grounded in the evidence. The BCCA concluded that the judge "overcame" his concerns on the central issue of whether sexual activity occurred based on the likelihood of a woman being mistaken about feeling a penis in her vagina, which was not "the proper subject of judicial notice or common sense". Whether a woman might be mistaken about having a penis in her vagina raised questions of "neurology, physiology, and psychiatry" requiring expert evidence. The BCCA also suggested the complainant ought to have been asked what having the respondent's penis in her vagina felt like and why she was so certain.

3. As an overarching point, the appellant says the BCCA ought to have deferred to what was a credibility assessment made by the trial judge. While the judge acknowledged there were admitted gaps and uncertainties in the complainant's recollection giving rise to reliability concerns, he accepted her evidence on the core issue that she felt the respondent's penis in her vagina. The reliability concerns identified by the BCCA were solely based on a defence theory not supported by any evidence. This is the context in which the BCCA found fault with the trial judge's credibility finding.

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[1] Appellant's Record (AR) Vol I – Tab 1C, Pg 9-25 (BCCA Reasons)

[2] *R. v. Kruk,* 2020 BCSC 1480: AR Vol I – Tab 1D, Pg 26-41 (BCSC Reasons)

4. With leave, the appellant argues the BCCA erred in concluding that the trial judge engaged in speculative reasoning. It says the BCCA did so in three respects.

5. First, the BCCA did not read the reasons functionally and contextually when it characterized the trial judge's manner of expression, in a single sentence of the reasons for judgment, as demonstrating reversible error. There was no basis in the reasons for the BCCA's assertion that the judge had reliability concerns that had to be "overcome". The trial judge did not express concerns with the complainant's core testimony about feeling her vagina being penetrated, and he was not required to give effect to a defence theory that she was mistaken based on general impairment by alcohol. The BCCA also disregarded the circumstantial evidence the judge noted in support of the offence having occurred, and the purposeful and goal-driven behaviour the complainant engaged in when she awoke – all of which supported his factual finding which, in any event, was owed deference.

6. Second, the judge did not make a factual finding about what "*any* complainant *would* feel" based on "judicial notice". Rather, the trial judge reasonably tested the defence hypothesis against the common-sense inference that a woman awoken by a serious assault on her bodily integrity is unlikely to mistake that sensation, in the context of this complainant who credibly testified that she was not mistaken. The trial judge was entitled to rely on common sense and life experience in his decision-making.

7. Third, it *is* a matter of common sense that a credible witness would not easily mistake sensations associated with a traumatic assault. There was nothing wrong with the trial judge's assessment of the objective implausibility of this complainant being mistaken about the physical sensation of vaginal penetration where she credibly testified that she knew what she felt.

8. If the rules against ungrounded common-sense assumptions and stereotypical inferences are too readily used to displace the highly deferential standard of review that governs credibility findings, that standard is diluted, and trial judges are hampered in their ability to effectively try a case. Further, the BCCA's reasoning hearkens back to a time where the law treated the evidence of sexual assault complainants as inherently untrustworthy. The Court's criticism about the sufficiency of evidence elicited from the complainant in this case invites presumptively inadmissible sexual history evidence and demands her to describe unnecessary detail that would

be difficult to articulate, and contrary to measures implemented by Parliament and acknowledged by Canadian courts to protect the dignity of sexual assault complainants.

9. Should this Court agree that the trial judge's manner of expression did not undermine his credibility assessment, the appropriate remedy is to restore the conviction. Although the BCCA did not address the respondent's alternate ground of appeal regarding possible misapprehensions of evidence, his arguments were without merit and this Court is equally well situated to make that determination.

B. The Evidence at Trial

10. Around midnight on May 26, 2017, the respondent discovered the 19-year-old complainant sitting on a curb alone, crying, and extremely intoxicated in the Gastown area of downtown Vancouver. Although he did not know the complainant, he offered to help her get home on the SkyTrain. She called her parents, who were extremely worried, to tell them that the respondent was helping her get home. She gave them the respondent's phone number because her phone battery was dying.[3]

11. At 2:14 a.m., the respondent called the complainant's mother to tell her the complainant was on her way home in a cab. But the complainant never made it home. The respondent had instead taken her to his home. The complainant's mother called the respondent repeatedly, but he did not pick up.[4]

12. Due to her state of intoxication, the complainant had no memory of getting off the SkyTrain and taking a cab to the respondent's residence. The next thing she remembered was waking up with the respondent's penis inside her vagina. She was lying on the respondent's bed, with the respondent on top of her, and her pants had been removed. She tried to push him off her twice and

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[3] AR Vol I – Tab 1D, Pg 27-28 (BCSC Reasons, ¶¶5-6); AR Vol I – Tab 1C, Pg 11 (BCCA Reasons, ¶¶7-9)

[4] AR Vol I – Tab 1D, Pg 29-30 (BCSC Reasons, ¶¶15, 17); AR Vol I – Tab 1C, Pg 11-12 (BCCA Reasons, ¶¶10-12)

was successful on the second attempt.[5] From the time she woke up to the point where she was able to push him off her, approximately 20 to 30 seconds elapsed.[6]

13. The complainant did not think the respondent was wearing a condom and did not believe that he ejaculated. When asked whether she felt him moving at all when he was inside of her, she said, "No, not when I woke up".[7]

14. In cross-examination, the complainant disagreed that she woke up because the respondent was shaking her and that she did not know what he was doing when she woke up: "…I did know, I knew what he was doing."[8] She disagreed with the suggestion that she was "putting two and two together", that she woke up with no pants on and a man on top of her, and she assumed what was happening: "No, I could feel it."[9]

15. The complainant testified that she pushed the respondent off her twice while asking where her dad was. She agreed that she could not recall whether he was wearing pants or a shirt.[10] She then got up to look for her phone and wandered about the respondent's house looking for a charger. She was unable to operate a light switch in the home, so she thought there was no electricity at the residence. She observed that there were children's toys in the living room. About five to ten minutes later, she heard a knock at the door. The respondent went downstairs to answer it.[11]

16. She agreed that she was still experiencing the effects of intoxication "a little bit", disagreeing with defence counsel's suggestion that it was "a lot at that point."[12] There was no evidence of the complainant's blood alcohol concentration at the time of the alleged sexual assault.

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[5] AR Vol II – Tab 17, *Complainant's Evidence,* 15(45)-16(46); AR Vol I – Tab 1D, Pg 28-29 (BCSC Reasons, ¶¶7-9); AR Vol I – Tab 1C, Pg 12 (BCCA Reasons, ¶13)

[6] AR Vol II – Tab 17, *Complainant's Evidence,* 50(33-37)

[7] AR Vol II – Tab 17, *Complainant's Evidence,* 16(11-12), 16(34-38)

[8] AR Vol II – Tab 17, *Complainant's Evidence,* 44(3-36), 51(34-42), emphasis added

[9] AR Vol II – Tab 17, *Complainant's Evidence,* 50(38-42), emphasis added

[10] AR Vol II – Tab 17, *Complainant's Evidence,* 47(22)-50(16)

[11] AR Vol II – Tab 17, *Complainant's Evidence,* 17(1-35), 21(13-17)

[12] AR Vol II – Tab 17, *Complainant's Evidence,* 50(43-47)

A medical urine sample taken between about two and a half and seven hours after the assault revealed that the complainant's blood alcohol concentration was nearly three times the legal limit for operating a motor vehicle.[13]

17. The complainant's parents and brother located the respondent's address by calling various taxi companies.[14] Just after 4:00 a.m., the complainant's father knocked on the respondent's door. The respondent answered, wearing only swimming trunks. The complainant heard her father's voice and ran outside in her underwear. The complainant went to the hospital later that morning.[15]

18. The sexual assault nurse examiner observed a one-centimetre linear abrasion on the posterior fourchette, which extended into the complainant's vagina that was tender upon palpitation.[16]

19. The defence did not challenge the complainant's credibility.[17] The defence theory was that the complainant was disoriented and confused when she woke up, and that due to her extreme intoxication her "ability to perceive reality was compromised." In other words, she was so drunk when she woke up that she could not reliably testify that she felt the respondent's penis inside her

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[13] AR Vol I – Tab 1C, Pg 13 (BCCA Reasons, ¶18)

[14] AR Vol I – Tab 1D, Pg 30 (BCSC Reasons, ¶19); AR Vol II – Tab 18, *Complainant's Father's Evidence,* 101(28)-102(9), 103(15)-105(31); Tab 19, *Complainant's Brother's Evidence* 119(42)-120(26), 123(20-39)

[15] AR Vol I – Tab 1D, Pg 4 (BCSC Reasons, ¶¶12-13); AR Vol I – Tab 1C, Pg 13, 22 (BCCA Reasons, ¶¶16-19, 58)

[16] AR Vol I – Tab 1D, Pg 31 (BCSC Reasons, ¶24); AR Vol I – Tab 1C, Pg 13 (BCCA Reasons, ¶19). Crown counsel abandoned the application to qualify Ms. Isaacs as an expert and called her as a lay witness after the trial judge strongly indicated his view that a nurse is not qualified to give opinion evidence regarding mechanism of injury. [AR Vol II – Tab 22, 127(26)-136(25)]

[17] AR Vol I – Tab 1C, Pg 22 (BCCA Reasons, ¶57); AR Vol II – Tab 25, *Defence Closing Submissions,* 320(21-26)

vagina. The defence also theorized that the complainant woke up, panicked, and assumed the worst – convincing herself that something bad must have happened.[18]

20. The respondent testified that he sent the complainant home in a cab, but the cab driver brought her back because she was too intoxicated. He gave various reasons for why he did not call the complainant's parents including that he did not check his phone, his phone was dead, and his phone was charging but set on silent.[19] The respondent helped her inside and gave her some water. She spilled the water on her pants, so he sent her to his room and gave her some pajamas to change into. He went in to check on her and found her passed out on his floor with her pants lowered to her ankles. He put a blanket over top of her and tried unsuccessfully to wake her. He fell asleep for a bit. When he awoke, he tried again to wake the complainant. This time, she awoke, startled.[20] She began wandering around his house looking for a phone charger. She kicked her pants off as she left his room. She was "freaked out" by the presence of children's toys in the respondent's home.[21]

21. The respondent denied any sexual activity between him and the complainant. He did not explain why he was undressed or when he had changed into his shorts.[22]

22. The respondent's father testified. Defence counsel stated that his evidence "was not overly significant" other than to contradict the complainant's belief that there was no electricity at the residence.[23]

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[18] AR Vol II – Tab 25, *Defence Closing Submissions*, 303(28-44); 320(21)-321(5)

[19] AR Vol I – Tab 1D, Pg 39-40 (BCSC Reasons, ¶¶65-66)

[20] AR Vol I – Tab 1D, Pg 30-34 (BCSC Reasons, ¶¶29-34); AR Vol I – Tab 1C, Pg 12 (BCCA Reasons, ¶11, 14)

[21] AR Vol I – Tab 1D, Pg 34 (BCSC Reasons, ¶¶35-36); AR Vol I – Tab 1C, Pg 12 (BCCA Reasons, ¶15)

[22] AR Vol I – Tab 1D, Pg 35 (BCSC Reasons, ¶¶41-42)

[23] AR Vol II – Tab 25, *Defence Closing Submissions,* 317(36)-318(12)

C. BCSC Reasons

23. The only issue at trial was whether the respondent inserted his penis inside the complainant's vagina while she was sleeping, as she described.[24] After summarizing the evidence, the trial judge commented generally on the reliability and credibility considerations applicable to the witnesses at trial. Referencing the large gaps in the complainant's memory, he observed that the complainant was obviously unreliable due to her extreme intoxication.[25]

24. The trial judge observed that the family members of both the complainant and the respondent were "subtly and understandably biased" and that at times each of them proved to be a poor historian. With respect to the respondent's father, the trial judge stated:[26]

> […] there were some issues in his testimony separating what he observed from things that were told to him by his son. He gave the rather incredible evidence that he failed to notice a young lady exiting his home at four in the morning while not wearing pants.

25. The trial judge then turned to the "issues in the case". The trial judge provided detailed reasons why the respondent's evidence was not credible. He rejected the respondent's evidence "on several key issues", including his evidence regarding the state of "undress" of the parties at the time the complainant's father arrived. He found the respondent was lying when he told the police he was fully clothed and that this was "an extremely important fact." He held the respondent's police statement and his trial testimony were "obviously quite inconsistent" regarding the timing of his offer of pyjamas. He also "flatly" rejected the respondent's evidence regarding the reasons he provided for failing to contact the complainant's parents after 2:14 a.m.

26. The trial judge went on to consider whether he was satisfied beyond a reasonable doubt that the offence occurred, focussing on the complainant's "core assertion". The trial judge noted that the complainant was adamant that she felt the respondent's penis inside her vagina and that she knew what she was feeling. The trial judge accepted her evidence. He observed that:

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[24] AR Vol I – Tab 1D, Pg 36 (BCSC Reasons, ¶50)

[25] AR Vol I – Tab 1D, Pg 35 (BCSC Reasons, ¶48)

[26] AR Vol I – Tab 1D, Pg 35 (BCSC Reasons, ¶49)

> [The complainant's] evidence is devoid of detail, yet she claims to be certain that she was not mistaken. She said she felt [the respondent's] penis inside her and she knew what she was feeling. In short, her tactile sense was engaged. It is extremely unlikely that a woman would be mistaken about that feeling.[27]

27. In concluding that the respondent was guilty of sexually assaulting the complainant, the trial judge referenced the body of circumstantial evidence which corroborated her testimony:

> [69] There is some circumstantial evidence consistent with a sexual encounter having occurred between the accused and the complainant. Obviously, at some point while the complainant was in the accused's bedroom, the accused took off all of his clothes, and at some undetermined time put on swimming trunks. More importantly, the complainant's pants were completely removed. I have considered the possibility that the complainant for some reason removed her own pants and think such a notion is fanciful. I conclude that it was the accused who removed her pants.
>
> [70] Finally, I consider the failure of the accused to contact the complainant's parents in the overall circumstances here to be consistent with an intention to take sexual advantage of a young woman he knew to be in an extremely compromised and vulnerable state. That desire culminated in him removing her pants, likely after completely disrobing himself, and inserting his penis into her vagina. That act is likely what awakened the complainant, as she essentially described in her testimony.

D. BCCA Reasons

28. On appeal, the respondent alleged the trial judge took improper judicial notice of a "highly contentious fact" – the likelihood of a woman being mistaken about feeling a penis inside her vagina.[28] The BCCA agreed, holding that the trial judge largely "overcame his concerns on the central issue of whether sexual activity occurred" by making a factual finding that was not grounded in the evidence and was not the proper subject of judicial notice.[29]

29. The BCCA rejected the Crown position that the impugned statement was an application of common sense, and instead held that the likelihood of a woman being mistaken about sensing vaginal penetration "engages questions of neurology (the operation of the body's sensory system), physiology (the impact of alcohol on perception, memory and the body's sensory system) and

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[27] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68)

[28] AR Vol I – Tab 1C, Pg 10 (BCCA Reasons, ¶4)

[29] AR Vol I – Tab 1C, Pg 10 (BCCA Reasons, ¶5)

psychiatry (the impact of alcohol and/or trauma on perception and memory)".[30] The BCCA also commented that the Crown did not ask the complainant "to put into words what [the respondent's penis inside her vagina] felt like, whether she experienced any pain, whether she had been injured or even why she felt so confident about her testimony."[31]

30. The BCCA acknowledged that "the judge clearly found that, despite significant concerns regarding the reliability of the complainant's testimony generally, he was satisfied that 'her tactile sense was engaged' and that [the respondent] had inserted his penis into her vagina."[32] The Court noted that it was implicit in the trial judge's reasons that he rejected the defence theory of the case.[33] It then observed that "[t]he *what* of the judgment is clear. But what about the *why*?"[34]

31. The BCCA found that "the primary reason the judge accepted the complainant's core assertion is contained in a single sentence: 'It is extremely unlikely that a woman would be mistaken about that feeling.'"[35] The Court concluded that the trial judge erred "by engaging in speculative reasoning that was not grounded in the evidence."[36]

32. Having allowed the appeal on this basis, the BCCA said it did not need to address the alternate ground of appeal regarding possible misapprehensions of the evidence made by the trial judge.[37]

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[30] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶67)

[31] AR Vol I – Tab 1C, Pg 22 (BCCA Reasons, ¶55)

[32] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶62)

[33] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶62)

[34] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶63)

[35] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶65), emphasis added

[36] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶68)

[37] AR Vol I – Tab 1C, Pg 11 (BCCA Reasons, ¶6)

PART II – QUESTIONS IN ISSUE

33. **ISSUE 1**: The BCCA erred in concluding that the trial judge relied on speculative reasoning in accepting the complainant's evidence. The trial judge found the complainant's evidence that she felt a penis in her vagina credible and he did not have any reliability concerns with her testimony because she was certain about what she felt, and she was unlikely to be mistaken in her unwavering assertion that her own bodily integrity was violated. The trial judge was entitled to rely on common sense and life experience to assess the inherent improbability of a defence hypothesis in his evaluation of her evidence.

34. **ISSUE 2**: There was no merit to the respondent's alternate argument regarding alleged misapprehensions of evidence, and the appropriate remedy is to restore the conviction.

PART III – STATEMENT OF ARGUMENT

ISSUE 1: The BCCA erred in concluding that the trial judge relied on speculative reasoning in accepting the complainant's evidence

35. The BCCA erred in overturning the trial judge's credibility finding on the basis that he relied on speculative reasoning not grounded in the evidence. That is because: (a) the BCCA did not read the reasons functionally and contextually in finding reversible error in the trial judge's manner of expression; (b) the trial judge reasonably assessed the inherent improbability of the defence hypothesis; and (c) there was nothing wrong with the judge's assessment of the objective implausibility of the complainant being mistaken about feeling vaginal penetration where she credibly testified that she knew what she felt.

A. The BCCA did not read the reasons functionally and contextually

36. The BCCA's finding that the judge's acceptance of the complainant's evidence was based solely on impermissible reasoning is not supported by a functional and contextual review of the reasons. Notwithstanding the BCCA's acknowledgement that "the trial judge's reasons must be read contextually, functionally and as a whole",[38] the Court went on to conclude that "the primary reason the judge accepted the complainant's core assertion is contained in a single sentence: 'It is

[38] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶64)

extremely unlikely that a woman would be mistaken about that feeling'".[39] The BCCA held that the trial judge "largely overcame his concerns on the central issue of whether sexual activity occurred" based on the likelihood that a woman would be mistaken, as opposed to whether this complainant was mistaken.[40]

37. The BCCA erred in its interpretation of the reasons in three respects. First, the BCCA read into the trial judge's reasons reliability concerns that the judge did not have by equating intoxication with blanket unreliability that had to be "overcome". Second, the BCCA ignored the factual findings and the evidentiary record that supported the trial judge's verdict in holding that the "primary reason" for the judge's acceptance of the complainant's evidence was established by a single sentence. Third, the BCCA finely parsed the language used by the trial judge, ascribing undue significance to two words: namely, the words "a woman".

38. This Court has emphasized the need to review a trial judge's language with care and in context. Appellate review "does not call for a word-by-word analysis …The task is to assess the overall, common sense meaning, not to parse the individual linguistic components."[41] On a functional and contextual reading of these reasons, the trial judge committed no reversible error. The BCCA was obliged to give deference to what was a straight-forward credibility assessment of a witness who was certain about an assault on her bodily integrity.[42]

(i) ***The BCCA unreasonably read reliability concerns into the trial judge's reasons***

39. The BCCA gave effect to a defence theory at trial that did not cause the trial judge to doubt the complainant's reliability on the critical issue of whether she felt a penis in her vagina. It did so by failing to review the reasons in the manner prescribed by this Court, and by equating intoxication with an automatic absence of reliability that had to be "overcome", contrary to well-established authority.

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[39] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶65), emphasis added

[40] AR Vol I – Tab 1C, Pg 11, 23-24 (BCCA Reasons, ¶¶5, 66), emphasis added

[41] *R. v. Gagnon,* 2006 SCC 17, ¶19; *R. v. Laboucan,* 2010 SCC 12, ¶¶16-17; *R. v. G.F.,* 2021 SCC 20, ¶69

[42] *G.F.*, ¶81

40. This was a straight-forward credibility case, and the trial judge properly applied the *W.(D.)* framework analysis.[43] Having rejected the respondent's evidence, the trial judge turned to consider whether the complainant's evidence proved beyond a reasonable doubt that the offence occurred.[44]

41. While the trial judge referenced "massive gaps in [the complainant's] memory" on account of her "state of extreme intoxication" as an introductory comment with respect to reliability considerations,[45] he focussed his analysis on the complainant's evidence about waking up with the respondent's penis inside her vagina.[46] Put another way, the judge acknowledged that the complainant was an unreliable historian about the entire sequence of events that evening because she admittedly did not remember some things that occurred before she woke up.[47] However, when he subsequently turned to the "live issues in this case",[48] the trial judge accurately noted that the complainant was resolute that she felt a penis in her vagina.[49] She knew what the respondent was doing. She did not think or assume something happened. She felt it.[50]

42. Ultimately, the trial judge accepted the complainant's core evidence that her tactile senses were engaged when she felt the respondent's penis inside of her.[51] As such, he expressed no concerns with the complainant's reliability on the central issue. The BCCA recognized that the judge resolved the case on this basis: "he was satisfied that 'her tactile sense was engaged' and that Mr. Kruk had inserted his penis into her vagina".[52]

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[43] *R. v. W.(D.),* 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742

[44] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68)

[45] AR Vol I – Tab 1D, Pg 36 (BCSC Reasons, ¶48)

[46] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68)

[47] AR Vol I – Tab 1D, Pg 36 (BCSC Reasons, ¶48)

[48] AR Vol I – Tab 1D, Pg 36 (BCSC Reasons, ¶50)

[49] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68)

[50] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68); AR Vol II – Tab 17, *Complainant's Evidence,* 44(3-36), 50(38-42), 51(34-42)

[51] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68)

[52] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶62)

43. The trial judge had "the benefit of the intangible impact of conducting the trial".[53] He was best placed to weigh the complainant's unequivocal testimony about what she *did* feel against a mere assertion that she imagined a penis in her vagina when she woke up. He made a factual finding based on the complainant's clear testimony, implicitly rejecting the defence theory.

44. The judge did not need to "overcome" reservations he did not have and the BCCA erred in imputing concerns to him, or suggesting they were concerns he was required to have.[54] The BCCA elevated the defence theory, which had no direct evidentiary basis and could itself have been characterized as speculative, into a factor that positively impaired the reliability of all the complainant's evidence. Effectively, the BCCA created a presumption of unreliability. This explains why the BCCA determined that the judge's acceptance of the complainant's core evidence was insufficient to explain the "why" of his judgment.[55] Something more, on the BCCA's analysis, was required to explain how the trial judge "overcame" the complainant's alleged unreliability to accept her core evidence even though the trial judge expressed no such reservations.

45. A presumption of unreliability is contrary to established jurisprudence. It is wrong in law to equate intoxication with an automatic absence of reliability:

- *Kishayinew*:[56] "The trial judge demonstrated an understanding that a witness who has suffered memory blackouts cannot testify as to what occurred during periods when he or she has no memory but that factor alone does not render his or her other evidence unreliable … an absence of memory of certain portions of the crucial events does not automatically create an absence of reliability for the witness's other testimony."

- *Ghadghoni*:[57] "Nothing in either the appellant's or the complainant's narrative of events or defence counsel's submissions suggests that the complainant was impaired by alcohol

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[53] *G.F.,* ¶81

[54] AR Vol I – Tab 1C, Pg 11 (BCCA Reasons, ¶5)

[55] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶63)

[56] *R. v. Kishayinew,* 2019 SKCA 127, ¶74 *per* the dissent, rev'd 2020 SCC 34

[57] *R. v. Ghadghoni,* 2020 ONCA 24, ¶33

when she woke up to the extent that she could not be a reliable historian of what she experienced as she woke up."

- *M.B.*:[58] "The trial judge carefully reviewed the complainant's evidence and was alive to its frailties. The trial judge accepted the complainant's explanation for her poor memory and found that it did not affect her credibility in relation to her core memory of the sexual assault."

- *Rand*:[59] "The complainant's memory loss, which was probably brief, did not undermine her credibility or the reliability of her evidence on the crucial issue of whether she consented to the sexual acts with these two strangers … For the purpose of determining whether the *actus reus* of the offence was committed, the relevant period of time was when the sexual touching was occurring …"

- *Kinney*:[60] The trial judge "appreciated there were gaps in C.G.'s recollection due to her intoxication but found nothing to suggest her account was concocted or imagined".

- *M.R.*:[61] "In my view, in this part of his reasons, the trial judge was turning his mind to the critical issue of whether the complainant was so intoxicated that it prevented him from accurately perceiving what was happening to him. His reference to the complainant's blood alcohol content without mentioning the other evidence on the complainant's intoxicated level was unfortunate. However, leaving aside whether extreme intoxication is capable of causing someone to lose the ability to distinguish between dream and reality, there was ample evidence to ground a finding that the complainant was not so intoxicated that he hallucinated or was in a delusional state."

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[58] *R. v. M.B.,* 2018 ONCA 399, ¶5

[59] *R. v. Rand,* 2012 ONCA 731, ¶17

[60] *R. v. Kinney,* 2013 YKCA 5, ¶16

[61] *R. v. M.R.,* 2021 ONCA 572, ¶28

- *Perrone*:[62] "I am of the view that the trial judge, through her reasons, has confirmed that she assessed both the credibility and reliability of the witness taking into account the areas of concerns which she outlined. Having done so, it was open to her to find that the complainant's evidence should be accepted on the core issue of whether the events occurred as she described them."

46. The BCCA's analysis stemmed from the faulty premise that the trial judge needed to overcome a reliability concern that he clearly did not have, and that he was not obliged to have just because the complainant was intoxicated. Although purporting to recognize that "highly intoxicated complainants are [capable] of giving reliable testimony about the invasive feeling of penises in their vaginas",[63] the BCCA erected a barrier for this trial judge to "overcome" to be able to legitimately accept the complainant's evidence that she knew what she felt, when that barrier had no foundation in his decision or in a correct application of the law.

(ii) ***The BCCA ignored relevant factual findings and evidence that supported the trial judge's acceptance of the complainant's evidence***

47. The BCCA erred when it found that the "primary reason" the judge accepted the complainant's testimony was because of "the extreme unlikelihood that any complainant, even one who was highly intoxicated, would be mistaken about the feeling of a penis inside their vagina".[64] This view is not supported by the reasons or the record. The impugned sentence was simply the judge's rejection of the speculative defence theory, and it was not central to his acceptance of the complainant's evidence.

48. The first problem with the BCCA's interpretation of the reasons flows from its view that the trial judge could not accept the complainant's evidence as reliable without "overcoming" a defence theory. This skewed the BCCA's interpretation of what the judge said, in the context of the overall, common sense meaning of the reasons read as a whole. The primary reason the judge accepted the complainant's testimony was manifestly because he believed her. It was open to him

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[62] *R. v. Perrone,* 2014 MBCA 74, ¶48, aff'd 2015 SCC 8

[63] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶68)

[64] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶65)

to accept her evidence on the core issue of whether the sexual activity occurred. There was simply no substance to the defence assertion that she concocted feeling a penis in her vagina when she woke up and yet credibly testified that she knew what she felt and was not mistaken.

49. The second problem is that the BCCA disregarded the evidence the judge mentioned in support of his credibility assessment. By seizing upon a single sentence in the judgment wherein the trial judge explained why he did not give effect to what he regarded as a speculative challenge mounted by defence, the BCCA did not give due regard to the whole of the decision.

50. The BCCA only noted "the parties' state of undress" as supportive of the judge's finding that the offence occurred.[65] It ignored that the judge specifically found: the respondent removed the complainant's pants; he deliberately failed to contact the complainant's parents to advise them about her whereabouts "with an intention to take sexual advantage of a young woman he knew to be in an extremely compromised and vulnerable state," which he then acted upon; the complainant's tactile senses were engaged when the respondent penetrated her with his penis; and that act is likely what awakened her as she described in her testimony.[66]

51. If the BCCA had read the reasons "contextually, functionally and as a whole",[67] the Court could not have concluded that the "primary reason" the judge accepted the complainant's testimony was expressed in a single sentence given: (1) the judge addressed the complainant's unequivocal testimony in the preceding three sentences;[68] and (2) in the next two paragraphs, the judge outlined circumstantial evidence consistent with a sexual encounter having occurred.[69]

52. The third problem with the BCCA's interpretation is that it was antithetical to the presumption of correct application of the law.[70] The trial judge's rejection of a flimsy defence theory was not the mainstay of his conviction. The judge's reasons demonstrate that he was

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[65] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶65)

[66] AR Vol I – Tab 1D, Pg 40-41 (BCSC Reasons, ¶¶69-70)

[67] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶64)

[68] AR Vol I – Tab 1D, Pg 40 (BCSC Reasons, ¶68)

[69] AR Vol I – Tab 1D, Pg 40-41 (BCSC Reasons, ¶¶69-70)

[70] *G.F.*, ¶82

sensitive to the correct burden and standard of proof, and that he made a genuine evaluation of this complainant's evidence.

53. The fourth problem is that the BCCA declined to consider all the evidence that justified the trial judge's decision.[71] Again, by seizing upon a single sentence in the judgment, the Court found that it did not need to consider the record: "I agree with the Crown that there was a body of evidence on which the trial judge could convict … my task on appeal is to conduct a contextualized review of the reasoning path reflected in the reasons for judgment".[72] A contextualized review, however, requires the reviewing court to consider whether factors supporting or detracting from credibility are clear from the record.[73] Reasons for judgment should not be read as a verbalization of the entire reasoning process engaged in by the trial judge in reaching a verdict.[74]

54. There was ample support in the record for the trial judge's acceptance of the complainant's testimony that she was not mistaken. The complainant engaged in purposeful and goal-driven behaviour when she awoke; she disclosed the assault immediately to her family and to the police; she attended the hospital and underwent an invasive sexual assault examination; and that examination revealed an injury to her vagina and corresponding pain upon palpitation.[75] Much of her testimony in this regard was corroborated.

55. Had the BCCA focussed on the complainant's "actual capacities as demonstrated by her ability to perceive, recall and recount the events in issue, in light of the totality of the evidence"[76] it would have appreciated that the trial judge's finding on credibility was not primarily based on generalizations. It was the defence theory that was founded on generalizations, which the trial

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[71] *G.F.,* ¶¶70-71*; R. v. R.E.M.,* 2008 SCC 52*,* ¶¶38-40

[72] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶61)

[73] *R.E.M.,* ¶51

[74] *R. v. Morrissey,* 1995 CanLII 3498 (ONCA), p.16

[75] *See* AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶60): the BCCA considered this evidence, but not in its proper context.

[76] *R. v. Slatter,* 2020 SCC 36, ¶2

judge rejected. In contrast, the judge's factual finding that the offence occurred as described by the complainant was fundamentally based on a principled engagement with all the evidence.

(iii) ***The BCCA engaged in parsing of language***

56. The BCCA parsed the trial court's language contrary to this Court's recent direction in *G.F.,*[77] and long-standing jurisprudence that a trial judge's perhaps imperfect articulation "should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence."[78]

57. In addition to assigning undue significance to a single sentence, the BCCA seized on two words in that sentence where the trial judge expressed himself in a general way about whether "a woman" would be mistaken.[79] As such, the BCCA's analysis turned on what amounted to the judge's use of an indefinite article.[80] The Court held, "there is no need to parse and there are no ambiguities".[81] Despite instructing itself on the legal principles, the BCCA committed the very error it identified by applying a word-by-word analysis contrary to this Court's direction to consider overall common-sense meaning.

58. By restricting its analysis to an individual linguistic component of the judge's reasons, the BCCA removed the context of the live issue at trial from its assessment of the reasons. The judge was plainly aware of the central issue, namely whether the whole of the evidence reliably established that the respondent inserted his penis into the complainant's vagina.[82] The judge's use of general terminology in one sentence did not detract from what was his clear rejection of the defence theory that *this* complainant's core testimony was unreliable by reason of intoxication.

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[77] *G.F.,* ¶¶69-82

[78] *R. v. B.(C.R.)*, 1990 CanLII 142 (SCC), [1990]1 S.C.R. 717, p.737

[79] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶65), emphasis added

[80] Substitute "this woman" for "a woman" and presumably the judge's reasons would be unassailable on the BCCA's reasoning.

[81] AR Vol I – Tab 1C, Pg 23 (BCCA Reasons, ¶65)

[82] AR Vol I – Tab 1C, Pg 22 (BCCA Reasons, ¶59)

59. On a fair reading of the reasons, the trial judge was not purporting to make a factual finding about "what *any* complainant *would* feel".[83] He did not make a factual finding based on judicial notice. Rather, he tested the defence hypothesis against common sense. Viewed in this way, the trial judge's reference to what "a woman" would reliably sense was directly responsive to the defence theory that, in effect, it was plausible that "a woman" could mistakenly think that there was a penis in her vagina (as there was no evidence this complainant did so – she denied that she was so mistaken).

60. The trial judge applied the proper legal test: he examined the credibility and reliability of the complainant's core testimony to determine whether the Crown had proven the offence within the third prong of the *W.D.* analysis. His acceptance of the complainant's evidence about what she felt could readily be justified on the record. His manner of expression should not have vitiated his credibility assessment, and it could not have had any impact on the verdict.[84]

B. The trial judge reasonably assessed the inherent improbability of the defence hypothesis

61. The BCCA misapplied the prohibition on speculative reasoning to oust permissible use of common sense by a trial judge in assessing the credibility and/or reliability of a witness's account. There is a distinction between judicial notice of facts not tendered in evidence and common-sense inferences drawn from matters tendered in evidence.[85] The BCCA failed to distinguish these concepts by equating the judge's common-sense inference to "judicial notice."[86] This resulted in the BCCA unjustifiably overturning the judge's credibility finding because "he did not make a finding that was tethered to the evidence".[87]

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[83] AR Vol I – Tab 1C, Pg 23-24 (BCCA Reasons, ¶¶66), emphasis in the original

[84] *R. v. Van,* 2009 SCC 22, ¶34 considering s.686(1) of the *Criminal Code*

[85] *R. v. Hogan,* 2022 ABCA 5, ¶13; *R. v. Allen,* 2015 BCCA 299, ¶5; *R. v. Cloutier,* 2011 ONCA 484, ¶¶96-98; *R. v. Kim*, 2011 BCCA 127, ¶¶18-19; *R. v. Flight,* 2014 ABCA 185, ¶¶77-79

[86] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶¶67-69)

[87] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶69)

62. The reasoning process engaged in by the trial judge in reaching his verdict was, as noted, firmly rooted in a principled engagement with the evidence at trial. The complainant's evidence was clear: she acknowledged where she lacked recall and where she was uncertain, but she was one hundred per cent sure about experiencing the sensation of the respondent's penis penetrating her vagina. The judge's analysis was based entirely on what the complainant said she felt. It did not rely on speculative reasoning at all.

63. Although recognizing that, "[t]he issue was always, appropriately, what *this* complainant *did* feel"[88] the BCCA overlooked that the trial judge's factual finding was based on *this* complainant's evidence about what she *did* feel. It did so by unreasonably characterizing the judge's reference to the likelihood of "a woman" being mistaken about vaginal penetration as a factual finding about what *any* woman would experience in *any* situation.

64. The trial judge relied on common sense and life experience in his decision-making by subjecting the complainant's evidence that she was not mistaken about the invasive feeling of the respondent's penis in her vagina to an examination of its consistency with the probabilities that surrounded the event, as he was asked to do by the defence.[89] Courts are entitled to "use the inherent improbability of certain hypotheses" to evaluate evidence, and are expected to "bring their experience and common sense" to that task, even when assessing sexual interactions.[90]

65. This exercise inherently involves comparing the witness's specific account to what common sense and human experience generally dictate. Generalizations about what people usually do, think, or feel in a situation are an integral part of fact-finding. Generalizations are routinely used to assess circumstantial evidence.[91] Generalizations also underlie recognized common-sense

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[88] AR Vol I – Tab 1C, Pg 23-24 (BCCA Reasons, ¶66)

[89] *Faryna v. Chorny*, 1951 CanLII 252 (BCCA), p.357; *R. v. R.H.A.,* 2000 CanLII 3027 (ONCA), ¶4

[90] *R. v. R.R.*, 2018 ABCA 287, ¶8; *R. v. A.J.R.D.,* 2017 ABCA 237, ¶100 (in dissent), aff'd 2018 SCC 6; *R. v. G.H.,* 2018 ONCA 349, ¶¶3-5

[91] *R.R,* ¶¶6-8

inferences such as: a person foresees or intends the natural consequences of their acts,[92] a person is unlikely to make false statements against their own interest;[93] a person is unlikely to repeatedly self-inflict painful injuries;[94] or a person is unlikely to flee a crime scene if he or she is not responsible for the act.[95]

66. That is not to say that *no person* falsely confesses, self-inflicts injuries, or flees a crime scene although innocent. The validity of the line drawn between reasonable doubt and speculation does not lie in an evaluation of whether the baseline comparison is "indisputable" as if it were a factual finding based on judicial notice. Comparison with the prevailing probabilities simply provides a benchmark to assess the cogency of the witness's account or, in this case, the cogency of a defence theory. The focus is on whether the trial judge's inference was a reasonable one. Every trier of fact need not inevitably have reached the same conclusion as the trial judge.[96]

67. As the Court of Appeal of Alberta (ABCA) recently noted:[97]

> [13] A trial judge is entitled to draw common sense inferences about how a witness' testimony, memory, or reliability might be affected by trauma or other surrounding circumstances. These types of inferences are not helpfully analysed as a form of "judicial notice", and the trial judge is not precluded from drawing inferences about the reliability of evidence because there is no expert evidence on the topic.

68. By applying the stringent threshold applicable to judicial notice to the trial judge's analysis in this case, the BCCA wrongly transformed a plainly rational observation into a factual finding that it said needed to be so "notorious" to be "capable of immediate and accurate proof by resort to a readily accessible source of indisputable accuracy".[98]

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[92] *R. v. Walle*, 2012 SCC 41, ¶¶63-68

[93] *R. v. O'Brien*, 1977 CanLII 168 (SCC), [1978] 1 S.C.R. 591, p.594

[94] *R. v. Theoret,* 2018 ONCA 700, ¶53

[95] *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314, ¶50

[96] *R. v. Villaroman,* 2016 SCC 33, ¶69

[97] *Hogan*, ¶13, emphasis added

[98] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶69)

C. The BCCA erred in holding that the objective implausibility of a woman being mistaken about the feeling of vaginal penetration is not a matter of common sense

69. The BCCA also said that the likelihood of a woman being mistaken about the feeling of a penis in her vagina is not a matter of common sense.[99] According to the BCCA, the plausibility of a woman mistaking vaginal penetration engages "questions of neurology (the operation of the body's sensory system), physiology (the impact of alcohol on perception, memory and the body's sensory system) and psychiatry (the impact of alcohol and/or trauma on perception and memory)".[100]

70. It is, however, a matter of common sense that a truthful person is unlikely to be mistaken in their unwavering assertion that their own bodily integrity was violated. Some observations or experiences are just not susceptible to mistake. The line between fabrication and misperception narrows considerably when applied to something conspicuous like penetration of an orifice. Underpinning this logic is that a sexual assault of an intrusive nature would have a profound impact on the complainant's bodily integrity, not to mention her psychological and emotional well-being.[101] Indeed, inconsistency in a complainant's evidence about the manner of penetration has been characterized as a detail that would seem impossible to be mistaken about, to the detriment of her credibility.[102]

71. The Court of Appeal of Manitoba, contrary to the reasoning of the BCCA, upheld a conviction on this very basis:

> [3] … The core allegation here was that there was non-consensual penetration that began while the complainant was asleep. The judge's reasons demonstrate that he took appropriate care in his assessment of both the credibility and reliability of the complainant. He believed her evidence and also explained why it was reliable on the core allegation despite her gross intoxication. We see no basis to interfere with his assessment of the evidence given the fact that being awoken by vaginal intercourse is the type of traumatic event not easily mistaken by a witness found to be credible.[103]

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[99] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶67)

[100] AR Vol I – Tab 1C, Pg 24 (BCCA Reasons, ¶67)

[101] *R. v. Friesen*, 2020 SCC 9, ¶142

[102] *R. v. V.R.C.,* 2016 ONCJ 389, ¶84

[103] *R. v. Hunter,* 2016 MBCA 2, emphasis added

72. Ordinary people would not generally require assistance by persons with special knowledge of neurology, physiology, and psychiatry to assess the likelihood that a witness found to be credible would be mistaken about a traumatic physical assault. Just because a general observation may have scientific dimensions does not mean the observation cannot be legitimately grounded in common experience.[104] As the ABCA observed, "[t]he Crown does not have to call an expert on human sexuality in every prosecution on the assumption that judges and juries are all cloistered virgins."[105]

D. The BCCA's decision represents a stark retreat in the development of the law governing sexual assault prosecutions

73. While the foregoing establishes that the BCCA was wrong to intervene in this case on several fronts, the broader import of the BCCA's reasoning further demonstrates that its intervention was problematic. Its analysis represents a stark retreat from significant and sustained developments made in the law in this area. It restricts a trial judge's ability to make credibility determinations without corroboration and erodes protections afforded to sexual assault complainants.

(i) The BCCA's approach impairs a trial judge's ability to make credibility findings

74. The BCCA's approach unduly fetters a trial judge's ability to make credibility findings. Judges must rely on their background knowledge in fulfilling their adjudicative function.[106] This provides trial judges with the ability to resolve questions of fact when presented with conflicting evidence.

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[104] *R. v. G.M.C.,* 2022 ONCA 2, ¶¶38-39

[105] *R.R.,* ¶8

[106] *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, ¶39

75. Canadian courts have struggled to distinguish legitimate inferences grounded in common sense and judicial experience from prohibited speculative and stereotypical reasoning.[107] The Court of Appeal for Ontario (ONCA) attempted to bring order to this area of the law in *J.C.*[108] It articulated a framework of rules to determine what precisely is prohibited by articulating two distinct but overlapping rules against common-sense assumptions and stereotypical inferences. The Court defined "the rule against ungrounded common-sense assumptions" as follows:[109]

> [58] The first such rule is that judges must avoid speculative reasoning that invokes "common-sense" assumptions that are not grounded in the evidence or appropriately supported by judicial notice: *R. v. Roth*, 2020 BCCA 240, at para. 65; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286, at paras. 19-27; *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289, at paras. 35-36. For clarity, I will call this "the rule against ungrounded common-sense assumptions".
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> …
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> [61] Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour.

76. While the framework presented by the ONCA has been regarded as a significant step, uncertainties remain, e.g., can common-sense reasoning only survive the rule against ungrounded common-sense assumptions by being grounded in judicial notice?[110] This case exemplifies the difficulties that arise when an appellate court approaches the prohibition on "ungrounded" common-sense reasoning strictly and literally to require either an evidentiary foundation *for the assumption* itself, or barring that, the application of judicial notice.

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[107] Lisa Dufraimont, *Current Complications in the Law on Myths and Stereotypes* (2021) 99:3 Can Bar Rev 536, 2021 CanLIIDocs 13421, pp.554 ("Dufraimont") citing the divided appellate courts in: *R. v. Quartey,* 2018 ABCA 12 aff'd 2018 SCC 59; *R. v. Delmas,* 2020 ABCA 152 aff'd 2020 SCC 39, *A.R.J.D.*; *see also R. v. Tsang,* 2022 BCCA 345, ¶13

[108] *R. v. J.C.*, 2021 ONCA 131

[109] *J.C.,* ¶¶58-61

[110] Dufraimont, p.563 citing *J.C.* at ¶5

77. Common-sense assumptions are based on generalizations that are, by definition, not grounded in direct evidence but rather in human experience. The reasonableness of drawing an inference based on logic or human experience, however, will invariably depend on the specifics of the trial evidence. If the BCCA is correct that the current framework requires evidence on the "ability of a highly intoxicated woman to reliably discern penile penetration" to dispel a defence challenge to the complainant's credibility,[111] it is unworkable and produces an unprincipled result.

78. Of course, invocations of common sense should be scrutinized to ensure that the trier of fact is not relying on irrelevant or unreliable generalizations.[112] Some generalizations that were "common sense" in the past are clearly objectionable today.[113] An evolved understanding about how unfair assumptions compromise judicial decision-making, however, should not mean that resort to common sense is altogether jettisoned.

79. Appellate review must preserve a robust role for the proper application of common sense and life experience in the adjudication of sexual assault cases. Trial judges must be able to rely on their experience and common sense to assess the inherent improbability of certain hypotheses in evaluating credibility. Without latitude to test the evidence against common sense, a trial judge cannot effectively perform their role as the trier of fact. A trial judge will either be hamstrung in their ability to resolve credibility conflicts, or overturned on appeal because they relied on an "unfounded" common-sense assumption or otherwise failed to "grapple" with the evidence. This, in turn, risks a return to bygone days where a sexual assault conviction could not stand absent corroboration despite a trial judge believing the complainant's evidence.

(ii) The BCCA's decision erodes protections afforded to sexual assault complainants

80. The potential impact of the BCCA's reasoning in this case is not limited to intoxicated complainants. As David Tanovich observed: "[m]any sexual assault complainants are vulnerable in some way. Some complainants are young or testifying about events that occurred when they were children. Some suffer from addiction, mental illness or have a disability. Some are homeless.

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[111] AR Vol I – Tab 1C, Pg 18 (BCCA Reasons, ¶43)

[112] *A.J.R.D. (ABCA),* ¶9

[113] *A.J.R.D. (ABCA),* ¶57; *R. v. Find,* 2001 SCC 32, ¶103; *R. v. Spence*, 2005 SCC 71, ¶51

Others are Aboriginal or racialized. Many have intersecting vulnerabilities."[114] Courts must be cautious against equating a vulnerability to general unreliability. Otherwise, the law risks reverting to treating the evidence of many sexual assault victims as inherently untrustworthy.[115]

81. Because the BCCA implicitly accepted blanket unreliability in the complainant's evidence that had to be "overcome", it raised corresponding concerns about the sufficiency of the complainant's evidence to permit a reliability assessment. The BCCA's criticism of the Crown for not asking the complainant "to put into words what [the respondent's penis inside her vagina] felt like, whether she experienced any pain, whether she had been injured or even why she felt so confident about her testimony" runs counter to directives of Parliament and this Court.[116]

82. The complainant's core assertion about feeling the respondent's penis inside her vagina is akin to lay opinion evidence involving a compendious statement of facts in respect of "matters of common experience" where "it is difficult to transmit the basis of the opinion".[117] The sensations attendant on vaginal penetration would be challenging to narrate separately and distinctly. Asking the complainant to describe what it felt like and how she was sure a penis was inside her vagina is humiliating and degrading and it invites a response that engages presumptively inadmissible prior sexual history evidence (*e.g.*, "I've felt that before" / "I know what that feels like").

83. It must be open to a trial judge to accept that a complainant (who was not delusional or so grossly intoxicated that she had taken leave of her senses) is a reliable historian about what happened to her own body. Her evidence should not attract greater scrutiny than if she had reported

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[114] Tanovich, David M, Regulating Inductive Reasoning In Sexual Assault Cases (April 8, 2017). Berger, Ben; Cunliffe, Emma; and Stribopoulos, James; TO ENSURE THAT JUSTICE IS DONE: ESSAYS IN MEMORY OF MARC ROSENBERG (Toronto: 2017, Carswell), p.81, Available at SSRN: https://ssrn.com/abstract=2949147

[115] *R. v. Seaboyer; R. v. Gayme,* 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, pp.665-669 (per L'Heureux-Dube J. dissenting in part, but not on this point)

[116] AR Vol I – Tab 1C, Pg 22 (BCCA Reasons, ¶55)

[117] *R. v. Ilina,* 2003 MBCA 30, ¶77 citing Ewaschuk, E.G., *Criminal Pleadings and Practice in Canada* (2nd ed.) §16:645

some other form of assault, *e.g.,* getting pushed from behind, or hit in the back of the head, or having a finger inserted into her ear. To be believed in those other contexts, a complainant is not generally obliged to provide an in-depth account of the accompanying bodily sensations or to explain why she is so confident that she felt the assault. The fact that the assault is on a vagina should not create an exception.

84. Section 276 of the *Code* aims to encourage the reporting of sexual offences not only by "preventing unnecessary invasion of witnesses' privacy" but "by eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant."[118]

85. Requiring the Crown to pre-emptively lead evidence that would maximize the embarrassment and discomfort to the complainant to ward off sweeping and dubious attacks to her reliability constitutes a significant step back in the law designed to promote the dignity and equality of victims of sexual offences. With the enactment of ss. 274-276 of the *Code*, "Parliament recognized that all witnesses who claim they have been victims of crime should enjoy the same baseline standard for credibility assessments: certain categories of complainants should not start from a deficit position or face the additional barriers of being discredited based on myths and stereotypes."[119]

ISSUE 2: There was no merit to the respondent's alternate argument regarding alleged misapprehensions of evidence, and the appropriate remedy is to restore the conviction.

86. The respondent raised a further ground of appeal in the court below that was not dealt with by the BCCA. He argued that the trial judge misapprehended or failed to give effect to evidence inconsistent with the appellant's guilt, specifically: (1) cellular telephone records; (2) the absence of DNA evidence corroborating the complainant's testimony; and (3) the respondent's father's evidence that the respondent told him that the complainant had spilled water on herself.[120]

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[118] *Seaboyer*, p.605

[119] *R. v. C.M.G.,* 2016 ABQB 368, ¶¶56-58

[120] AR Vol I – Tab 4, Pg 65-71 (Appellant's Factum in the BCCA (AF-BCCA), ¶¶45-63)

87. The respondent did not meet the stringent threshold to demonstrate a misapprehension of evidence warranting appellate intervention.[121] This Court is equally well situated to make that determination. The interests of justice would not be best served by remitting this matter back to the BCCA. For the following reasons, stated in brief, there was no merit to the respondent's arguments in the court below. The appropriate remedy is to restore the conviction.

88. The cellular telephone records: The respondent argued that the trial judge "materially misapprehended the content of [cellular phone records entered as Exhibit 2 at trial]" because those records did not identify the entity associated to the recorded phone numbers.[122] Standing alone, the records did not establish that members of the complainant's family made several calls to taxi companies to ascertain the address of the respondent. But the content of the records, and the judge's interpretation of them, was informed by the testimony of the complainant's family members about making those calls.[123] There was ample support in the record for the judge's factual finding. The plain language and the thrust of the reasons disclosed no actual mistake.[124]

89. The absence of DNA evidence corroborating the complainant's testimony: The respondent argued that the trial judge was "obliged in this case, but failed, to consider [DNA testing evidence]".[125] However, failure to mention a piece of evidence does not demonstrate a failure to consider it. A trial judge need not advert to all the evidence, answer every argument made, resolve every inconsistency or frailty in the evidence, or detail every finding reached in arriving at a verdict.[126] Moreover, in the absence of evidence that DNA necessarily would have been found on the complainant had the sexual assault occurred, absence of DNA cannot be characterized as

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[121] *R. v. Swales,* 2014 BCCA 350, ¶¶48-49, leave to appeal ref'd, [2016] S.C.C.A. No. 68

[122] AR Vol I – Tab 4, Pg 66-67 (AF-BCCA, ¶¶47-49)

[123] AR Vol II – Tab 18, *Complainant's Mother's Evidence,* 76(22)-85(32); Tab 19, *Complainant's Father's Evidence,* 101(28)-102(9), 103(15)-105(31); Tab 20, *Complainant's Brother's Evidence* 119(42)-120(26), 123(8-39)

[124] *R. v. Sinclair,* 2011 SCC 40, ¶53

[125] AR Vol I – Tab 4, Pg 67-68 (AF-BCCA, ¶54)

[126] *R. v. J.H.C.*, 2011 SCC 45, ¶¶31-32; *R. v. Dinardo*, 2008 SCC 24, ¶30; *R.E.M.*, ¶¶15-20, 37, 42-44, 52-57; *Villaroman*, ¶15

exculpatory.[127] It is a neutral factor and the trial judge was not obliged to explain why it did not raise a reasonable doubt, nor did he fail to give it "proper effect" by not having a doubt.

90. The respondent's prior consistent statement to his father: The judge accurately described the respondent's father's evidence that the respondent told him that the complainant had spilled water on herself.[128] The respondent's complaint in this regard was that the judge did not explicitly "reject the evidence of Robert Kruk on this point or give effect to his evidence".[129] This was an invitation to the BCCA to improperly re-weigh evidence. The judge had concerns with the father's evidence both in terms of credibility (bias) and reliability (distinguishing between what he witnessed and what he had been told after-the-fact and failing to observe what was patently there to be seen).[130] The trial judge was entitled not to give the father's evidence any weight and the trial judge did not err in his "appreciation of the evidence in a manner that could have affected the outcome".[131]

91. All the arguments advanced by the respondent to overturn his conviction on this ground, like the speculative reasoning ground acceded to by the BCCA, involve the sort of technical search for error that has been discouraged by this Court, and run contrary to the importance of approaching reasons for conviction with sensitivity to the trial judge's role and advantage in making findings of fact and credibility.[132]

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[127] *R. v. Dueck,* 2011 SKCA 45, ¶¶61, 63; *Hester c. R.,* 2019 QCCA 856, ¶53

[128] AR Vol I – Tab 1D, Pg 35 (BCSC Reasons, ¶45)

[129] AR Vol I – Tab 4, Pg 70 (AF-BCCA, ¶62)

[130] AR Vol I – Tab 1D, Pg 36 (BCSC Reasons, ¶49)

[131] *R. v. Lohrer,* 2004 SCC 80, ¶7

[132] *G.F.,* ¶5

PART IV – SUBMISSIONS ON COSTS

92. The appellant does not seek costs and asks that no costs be awarded against it.

PART V – NATURE OF ORDER SOUGHT

93. The appellant submits that this Court should allow the appeal, set aside the order of the Court of Appeal, and restore the respondent's conviction for sexual assault, thereby reinstating the Warrant of Committal.

PART VI – PUBLICATION BAN

94. The publication ban under s. 486.4 of the *Criminal Code* prohibits publication of information that could identify the complainant. The Court should not publish the name of the complainant, or any other information tending to identify the complainant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Susanne Elliott
Lauren A. Chu
Counsel for the appellant

October 20, 2022

Vancouver, B.C.

PART VII – TABLE OF AUTHORITIES

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2.	Tanovich, David M, Regulating Inductive Reasoning In Sexual Assault Cases (April 8, 2017). Berger, Ben; Cunliffe, Emma; and Stribopoulos, James; TO ENSURE THAT JUSTICE IS DONE: ESSAYS IN MEMORY OF MARC ROSENBERG (Toronto: 2017, Carswell), Available at SSRN: https://ssrn.com/abstract=2949147	80

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2.	*Criminal Code*, R.S.C. 1985, c. C-46, s. 681(1) *Code criminel*, L.R.C. (1985), ch. C-46, s. 681(1)	60