SCC FILE NO.: 37461

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MICHAEL SHAWN BOURGEOIS

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE APPELLANT

(MICHAEL SHAWN BOURGEOIS, APPELLANT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156

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A. Overview

1. This appeal raises the question of whether "flaws, errors and defects in the analysis" of the trial judge warrant appellate intervention. Berger J.A.[1] in dissent was "profoundly concerned that the case at bar may have been a wrongful conviction" after conducting a "careful consideration of the record through the lens of judicial experience and mindful of the advantage of the trial judge" he correctly concluded the verdict was unreasonable. [2]

2. The only issue at trial was whether the Crown had proven the absence of consent beyond a reasonable doubt. The Appellant's evidence was the complainant consented. The complainant's evidence was she did not consent. The act of sexual intercourse was not at issue. There was "no independent confirming evidence of whether the sexual intercourse was consensual or otherwise."[3] The medical evidence was equally consistent with consensual intercourse as non-consensual intercourse.[4]

3. The uncontested evidence of the text messages, testimony of the complainant and evidence of the complainant's parents establish the complainant's (a) bizarre preoccupation with and repeated comments about rape, murder, and television crime shows, (b) serious but entirely objectively unfounded thoughts before getting into a truck alone with the Appellant that he was going to murder her, (c) bizarre text messages to her friends referencing death and the possibility she would not make it home safe because she thought the Appellant had a wife, (d) dispute with her mother that night, (e) warning to her mother not to open the garage door because the Appellant would murder them, and (f) falsely telling her parents that the Appellant took her phone away from her.

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[1] *R v Bourgeois*, 2017 ABCA 32: Alberta Court of Appeal Memorandum of Judgment, filed January 30, 2017 ["**Reasons for Judgment of Berger, J.A**."] at para 68, Appellant's Record ["**AR**"], Vol I [**TAB 1C**]
[2] Reasons for Judgment of Berger, J.A., at para 68, AR Vol 1 [**TAB 1C**]
[3] Reasons for Judgment of Berger, J.A., at para 66, AR, Vol 1 [**TAB 1 C**]
[4] Oral Reasons for Judgment on Conviction, Mr. Justice A.D. Macleod, Court of Queen's Bench of Alberta, dated May 6, 2015 ["**Trial Judge's Reasons for Judgment**"], at 2/9-14, AR, Vol, I [**TAB 1A**]

4. The Appellant asserts, within this undisputed evidentiary context, the trial judge's reasons demonstrate illogical and irrational reasoning in arriving at conclusions and material misapprehension of evidence not supported by the record.

5. A proper exercise of appellate review must both respect the advantage of the trial judge and acknowledge the importance of preserving the right to meaningful appellate review of all convictions, including those where the essential elements of the offence are proven by determinations of credibility. Appellate intervention is required in this case to ensure that an unreasonable verdict arrived through illogical and irrational reasoning and plagued by material misapprehension of evidence is not permitted to stand and perpetuate a realistic risk of wrongful conviction.

B. Background Facts

6. The Appellant and complainant met through a mutual friend ("Chris") on the evening of December 23, 2012 at a pub in Calgary. The complainant was attracted to the Appellant and obtained his telephone number. At approximately 1:30am on December 23rd the complainant initiated text message communication with the Appellant. For the next three and a half hours they exchanged 326 text messages and had at least one telephone conversation.[5]

7. During the text message communication the parties requested and exchanged pictures of each other.[6] The trial judge found "[t]he tenor of the messages were for the most part sexual".[7] In relation to the content of the telephone call the complainant could not recall whether there was any talk about having sex with the Appellant.[8]

8. Although objectively some of the complainant's messages included sexual references, the complainant disputed they were sent for that purpose. For example, while the complainant

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[5] Evidence of AF in the Court of Queen's Bench of Alberta, called by the Crown, April 22, 2015, Excepts of Examination in Chief ["**Complainant's Evidence in Chief**"] at 52/14-41, AR, Vol I at [**TAB 3A**]; Trial Judge's Reasons for Judgment, at 2/22-35, AR, Vol I [**TAB 1A**]

[6] For examples of the complainant's flirtatious comments see messages #134, #153, #191, Printed Copy of Report by Shane Cross, marked as Exhibit 9 on April 20, 2015 ["**Exhibit 9**"], at 117, 119, 124, AR, Vol II [**TAB 4A**]

[7] Trial Judge's Reasons for Judgment, at 2/33, AR, Vol I [**TAB 1A**]; Reasons for Judgment of Berger J.A., at para 66, AR, Vol I [**TAB 1C**]

[8] Complainant's Evidence in Chief, at 74/23-39, AR, Vol I [**TAB 3A**]

agreed she responded to the Appellant's request for a picture of her by texting "of my face or something else" (message 200), she disputed this comment was a sexual reference and asserted it could be a full body shot with clothing. In response to the Appellant's inquiry "What's the something else" (message 204) the picture the complainant sent to him was a semi-nude picture of just her midriff and lower portion of her breasts (message 206),[9] yet according to her the exchange was not intended to entice the Appellant sexually.

9. Following this exchange, the complainant asked for a "six-pack photo" of the Appellant (message 222).[10]

10. In the afternoon of December 24th and into the early hours of December 25th, the complainant and Appellant exchanged 279 text messages, including message 381 where the complainant invited the Appellant to "Come visit me".[11] Further text messages were exchanged around 8pm on December 25th including a message where the Appellant invited the complainant to his friend's house in northeast Calgary ("Cody's house") to watch the Team Canada junior hockey game.[12]

11. Before going out with the Appellant, the complainant engaged in a text message exchange with her friend Drew which included Drew texting, "Oh stop. Your (sic) so stressed lol. You need to get hammered or get high or have sex or run around the (sic)". The complainant's text message reply was "Yeah".[13]

12. The complainant texted Drew about her date with the Appellant to which Drew texted "Wear a condom". The complainant testified this was likely just Drew joking. These messages

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[9] Complainant's Evidence in Chief, at 70/39 – 71/13, AR, Vol I; Evidence of AF in the Court of Queen's Bench of Alberta, called by the Crown, April 23, 2015, Excepts of Cross-examination ["**Complainant's Evidence in Cross-Examination**"], at 158/31 – 159/29, AR, Vol I [**TAB 3A**]; see Exhibit 9, Message #120, at 126, AR, Vol II [**TAB 4A**]; Reasons for Judgment of Berger J.A., at para 66, AR, Vol I at p. 29 para 66 [**TAB 1C**]

[10] Complainant's Evidence in Chief, at 74/25-26 and 75/20-21, AR, Vol I [**TAB 3A**]

[11] Complainant's Evidence in Chief, at 52/14-41, AR, Vol I [**TAB 3A**]; Trial Judge's Reasons for Judgment, at 3/4-11, AR, Vol I [**TAB 1A**]; Exhibit 9, Message #381, at 149, AR, Vol II [**TAB 4A**]

[12] Trial Judge's Reasons for Judgment, at 2/22 - 3/11, AR, Vol I [**TAB 1A**]

[13] One-Page Sheet Supplementing Report Prepared by Shane Cross, marked as Exhibit 9A on April 20, 2015 ["**Exhibit 9A**"], Messages #21 and #20, at 132, AR, Vol III [**TAB 4B**]

with Drew were deleted by the complainant before the phone was forensically examined by the police.[14]

13. Shortly after this text message from Drew, the Appellant picked up the complainant from her neighbour's house around 10:15pm for their date. Between 11pm and midnight on December 25th, the Appellant and complainant arrived at Cody's house. They played games, drank, socialized and watched the hockey game.[15]

14. While at Cody's house, starting around 2:00 am, the complainant received text messages from her mother inquiring about how she was doing. The complainant responded, "I'm with my husband thanks" and clarified that she was referring to "Mike". Her mother texted expressing concern about the complainant's safety as she was out with someone they did not know. The complainant replied "Ok" and after further prodding at 2:53 am responded "I'm safe thanks".[16]

15. The complainant testified at trial she had no recollection of her mother texting her over the night, expressing any concerns, or wondering where she was and when she would be home.[17] This evidence was inconsistent with the complainant's evidence at the preliminary inquiry where she testified her parents had been texting over the night and were wondering when she was going to be home.[18]

16. After being confronted with her evidence at the preliminary inquiry, the complainant testified that she did not remember "physically doing it" but remembered looking at the texts when she was in the Appellant's truck. She testified she did not recall sending and receiving the messages with her mother but recalled looking at them. Despite the fact the text records show

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[14] Complainant's Evidence in Cross-Examination, at 169/16 – 171/27, AR, Vol I [**TAB 3A**]; Exhibit 9, Message #7, at 130, AR, Vol III [**TAB 4A**]; Exhibit 9A, Message #10, at 132, AR, Vol III [**TAB 4B**]

[15] Trial Judge's Reasons for Judgment, at 3/13-22, AR, Vol I [**TAB 1A**]; Reasons for Judgment of Berger J.A., at para 66, AR, Vol I [**TAB 1C**]

[16] Exhibit 9, Message #14, at 129, AR, Vol III [**TAB 4A**]; Complainant's Evidence in Cross-examination, at 192/18 – 193/14 – 198/26, AR, Vol I [**TAB 3A]**; Complainant's Evidence in Chief, at 124/1-26, AR, Vol I [**TAB 3A**]

[17] Complainant's Evidence in Cross-examination, at 200/20 – 201/6, AR, Vol I [**TAB 3A**]

[18] Complainant's Evidence in Cross-examination, at 202/30 – 35, AR, Vol I [**TAB 3A**]

she was reading the messages at the time they were sent, the complainant maintained her lack of memory.[19]

17. Approximately 20 minutes after the complainant texting that she was safe, the complainant's mother sent her the following text message:[20]

> Wow. I just read all these messages on dad's phone and I can't tell you how Hurt I am that you are such a liar but I guess now I know how you really feel about me..... I'm so sad that you try to pit dad against me, i truly believe that you have hit your lowest in the above messages and can't believe that you actually could feel that way about me..... You have such an ugly heart ... I don't know who you are as a person anymore but I know you are not the sweet girl I raised all those years... I don't think I can actually ever forgive you for the above comments? Don't think our relationship will survive all of this....
>
> Sorry

18. Both the complainant and her mother denied recollection of this text which the records indicate the complainant read at 3:15 am.[21] The complainant testified, "I saw it and I knew my mom was mad at me. I just didn't even read it. I saw that she sent me a message, and then I put it away, I think. I didn't respond".[22] She did not recall opening the text and did not know what the text was about. She speculated that her and her mother were probably fighting in the previous days and this was just typical of their arguments.[23]

19. The complainant's father testified he did not recall seeing this text before, but agreed the text message was not reflective of the standard kind of spat between his wife and daughter.[24]

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[19] Complainant's Evidence in Cross-examination, at 202/30 – 204/22, AR, Vol I [**TAB 3A**]
[20] Exhibit 9, Message with Dad, at 115, AR, Vol III [**TAB 4A**]
[21] Complainant's Evidence in Chief at 119/20-40, AR, Vol I [**TAB 3A**]; Evidence of JF in the Court of Queen's Bench of Alberta, called by the Crown, April 22, 2015, Excerpts of Examination in Chief ["**Evidence of JF in Chief**"] at 254/8 – 255/24, AR, Vol I [**TAB 3B**]; Evidence of JF in the Court of Queen's Bench of Alberta, called by the Crown, April 22, 2015, Excerpts of Cross-Examination ["**Evidence of JF in Cross-Examination**"] at 266/28 – 267/17, AR, Vol I, [**TAB 3B**]; Exhibit 9, Message with Dad at 115, AR, Vol III [**TAB 4A**]
[22] Complainant's Evidence in Cross-examination at 185/4-10, AR, Vol I [**TAB 3A**]
[23] Complainant's Evidence in Cross-examination at 185/9 - 187/8, AR, Vol I [**TAB 3A**]
[24] Evidence of DF in the Court of Queen's Bench of Alberta, called by the Crown, April 21, 2015, Excerpts of Cross-Examination ["**Evidence of DF in Cross-Examination**"] at 9/18 – 10/4, AR, Vol II [**TAB 3C**]

20. Approximately 2 minutes after the text from the complainant telling her mother that she was safe, the complainant texted her friend Jessica asking, "Are you Awake or Should iplay (sic) nice with his (sic) guy".[25] Approximately 8 minutes after the message from her mother about the complainant being a liar and hurting her, the complainant texted Jessica again stating, "I feel this man has a wife so here is his last name if I never even up home Bourgeois".[26] About 3 minutes later the complainant texted Sabrina, who was at Cody's house, "Hey girl it's Ali".[27]

21. However, before leaving Cody's house, the complainant's testimony and the text message evidence demonstrate her preoccupation with thoughts of rape and murder.[28] The first example arises shortly after the complainant and Appellant started their text exchange. In message 75 on December 24th at 2:12 am the complainant texted "Or you could murder me cause (sic) I watch a lot of criminal minds". When asked to explain this message she testified it was said in jest but that she did watch a lot of crime shows.[29]

22. However, in message 120, approximately 15 minutes later, she stated "I don't go out with guys I don't know and I don't get stranded in vehicles with them when I'm drunk cause that's how rape [and] murder happens"[30] followed by "I know it's horrible my mind is messed up"[31] and "It happens mike!".[32] The Appellant's response was "LOL not in Canada".[33]

23. In explaining these messages the complainant testified that she always drives herself to meet up with a guy because "I don't want to get stranded in a vehicle with him because I know that's how rape and murder happens."[34]

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[25] Exhibit 9, Message with Jessica, at 84, AR, Vol III [**TAB 4A**]
[26] Exhibit 9, Message with Jessica, at 84, AR, Vol III [**TAB 4A**]
[27] Exhibit 9 Messages with (403) 926-9322, at 114, AR, Vol III [**TAB 4A**]
[28] Reasons for Judgment of Berger J.A., at para 66, AR, Vol I [**TAB 1C**]
[29] Complainant's Evidence in Chief, at 59/28-38, AR, Vol I [**TAB 3A**]; Complainant's Evidence in Cross-Examination, at 165/28 – 166/8, AR, Vol I [**TAB 3A**]
[30] Exhibit 9, Message #120, at 115, AR, Vol II [**TAB 4A**]
[31] Exhibit 9, Message #121, at 115, AR, Vol II [**TAB 4A**]
[32] Exhibit 9, Message #123, at 116, AR, Vol II [**TAB 4A**]
[33] Exhibit 9, Message #124, at 116, AR, Vol II [**TAB 4A**]
[34] Complainant's Evidence in Chief, at 61/37 – 62/17, AR, Vol I [**TAB 3A**]; Complainant's Evidence in Cross-examination, 166/24-34, AR, Vol I [**TAB 3A**]

24. In cross-examination on these messages the complainant testified to having imagined her own rape:[35]

> Q That's ultimately what you say he did, though other than murder you.
>
> A Yeah, because it did. **It's a little eerie I could foreshadow that in my life, though**.

25. Her focus on murder and rape is also reflected in her text messages with other individuals. For example, she messaged the following to Drew between 4:57 and 5:08am on December 26th:[36]

> It (sic) for some reason i die onight (sic) I love you
> Death is. My safe word
> And by death I mean I never wanna leave my hose (sic) again
> Ever

26. Although she remembers these texts, the complainant testified to having no recall of the text sent minutes later to Drew stating, "Well I'm very super hppy (sic) to be proved wrong 4000".[37] The complainant acknowledged these were unusual messages to send someone and was unable to explain what she meant by these texts.[38]

27. Also appearing throughout the complainant's text messages is her preoccupation with whether the Appellant had a wife.[39] In messages 538 and 541 the complainant refers to Chris telling her that the Appellant was married. Her message to Jessica at 3:23am while at Cody's states that she had a feeling the Appellant has a wife.[40] She also testified to being told the Appellant had a wife by Sabrina while at Cody's house.[41]

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[35] Complainant's Evidence in Cross-Examination, at 167/17 – 18, AR, Vol I [**TAB 3A**]; Reasons for Judgment of Berger J.A., at para 66, AR, Vol I [**TAB 1C**]
[36] Exhibit 9, Messages #1-5 with Drew at 116, AR, Vol III [**TAB 4A**]
[37] Complainant's Evidence in Cross-Examination, at 167/29-38, AR, Vol I [**TAB 3A**]
[38] Complainant's Evidence in Chief, at 216/33 – 127/20, AR, Vol I [**TAB 3A**]; Complainant's Evidence in Cross-Examination, at 168/5-22, AR, Vol I [**TAB 3A**]
[39] Exhibit 9, Messages #86, #538, #541, #593, #595 and #598, at 111, 170, 177, AR, Vol II [**TAB 4A**]
[40] Exhibit 9, Message with Jessica, at 84, AR Vol III [**TAB 4A**]
[41] Complainant's Evidence in Chief, at 113/17-18, AR, Vol I [**TAB 3A**]

28. The complainant testified that while at Cody's house she became less attracted to the Appellant and had concerns the Appellant was married.[42]

29. The complainant also testified that, while at Cody's house, she had thoughts about the Appellant murdering her. She explained that the thoughts were based on a feeling not on anything that the Appellant said or did. She remembered thinking between one to three times at the party "this is where he murders me".[43] She agreed this was a serious thought.[44]

30. Despite these thoughts and the other available options to get home, including her evidence that it was common for her parents to pick her up or to pay for her to take a cab home, [45] the complainant left Cody's house with the Appellant in his truck around 4:50 am on December 26, 2012.[46]

31. It is at this point that the Appellant's and Complainant's versions of events become contentious.

C. Events after leaving Cody's house: evidence of the Appellant

32. According to the Appellant's statement provided to the police tendered as an exhibit at trial, the two engaged in sexual touching on the drive home while in his truck. The sexual touching started with kissing and heavy petting. He pulled over and they continued with the sexual touching.[47] When they pulled over the Appellant commented to the complainant that they weren't going to have sex to which the complainant said just don't kill me and leave me here. The Appellant stated that the complainant was talking about crime shows and referencing rape and murder that night and since the beginning of their communications.[48] He referenced the complainant saying things like "I just watch these shows and that's always what happens when

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[42] Complainant's Evidence in Cross-Examination, at 208/1-31, AR, Vol I [**TAB 3A**]
[43] Complainant's Evidence in Cross-Examination, at 208/23-33, AR, Vol I [**TAB 3A**]
[44] Complainant's Evidence in Cross-Examination, at 209/37-39 and 213/1-9, AR, Vol I [**TAB 3A**]
[45] Complainant's Evidence in Cross-Examination, at 199/31- 200/23, AR, Vol I [**TAB 3A**]; Evidence of DF in Cross-Examination, at 11/19 – 12/26, AR, Vol II [**TAB 3C]**; Evidence of JF in Cross-Examination, at 263/7-27, AR, Vol I [**TAB 3B**]
[46] Complainant's Evidence in Cross-Examination, at 211/11-30, AR, Vol I [**TAB 3A**] Trial Judge's Reasons for Judgment, at 3/2, AR, Vol I [**TAB 1A**];
[47] Exhibit 15, at 143- 147, AR, Vol III [**TAB 4C**]
[48] Exhibit 15, at 178- 179, AR, Vol III [**TAB 4C**]

strange people, when they get together, they always get raped and killed".[49] The Appellant interpreted this as the complainant's odd sense of humour.[50]

33. They proceeded into the back of the truck and the complainant said she was having her period. The Appellant took out her tampon and disposed of it outside the truck. While he was touching her vaginal area with his hand, the complainant was telling him it felt good at the same time as she was touching his penis. She told the Appellant that she wanted him inside of her and then the Appellant took off his pants and put his penis inside of her. He became concerned she was not enjoying the intercourse so he stopped. They had some discussion, further kissing and she consented to further intercourse. At this point the complainant was saying things such as "I love your hard cock" and "fuck me harder" and encouraged him to ejaculate inside her.[51]

34. During the sexual touching, they were trying to remove her jacket. The jacket zipper got caught on her tank top and caused it to rip.[52]

35. After having sexual intercourse, the Appellant explained that he felt badly because he was unfaithful to his girlfriend and was unfair to the complainant for having sex with her while in a relationship. The Appellant was particularly upset because the complainant had told him earlier that it made her feel like a slut when guys had sex with her and then did not call her back.[53]

36. The Appellant was visibly upset after the sexual intercourse. The complainant comforted him and told him it was alright. She told him that she was not going to tell anyone and that she still thought he was attractive and wanted to have sex with him again.[54]

37. The complainant asked if he had cheated before which the Appellant explained was because someone told her at Cody's house that he had a wife and kids.[55] She also asked whether

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[49] Exhibit 15, at 178, AR, Vol III [**TAB 4C**]
[50] Exhibit 15, at 178- 179, and 232 - 233, AR, Vol III [**TAB 4C**]
[51] Trial Judge's Reasons for Judgment, at 4/35 – 5/7, AR, Vol I [**TAB 1A**]; Exhibit 15, at 143-147, 181- 185, and 194, AR, Vol III [**TAB 4C**]
[52] Exhibit 15, at 182/13 – 183/9, AR, Vol III [**TAB 4C**]
[53] Exhibit 15, at 209/14-19, AR, Vol III [**TAB 4C**]
[54] Trial Judge's Reasons for Judgment, at 5/7-13, AR, Vol I [**TAB 1A**]; Exhibit 15, at 237 – 238, AR, Vol III [**TAB 4C**]

he had been sexually assaulted. Although the Appellant said he did not tell the complainant that he had a girlfriend, he believed that she knew because Chris knew he had a girlfriend and because of his reaction after sexual intercourse.[56]

38. According to the Appellant, when they arrived at the complainant's house she told him that he was a nice and attractive guy.[57] The Appellant told the complainant that he couldn't see her again because he did not want it to lead to sex again.[58]

39. The Appellant knew that the complainant and her mother were having issues at home, but he did not know what happened after the complainant went into the house.[59]

40. The Appellant repeatedly stated the complainant was never crying in the truck and was actively consenting to the sexual touching and intercourse.[60]

D. Events after leaving Cody's house: evidence of the Complainant, DF and JF

41. The complainant testified that she did not consent to the sexual intercourse.

42. The complainant testified she felt uncomfortable when she got into the truck but "didn't think [she] was in serious danger until [they] started driving, and then [she] just had a bad feeling". She agreed that at 4:57 am she was already in the truck with the Appellant and that she had her phone while in the truck and was sending texts. At no point did the Appellant take her phone away from her in the truck.[61]

43. Once in the truck, she testified to the Appellant starting to rub her leg and asked her to rub his leg. The Appellant indicated he wanted to stop and make out but she testified she just

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[55] Exhibit 15, at 149, AR, Vol III [**TAB 4C**]
[56] Exhibit 15, at 187, AR, Vol III [**TAB 4C**]
[57] Exhibit 15, at 237 – 238, AR, Vol III [**TAB 4C**]
[58] Exhibit 15, at 208 – 209 and 211, AR, Vol III [**TAB 4C**]
[59] Exhibit 15, at 207, AR, Vol III [**TAB 4C**]
[60] Exhibit 15, at 226/17-19, 227/7-14, 234/4-17, 242/7-11, 249/8-12, AR, Vol III [**TAB 4C**]; Note the transcription of the statement was in error. Every time the transcript referred to "crime" it was actually "crying"
[61] Complainant's Evidence in Cross-Examination, at 168/36- 169/6; 215/40 – 216/6, AR, Vol I [**TAB 3A**]

wanted to go home. The complainant claims the Appellant pulled over and began touching himself and grabbed her hand to have her touch his penis over his clothing. The complainant testified she said "no" and that she wanted to go home.[62]

44. Then, according to the complainant, the Appellant came over the console of the truck and started grinding her. The complainant said she told the Appellant to stop. The Appellant then told her to get into the back of the truck. She does not recall how she got to the back of the truck. According to the complainant she told the Appellant she was having her period and did not want to have sex. The Appellant reached into her pants and removed her tampon and continued to touch her vaginal area with his fingers. The complainant testified that she was crying and attempting to resist him, but the Appellant persisted with vaginal intercourse.[63] After intercourse she followed the Appellant back over the console to the front passenger seat.

45. The complainant testified that she did not want to appear upset because she wanted the Appellant to give her a ride home. She cried and comforted the Appellant and told him she was not going to tell anyone and that this kind of thing happens all the time. She held the Appellant's hand during this discussion.[64]

46. The complainant acknowledged: (a) she sent text messages while in the Appellant's truck travelling from Cody's house, (b) she had access to her cell phone while in the truck, and (c) she knew there was an emergency dial function on her phone which included a GPS which could identify her location to an emergency service provider. At no time did she text or call for help or for someone to pick her up. Her last text message while in the car was to Drew saying she was super happy to be proved wrong.[65]

47. When she arrived home, she was missing her toque and shirt. The tank top she was wearing had a rip in the front. Initially the complainant testified she was 100 percent sure that

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[62] Trial Judge's Reasons for Judgment, at 3/26-32, AR, Vol I [**TAB 1A**]
[63] Trial Judge's Reasons for Judgment, at 3/34- 4/10, AR, Vol I [**TAB 1A**]; Complainant's Evidence in Chief, at 137/3-5 and 138/21-29, AR, Vol I [**TAB 1A**]
[64] Trial Judge's Reasons for Judgment, at 4/18-24, AR, Vol I [**TAB 1A**]; Complainant's Evidence in Chief, at 142/35 – 41, 144/1-30, AR, Vol I [**TAB 1A**]
[65] Complainant's Evidence in Cross-Examination, at 229/26- 230/12, AR, Vol I [**TAB 3A**]

she had her shirt over her tank top when she left Cody's house,[66] but later in cross-examination equivocated and said that she could not remember whether she left her toque and shirt at Cody's house.[67] She never got the toque or shirt back and the police did not locate these items in the search of the Appellant's truck.

48. Upon entering her house around 7am she was sobbing and immediately called upstairs for her mother and told her that she had to go to the hospital to get a "rape kit" done.[68]

49. The complainant's father and mother testified to the complainant's appearance and statements upon return home to their house at approximately 7am on December 26th. Her father testified to being woken by sounds of the complainant screaming and his wife saying "Oh, my God, she's been raped". He went downstairs and found the complainant crying and looking terrified. According to her father, the complainant was "very, very, very clear on what needed to be done. She knew we had to call the police. She had to go to the ER. She needed a rape kit" [69]; she kept saying, "I have to go - - we have to go to the ER. We have to go for a rape kit".[70] "She was, you know, very clearly describing things that happened and things that she had said".[71]

50. When his wife went to open the garage door, the complainant said, "Don't go out. Don't go out" "He'll come in. He'll kill us".[72]

51. Her mother testified that the complainant was agitated, screaming, crying and trembling when she arrived home calling "Mom, Mom, Mom". The complainant was yelling that they needed to take her to the ER to get a rape kit done because the Appellant had raped her.[73] According to her mother, the complainant physically held her back when she went to open the

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[66] Complainant's Evidence in Cross-Examination, at 178/3-8, AR, Vol I [**TAB 3A**]
[67] Complainant's Evidence in Cross-Examination, at 178/7- 179/8, AR, Vol I [**TAB 3A**]
[68] Trial Judge's Reasons for Judgment, at 5/26-33, AR, Vol I [**TAB 1A**]; Complainant's Evidence in Chief, at 148/1-7, AR, Vol I [**TAB 1A**]
[69] Evidence of DF in the Court of Queen's Bench of Alberta, called by the Crown, April 21, 2015, Excerpts of Examination in Chief by Ms. Juzwiak ["**Evidence of DF in Chief**"], at 8/9-11, AR, Vol II [**TAB 3C**]
[70] Evidence of DF in Chief, at 5/3-40, AR, Vol II [**TAB 3C**]
[71] Evidence of DF in Chief, at 8/9-11, AR, Vol II [**TAB 3C**]
[72] Evidence of DF in Chief, 5/41- 6/2, AR, Vol II [**TAB 3C**]
[73] Evidence of JF in Chief, at 255/20-28, AR, Vol I [**TAB 3B**]

garage door and said "Mom, don't. Come back in. He's going to hurt you. He is going to hurt us. I don't want him to know where we live" ... "You need to come back in".[74]

52. The complainant's father stated the complainant told them the Appellant took her phone. When they asked, "How come you didn't text us or get back to us", the complainant said "I didn't have my phone. He took my phone."[75] The complainant's mother confirmed that the complainant told them the Appellant took her phone from her.[76]

53. On this point, the complainant initially in direct examination indicated the Appellant might have had her phone at some point during their time together. [77] However, in cross-examination she admitted to not having any recollection of him taking the phone away from her or being without her phone for periods that night.[78] She acknowledged that she had her phone at all times while in the truck.[79]

54. Further, on December 26th the complainant told the investigating officer that she had her phone in her purse while in the truck and did not allege that the Appellant had her phone at any point during the evening.[80] She also never testified to the appellant taking her cell phone at the preliminary inquiry.[81]

55. The complainant agreed that when she got home the focus shifted from their fight to her allegation of rape.[82]

E. Position of the Appellant at Trial

56. The theory of the defence was the complainant, after having consensual intercourse, became aware the Appellant was not going to have a relationship with her. Feeling rejected and

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[74] Evidence of JF in Chief, 256/15-20, AR, Vol I [**TAB 3B**]
[75] Evidence of DF in Cross-Examination, at 15/4 - 16/15, AR, Vol II [**TAB 3C**]
[76] Evidence of JF in Cross-Examination, at 268/27-32, AR, Vol I [**TAB 3B**]
[77] Complainant's Evidence in Chief,, at 124/18-32, AR, Vol I [**TAB 3A**]
[78] Complainant's Evidence in Cross-Examination, at 198/31- 199/29, AR, Vol I [**TAB 3A**]
[79] Complainant's Evidence in Cross-Examination, at 168/36 – 169/6, 215/40 – 216/6, AR, Vol I [**TAB 3A**]
[80] Complainant's Evidence in Cross-Examination, at 204/30 – 205/1, AR, Vol I [**TAB 3A**]; Reasons for Judgment of Berger J.A., at para 66, AR, Vol I [**TAB 1C**]
[81] *Ibid*
[82] Complainant's Evidence in Cross-Examination, at 187/6-12, AR, Vol I [**TAB 3A**]

lied to by the Appellant, the complainant lied that the she did not consent to the sexual intercourse.[83]

57. Independent of his theory *why* the complainant would falsely assert the sexual intercourse was not consensual, the Appellant argued the evidence did not support a finding of proof beyond a reasonable doubt the absence of consent because: (a) the Appellant's evidence should be accepted, (b) even if the Appellant's evidence is not believed, it ought to raise a reasonable doubt, (c) if the Appellant's evidence is ought right rejected, the balance of the evidence is incapable of proving absence of consent beyond a reasonable doubt.

58. The Appellant argued the only evidence that was not equally consistent with consensual intercourse was the complainant's assertion. Her assertion of lack of consent is not credible because (a) she denied memory of any text messages which had the potential to reflect poorly on her, (b) her evidence at trial was inconsistent with her evidence at the preliminary inquiry, (c) her text messages in the truck were inconsistent with her evidence about how she was feeling at the time, and (d) she had alternative means of getting home other than the Appellant and her decision to go home with the Appellant were inconsistent with her assertions that she had feelings the Appellant was going to murder her.[84]

59. During defence counsel's submissions, the trial judge questioned how evidence the complainant was lying was relevant to the case if it did not relate directly to the sexual act, for example:

a) the trial judge noted his scepticism about the complainant and her parents having no recollection about the text message from her mother and the fight but states "I don't know where that gets me";[85] and
b) the trial judge questioned the relevance of the complainant's lie about her phone not being made available to her.[86]

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[83] Trial Judge's Reasons for Judgment, at 6/12-17, AR, Vol I [**TAB 1A**]
[84] Final Submissions by Mr. Archer in the Court of Queen's Bench of Alberta on May 1, 2015 ["**Defence Final Submissions**"], at 75/6-35, AR, Vol II [**TAB 3F**]
[85] Defence Final Submissions, at 79/16-2, AR, Vol II [**TAB 3F**]
[86] Defence Final Submissions, at 81/17-32, AR, Vol II [**TAB 3F**]

F. Position of the Crown at Trial

60. The Crown argued the Appellant was not credible because the information provided to the police about the roads he took that night was not possible because one of the roads did not connect as he stated in the interview. According to the Crown the complainant was credible because (a) she was "adamant" she did not consent, (b) was visibly upset when she arrived home which was consistent with the evidence of her parents and (c) her version was corroborated by the evidence of Dr. Vicas, the text messages and the Appellant's evidence.[87] The Crown argued since the text messages demonstrate the Appellant was persistent with his requests to go out with the complainant and persistent in his request for photographs of her, the trial judge could infer he would not have taken no for an answer two days later when they engaged in sexual intercourse.[88]

G. Trial Judgment

61. Starting with the assessment of the complainant's evidence, the trial stated, "I thought that she was telling the truth, or at least attempting to do so".[89] Before concluding, "[o]n the main issue before me as to whether or not the sex between [the complainant] and [the Appellant] was consensual, I found her evidence convincing" the trial judge only addressed the following issues:[90]

a) her confusion about the position she was in during the sexual intercourse was genuine and "she was *absolutely clear* that intercourse took place without her consent and against her wishes";
b) her lack of certainty about whether she had her shirt when leaving Cody's house was as a result of the "persistent questioning" by defence counsel; and
c) her evidence was convincing and her state of upset was confirmed by her parents.

62. The trial judge proceeded to the evidence of the Appellant and stated: [91]

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[87] Final Submissions by Ms. Juzwiak in the Court of Queen's Bench of Alberta on April 30, 2015 and May 1, 2015 ["**Crown Final Submissions"],** at 23/30-40; 24/37-40, AR, Vol II [**TAB 3E**]
[88] Crown Final Submissions, at 27/20 – 29/20, AR, Vol II [**TAB 3E**]
[89] Trial Judge's Reasons for Judgment, at 6/35-36, AR, Vol I [**TAB 1A**]
[90] Trial Judge's Reasons for Judgment, at 6/36 – 7/18, AR, Vol I [**TAB 1A**] [Emphasis added]
[91] Trial Judge's Reasons for Judgment, at 8/3-13, AR, Vol I [**TAB 1A**]

a) The conversation the Appellant asserted, including the complainant saying "Just don't kill me and leave me here or something", "absolutely would not have occurred" if they were considering making out;[92]

b) The Appellant's statement that the complainant was consoling him afterward because of his infidelity is not believable because he never told her about his girlfriend;[93]

c) It does not make sense that the complainant asked him if he had been sexually assaulted if he had not committed sexual assault;[94]

d) The suggestion the complainant asked "Have you ever cheated before?" was not credible;[95] and

e) The Appellant telling the complainant that he cannot go out with her again because they will end up having sex again is "consistent only with his not taking no for an answer". This along with her response that that he was a nice attractive guy and that she will not tell anybody they had sex is "consistent only" with the Appellant "having taken advantage of her against her will. Why else would she say, 'I'm not going to tell anyone'?" Further, the Appellant's description of his remorse and [the complainant's] reaction, is consistent with guilt; otherwise it's simply, in my view, not credible".[96]

63. With respect to the text message to the complainant from her mother calling the complainant a liar and expressing hurt, which both the complainant and her mother testified to not having a recall of the text message or the dispute, the trial judge initially states, "[t]here is no question that the language is strong, but the suggestion that it had anything to do with what occurred, is in my view, speculation and not at all persuasive".[97]

64. However, the trial judge later in his reasons states,[98]

> [the complainant] knew that her mother was hurt and that she was mad at her. She knew that her mother did not want her to go out on this date. She knew that her mother would

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[92] Trial Judge's Reasons for Judgment, at 7/29-37, AR, Vol I [**TAB 1A**]
[93] Trial Judge's Reasons for Judgment, at 7/37-39, AR, Vol I [**TAB 1A**]
[94] Trial Judge's Reasons for Judgment, at 7/39-41, AR, Vol I [**TAB 1A**]
[95] Trial Judge's Reasons for Judgment, at 7/41- 8/1, AR, Vol I [**TAB 1A**]
[96] Trial Judge's Reasons for Judgment, at 8/6-13, AR, Vol I [**TAB 1A**]
[97] Trial Judge's Reasons for Judgment, at 8/15-24, AR, Vol I [**TAB 1A**]
[98] Trial Judge's Reasons for Judgment, at 10/3-6, AR, Vol I (Emphasis added) [**TAB 1A**]

> tell her that I told you so. If the assault had not occurred it would clearly not have been in [the complainant's] best interests to say that it had.

65. In dealing with the complainant's evidence that while at Cody's house she thought the Appellant might murder her, the trial judge relied on the following text messages to demonstrate she was "genuinely concerned":[99]

a) 5am text to Drew that "if for some reason she dies tonight she loves him and that death is her safe word. She further texted that by death she meant she never wants to leave her house again";
b) 3am text to Jessica asking "whether she was awake or should she play nice with this guy"; and
c) 3:23 text to Jessica that "she feels this man has a wife, so if she never gets home his last name is Bourgeois".

66. The trial judge made no mention of the *last* text before the sexual intercourse occurred to Drew about being super happy to be proved wrong.

H. Appeal of Conviction to the Alberta Court of Appeal

67. The Appellant appealed his conviction to the Alberta Court of Appeal alleging amongst other things that the trial judge materially misapprehended the evidence, engaged in illogical and irrational reasoning and applied an unbalanced and skewed analytical approach to the evidence which warranted appellate intervention. After oral hearing, by way of letter to the parties, the Court requested further submissions on whether the impugned adjudication amounted to an unreasonable verdict pursuant to s. 686(1)(a)(i) of the *Criminal Code*.

68. In response, both parties filed supplemental submissions.

(1) Reasons of the Majority of the Court of Appeal[100]

69. Martin and Slatter JJ.A. ("Majority Judgment") found the high standard of review for overturning verdicts based on credibility findings "critical to the outcome of this appeal".[101] In

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[99] Trial Judge's Reasons for Judgment, at 9/28-40, AR, Vol I [**TAB 1A**]
[100] *R v Bourgeois*, 2017 ABCA 32: Alberta Court of Appeal Memorandum of Judgment, filed January 30, 2017, Reasons of Martin and Slatter JJ.A. ["**Majority Judgment**"], AR, Vol I [**TAB 1C**]

dismissing the appeal, the Majority Judgment indicated that the exchanges with defence counsel during closing submissions resolved some of the concerns raised regarding the misapprehension of evidence relating to the complainant's credibility.[102]

70. The Majority Judgment did not address the ground asserting the trial judge used illogical reasoning and misapprehended the evidence of the Appellant by making findings not supported by the record.

71. Further, the Majority Judgment, without reference to the arguments forwarded in the supplemental submissions, disagreed with Berger J.A.'s finding the verdict was unreasonable.[103] Despite no concern being raised at any earlier time by the Crown Respondent or by Martin and Slatter JJ.A to the request for supplemental submissions, the Majority Judgment characterised the request for supplemental submissions as impermissibly raising a new issue on appeal.[104]

(2) Reasons of the Dissent of the Court of Appeal

72. Mindful of the advantages of the trial judge and the reticence for appellate intervention on verdicts resting on questions of credibility, Berger J.A. found in exercise of his judicial function to review the record through the lens of judicial experience that the "errors, flaws and defects in the reasons of the trial judge" explain the unreasonable verdict and warrant appellate intervention under s. 686(1)(a)(i) of the *Criminal Code*. Berger J.A. was "***profoundly concerned that the case at bar may have been a wrongful conviction***".[105]

73. Starting by acknowledging the "tension in applying section 686(2)(a)(i) of the *Criminal Code* between an appellate court's deference to a trial judge's findings, and its duty to prevent a miscarriage of justice", Berger J.A. warns the application of appellate review on the ground of

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[101] Majority Judgment, at para 11, AR, Vol I [**TAB 1C**]
[102] Majority Judgment, at paras 26 – 29 and 31, AR, Vol I [**TAB 1C**]
[103] Majority Judgment, at para 50, AR, Vol I [**TAB 1C**]
[104] Majority Judgment, at paras 47 – 51, AR, Vol I [**TAB 1C**]; *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689
[105] Reasons for Judgment of Berger J.A., at para 68, AR, Vol I [**TAB 1C**] [Emphasis added]

unreasonable verdict must not be so constrained as to serve "as the genesis of wrongful convictions."[106]

74. After Berger J.A. reviewed the guiding authority on the standard for appellate intervention on the basis of unreasonable verdict,[107] he emphasised the Supreme Court has rejected a broader interpretation of s. 686(1)(a)(i) of the *Criminal Code* to include intervention on the basis of a "lingering or lurking doubt".[108] In recognizing appellate courts will exercise the power to intervene when a verdict rests on a question of credibility sparingly,[109] Berger J.A. concluded that this was a case where he could not shrink from exercising the power because when carrying out his statutory duty he concluded the errors, flaws and defects in the trial judge's reasons warrant appellate intervention.[110]

75. At paragraph 66, Berger J.A. articulates the "pertinent factual underpinnings" which he relies upon for finding the verdict to be unreasonable. Of particular note, Berger J.A. highlights at subparagraph 5 the uncontested facts which arise in the text messages exhibits and the complainant's testimony.

76. Within this factual context, Berger J.A., at paragraph 67, identifies 6 areas where the trial judge's "flaws, errors and defects in the analysis warrant appellate intervention" and concludes,[111]

> Upon careful consideration of the record through the lens of judicial experience and mindful of the advantage of the trial judge, I have concluded that the verdict is unreasonable. Indeed, I am profoundly concerned that the case at bar may have been a wrongful conviction.

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[106] Reasons for Judgment of Berger J.A., at para 52, AR, Vol I [**TAB 1C**]; Tricia K. Barry, "What happened in R. v. Beaudry? A Perspective on the 'Reconsideration' of the Standard for Appellate Intervention under Section 686(1)(a)(i)" 2007 12 Can. Crim. L. Rev. 1 at p.17 (Westlaw)
[107] Reasons for Judgment of Berger J.A., at paras 54- 60, AR, Vol I [**TAB 1C**]
[108] Reasons for Judgment of Berger J.A., paras 61-63, AR, Vol I [**TAB 1C**]; *R v Biniaris*, [2000] 1 SCR 381 at para 38, 2000 SCC 15
[109] *R v Burke*, [1996] 1 SCR 474 at paras 5 - 6, 1996 CanLII 229, 105 CCC (3d) 205
[110] Reasons for Judgment of Berger J.A., at paras 60, 63 – 64, and 67 – 68, AR, Vol I [**TAB 1C**]
[111] Reasons for Judgment of Berger J.A., at paras 67 and 68, AR, Vol I [**TAB 1C**]

77. In response to the Majority Judgment's questioning the propriety of the request for further submissions, Berger J.A. notes (a) the request did not raise a new issue as the issues were argued orally and in writing at first instance, (b) "[w]hen it emerged apparent that taken collectively those analytical errors might support an argument that the verdict was unreasonable and that there was good reason to believe that the failure to raise that as a separate ground of appeal would risk an injustice, the parties were invited to file supplementary factums", (c) no concern was raised by Martin and Slatter J.A. at the time the request was made, and (d) the appellate court has a duty to raise an arguable issue that may prevent a miscarriage of justice.[112]

PART II QUESTION IN ISSUE

Issue 1 Whether the flaws, errors and defects in the analysis of the trial judge warrant appellate intervention as an unreasonable verdict pursuant to s. 686(1)(a)(i) of the of the *Criminal Code*.[113]

PART III STATEMENT OF ARGUMENT

A. Issue 1: Flaws, Errors and Defects in the Trial Judge's Analysis Demand Appellate Intervention

(a) Purpose of appellate review and standard for appellate intervention

78. The right to meaningful appellate review is a right enjoyed by all individuals convicted of *any* criminal offence. No specific type of criminal offence is impervious to appellate review. No specific type of criminal offence is immune from a wrongful conviction. This includes cases, such as sexual assault, where proof beyond a reasonable doubt of the essential elements of the offence are integrally connected to findings of credibility.[114] As such, care must be taken not to interpret the standard of review so strictly as to remove the right of meaningful appellate review and the protection against wrongful convictions.

79. The reasons of Berger J.A. demonstrate a proper application of appellate review which both respects the parameters of appellate intervention and fulfills the meaningful function of appellate review.

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[112] Reasons for Judgment of Berger J.A., at para 69, AR, Vol I [**TAB 1C**]
[113] *Criminal Code*, RSC 1985, c.C-46 ("*CC*") at s. 686(1)(a)(i) Part IV
[114] *R v C.L.Y.*, [2008] 1 SCR 5 at para 8, 2008 SCC 2

80. A trial judge's assessment of credibility is generally owed deference on appellate review. Findings of credibility can be interfered with on appeal, however, if they are unreasonable *or* display palpable and overriding error.[115]

81. The need to remain conscious of the "advantages enjoyed by the trier of fact" in making credibility assessments, does not mean "that an appellate court should shrink from exercising the power when, after carrying out its statutory duty, it concludes that the conviction rests on shaky ground and that it would be unsafe to maintain it. In conferring this power on appellate courts to be applied only in appeals by the accused, it was intended as an additional and salutary safeguard against the conviction of the innocent."[116] Appellate courts are duty bound to intervene with an unreasonable verdict.[117]

82. Section 686(1)(a)(i) of the *Criminal Code* permits appellate intervention "on the ground that it is unreasonable or cannot be supported by the evidence".[118] Berger J.A. correctly summarizes the proper approach to appellate review of judge alone verdicts for unreasonableness as follows:[119]

> **60** The Supreme Court has noted that the review for unreasonableness on appeal from a judge alone verdict is both "different" and "somewhat easier." The Court has explained that "in those cases, the reviewing appellate Court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached and justify the reversal": ***Biniaris*** para. 37. The Court observed that "in trials by judge alone, the Court of Appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion." The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable "when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached." (***Biniaris*** para. 37) As I see it, such "defects", "flaws", "misstatements" or "failures to

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[115] *R v R.P*,. [2012] 1 SCR 746 para 9 2012 SCC 22; *R v Gagnon*, [2006] 1 SCR 621 at para 10, 2006 SCC 17*; R v Sinclair*, [2011] 3 SCR 3 at paras 12, 15, 19, 26, 30, 2011 SCC 22; *R v W.R.*, [1992] SCJ No 56 at para 20, 2 SCR 122; *R v D.D.S.*, 2006 NSCA 34 (CanLII) at para 41, [2006] NSJ No 103

[116] *Burke, supra* at paras 5 – 6; See also the dissenting reasons of Deschamps and Fish JJ. in *Gagnon, supra* at paras 49 - 52

[117] *Sinclair*, *supra* at para 22

[118] s. 686(1)(a)(i) *Criminal Code*

[119] Reasons for Judgment of Berger J.A., at para 60, AR, Vol I [**TAB 1C**]

apply legal principles" will, in many cases, warrant appellate intervention without reliance on the unreasonable verdict provision of the ***Criminal Code***.

83. Various types of errors, flaws or defects in a trial judge's reasons may contribute to a finding the verdict unreasonable warranting appellate intervention under s. 686(1)(a)(i) of the *Criminal Code*. Although s. 686(1)(a) provides for three distinct basis for appellant intervention, may involve more than one concern in the appellate review. For example, Doherty J.A. in *R v Morrissey*, recognized that an assertion of misapprehension of the evidence may warrant appellate intervention under all three grounds in s. 686(1)(a).[120] Fish J. in *R v Sinclair* agreed with Doherty J.A.'s comments that a trial judge's "failure to consider evidence relevant to a material issue" or "failure to give proper effect to the evidence" in a judge alone case can "figure prominently in an argument that the resulting verdict was unreasonable".[121]

84. An unreasonable verdict may also arise if the verdict was reached illogically or irrationally: "[a] verdict reached illogically or irrationally is 'unreasonable' because it is not reached judicially, or in accordance with the rule of law".[122] Acknowledging that "[i]llogical or irrational reasoning can render verdicts unreasonable under s. 686(1)(a)(i) of the *Code*, in various ways".[123] Two such ways were identified in *R v Beaudry* as "where a trial judge draws an inference or makes a finding of fact that is (1) plainly contradicted by the evidence relied on for that purpose by the judge, or (2) demonstrably incompatible with evidence that is not otherwise contradicted or rejected by the trial judge."[124]

85. A trial judge applying an "unbalanced or skewed analytical approach to evaluating the respective evidence of the appellant and the complainant" may also contribute to a finding the verdict is unreasonable under s. 686(1)(a)(i).[125]

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[120] *R v Morrissey*, 1995 CanLII 3498 at pp. 32, 34, and 35, 97 CCC (3d) 193
[121] *Sinclair*, *supra* at para 13; *Morrissey, supra* at pp. 32 and 35, 97 CCC (3d) 193
[122] *Sinclair*, *supra* at para 26; Reasons for Judgment of Berger J.A., at para 55, AR, Vol I [**TAB 1C**]
[123] *Sinclair*, *supra* at para 19
[124] *Sinclair*, *supra* at at paras 16, 19 and 21; *R.P. supra* at para 9; *R v Beaudry*, [2007] 1 SCR 190 at para 97, 2007 SCC 5
[125] *R v M.J.B,* 2015 ABCA 146 (CanLII) at para 18, [2015] AJ No 460(QL) affirmed at 2015 SCC 48, 3 SCR 34

86. In assessing whether the verdict is unreasonable an appellate court must do more than assess the mere sufficiency of evidence. It must analyse, re-examine and reweigh the evidence through the lens of judicial experience which "serves as an additional protection against an unwarranted conviction".[126]

87. There is no exhaustive list of the sorts of cases in which "accumulated judicial experience may suggest that a jury's verdict is unreasonable."[127] Included in the examples noted in the jurisprudence is the risk of accepting bizarre allegations of a sexual nature. However, central to this issue is not whether a case fits within a category previously acknowledged by a court. Rather the question is whether, when applying the lens of judicial experience, the frailties of the evidence relied upon as proof beyond a reasonable doubt creates a risk of an unjust conviction.[128]

88. Appellate intervention is required even where a conviction is available on the record, because, as Fish J. expressed in *R v Beaudry*:[129]

> ... No one should stand convicted on the strength of manifestly bad reasons – reasons that are illogical on their face, or contrary to the evidence – on the ground that another judge (who never did and never will try the case) could but might not necessarily have reached the same conclusion for other reasons. A verdict that was reached illogically or irrationally is hardly made reasonable by the fact that another judge could reasonably have convicted or acquitted the accused. I think it preferable by far, where there is evidence capable of supporting a conviction, to order a new trial so that a fresh and proper determination can be made by a real and not hypothetical "other judge".

89. Although an appellate court is to give deference to a trial judge's finding of credibility,[130] it cannot abdicate its duty to overturn a verdict that is premised on credibility findings that are clearly wrong, arrived at through illogical reasoning, or are unreasonable or unsupported by the evidence.

(b) Errors, flaws and defects leading to an unreasonable verdict

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[126] *Biniaris*, *supra* at paras 36-37 and 40; *Beaudry*, *supra* at para 58; *R v A.G.*, [2000] 1 SCR 439 at para 6, 2000 SCC 17; *R v W.H.*, [2013] 2 SCR 180 at para 28, 2013 SCC 22
[127] *W.H.*, *supra* at para 29
[128] *Biniaris*, *supra* at para 41; *W.H.*, *supra*, at para 29
[129] *Beaudry*, *supra* at para 97
[130] *Biniaris*, *supra* at paras 24 and 27; *R.P.*, *supra* at para 10

90. Important to the exercise of appellate review is understanding the factual underpinnings for finding the verdict unreasonable in this case are not generally in dispute. The deference afforded to the advantage of the trial judge is influenced by the nature of the evidence and the issues raised on appeal. In the Appellant's case the advantage of the trial judge over the appellate court to assess the evidence is limited because:

a) although the Appellant's and complainant's evidence about whether the sexual intercourse was consensual was diametrically opposed, much of the evidence at trial was not contentious;
b) a significant portion of the evidence is documentary: text messages and the statement of the Appellant; and
c) the testimonial evidence which raises concerns regarding the reasonableness of the verdict was evidence provided by the complainant herself.

91. It is the irrational and illogical reasoning of the trial judge, along with the material misapprehensions of the evidence and unbalanced approach to the evidence, which renders the verdict unreasonable. The errors, flaws and defects in the reasoning are central both to the trial judge's finding the Appellant's evidence does not raise a reasonable doubt and that the complainant's evidence proves beyond a reasonable doubt the essential elements of the offence of sexual assault. The verdict arising from such errors in reasoning is unreasonable and requires appellate intervention.

i. Flawed reasoning in assessing the evidence of conversations between the complainant and Appellant in the truck

92. One key area where the trial judge uses illogical reasoning is in his assessment of conversations the Appellant stated occurred while he and the complainant were in his truck. The first conversation and the trial judge's illogical and irrational reasoning is demonstrated in the following excerpt from his reasons for judgment:[131]

> At page 45 of his statement, [the Appellant] says that after he pulled over and parked where this alleged incident took place, he says something to the effect that, "I'm like don't worry, I don't think we're going to have sex". To which he says that she says, "Just don't leave." She's like, "Just don't kill me and leave me here or something, I don't know." He's asked

[131] Trial Judge's Reasons for Judgment, at 7/29-37, AR, Vol I [**TAB 1A**] [emphasis added]

> then why she would say that to which he replied, "She watches - - that she watched TV and this is where she got the idea". He said to Detective Archer that he started laughing and told her, "I'm not going to kill you and leave you on the side of the road. This conversation absolutely would not have occurred between [the complainant] and [the Appellant] if they were considering making out.

93. The trial judge's finding that the following conversation "absolutely would not have occurred if they were considering making out"[132] "does not logically flow from the evidence on which the inference is based."[133] First, the inference is plainly contradicted by the evidence from which it was drawn. In the Appellant's statement, he explains how the complainant consistently talked about rape and murder and her interest in crime shows. He says the complainant's comment was her attempt to be funny.[134]

94. According to the Appellant's statement, the complainant made these types of comments from the first time he met the complainant at the pub. The Appellant was driving their mutual friend Chris home and offered to give the complainant a ride home as well. In declining his offer, the complainant said "oh you guys are gonna rape me" referencing back to the crime shows she watched.[135]

95. Further, the inference is demonstrably incompatible with the undisputed evidence and the reasoning cannot be supported when subjected to contextual scrutiny.[136] It was not disputed that the complainant sent text messages, made comments and had thoughts about death, rape and murder. She testified to watching a lot of crimes shows and that her comments were both part of her sense of humour as well as a genuine concern.[137] The record is replete with such examples, some of which include:

a) Shortly into her text messaging with the Appellant on December 24th at a time where the complainant was pursuing a romantic relationship with the Appellant, the complainant, in

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[132] Trial Judge's Reasons for Judgment, at 7/29-37], AR, Vol I [**TAB 1A**] [Emphasis added]
[133] Reasons for Judgment of Berger J.A., para 67, AR, Vol I [**TAB 1C**]
[134] Exhibit 15, at 179, AR, Vol III [**TAB 4C**]
[135] Exhibit 15, at 232 – 233, AR, Vol III [**TAB 4C**]
[136] *Sinclair*, *supra* at para 23; *Beaudry*, *supra* at para 97
[137] Complainant's Evidence in Chief, at 59/25-38, 61/31 – 62/8, AR, Vol I [**TAB 3A]**; Complainant's Evidence in Cross-Examination, at 165/28 - 166/37, AR, Vol I [**TAB 3A**]; Exhibit 9, Messages #75, #120, #598 and #599, at 109, 115, 177, 178, AR, Vol II [**TAB 4A**]

message 75, states "Or you could murder me cause I watch a lot of criminal minds".[138] On a similar vein messages 120 and 121 refer to the complainant not getting stranded in vehicles when she is drunk because that is how rape and murder happens and acknowledges "I know it's horrible my mind is messed up".[139]

b) While at Cody's house the complainant texted her fiend Jessica, "I feel this man has a wife so here is his last name if I never even (sic) up home Bourgeois".[140]

To Drew the complainant texted:[141]

> It (sic) for some reason i die onight (sic) I love you
> Death is. My safe word
> And by death I mean I never wanna leave my hose (sic) again
> Ever

Less than 2 minutes later these texts were followed by "Well I'm very super hppy (sic) to be proved wrong 4000".[142]

c) In cross-examination she testifies that it is "a little eerie I could foreshadow" in the text messages and her thoughts her own rape.[143]

d) The complainant testified to thinking one to three times at Cody's house "this is where he murders me" referencing thoughts that the Appellant was going to kill her. She agreed these were serious thoughts.[144] There was no objective basis for these thoughts.

96. Neither the statement of the Appellant, nor the other evidence which was not rejected by the trial judge is compatible with the trial judge's inference that the conversation would absolutely not have occurred if the complainant was consenting to sexual touching. To the contrary, the undisputed evidence is that the complainant repeatedly made exactly these types of

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[138]Exhibit 9, Messages #75, at 109, AR, Vol II [**TAB 4A**]
[139] Exhibit 9, Messages #120 - 124, at 115 - 116, AR, Vol II [**TAB 4A**]
[140]Exhibit 9, Messages #8 with Jessica, at 84, AR, Vol III [**TAB 4A**]
[141] Exhibit 9 Messages 2-6 with Drew, at 130, AR Vol III[**TAB 4A**]
[142] Exhibit 9 Messages 1 with Drew, at 130, AR Vol III[**TAB 4A**]
[143] Complainant's Evidence in Cross-Examination, at 166/24 – 167/18, AR, Vol I [**TAB 3A**]
[144] Complainant's Evidence in Cross-Examination, at 208/33 – 210/23-39 and 213/1-9, AR, Vol I [**TAB 3A**]

comments. The trial judge's illogical reasoning is central to the verdict as it forms part of the basis for finding the Appellant's evidence did not raise a reasonable doubt.

97. The next conversations between the complainant and Appellant analysed by the trial judge applying illogical reasoning is as follows:[145]

> I'm like - even like when we were driving down Douglas Dale, it is like listen, like I'm so - like attracted to you, I know like that if we go - if we do it again - we're going to do it again we're going to end up doing the same thing over again." He goes on to describe her reaction which is, "you know, I think you're a really nice guy, you're really good looking, stuff like that and don't worry about it, I'm not going to tell anybody and stuff like that." This exchange described by the accused is consistent only, in my view, with him having taken advantage of her against her will. Why else would she say, "I'm not going to tell anyone"? And his statement to her is consistent only with his not taking no for an answer. His description of his remorse and [the complainant's] reaction, is consistent with guilt; otherwise, it simply in my view, not credible.

98. The trial judge's conclusion that these conversations are "consistent only" with the Appellant having sexually assaulted the complainant does not logically follow and is inconsistent with the evidence. This reasoning is illogical because the evidence is equally consistent with other inferences consistent with innocence.[146] It is not a reasonable exercise of a trial judge's judicial function to find the evidence is only consistent with guilt when there are other reasonably available inferences consistent with innocence.

99. As Berger J.A. correctly identifies: [147]

> With respect, the judge here ignores the plethora of evidence touching upon the issue of the appellant's marital status. Given the appellant's infidelity, his expression of remorse and the complainant's assurance not to reveal their sexual activity are both equally consistent with innocence. As to the appellant's statements to the complainant being consistent only with his not taking no for an answer, that proposition, simply put, does not follow. It is also equally consistent with innocence. It certainly accords with the complainant's text to her girlfriend Jessica at approximately 3:00 am inquiring as to whether "[she] should play nice with this guy?"

100. It was not reasonable for the trial judge to conclude the evidence that the Appellant told the complainant he cannot go out with the complainant again because they would end up having

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[145] Trial Judge's Reasons for Judgment, at 8/3-13, AR, Vol I [**TAB 1A**] [emphasis added]
[146] Reasons for Judgment of Berger J.A., at para 67, AR, Vol I [**TAB 1C**]
[147] Reasons for Judgment of Berger J.A., at para 67, AR, Vol I [**TAB 1C**]

sex was "consistent only with his not taking no for an answer". This evidence is equally consistent with the Appellant being regretful that he was unfaithful to his girlfriend and not wanting to be unfaithful again in the future.

101. Similarly, the trial judge's conclusion this conversation along with the complainant's response that the Appellant was a nice attractive guy and that she would not tell anybody they had sexual intercourse is "consistent only" with the Appellant "having taken advantage of her against her will" does not logically follow. The trial judge posed the question, "Why else would she say, 'I'm not going to tell anyone'?". Respectfully, the trial judge's conclusion flies in the face of the other logical explanation on the uncontroverted evidence that the Appellant and complainant met through a mutual friend and that the conversation arose from her reassuring the Appellant the fact of his infidelity would not be passed on by her.[148]

100. This evidence also demonstrates the flawed reasoning applied by the trial judge in ignoring that Appellant's description of remorse and the complainant's reaction are also equally consistent with innocence.

101. This irrational reasoning is carried forward from the trial judge's flawed reasoning in rejecting the Appellant's evidence that the complainant was consoling him after the sexual intercourse and asking whether he had cheated before or was assaulted.[149] The trial judge rejects the Appellant's evidence because the Appellant did not tell the complainant that he had a girlfriend. However, the portion of the statement relied upon by the trial judge includes the Appellant's explanation that although he did not expressly tell the complainant that he had a girlfriend she might know he had a girlfriend from his reaction and because Chris knew he had a girlfriend.

102. Further, this finding is demonstrably incompatible with the evidence the complainant was told the Appellant was in a relationship. There is ample evidence of the complainant's belief the Appellant was in a relationship with another woman; including being told by Chris and Sabrina. The text messages and evidence of the complainant regarding being told the Appellant was in a

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[148] Exhibit 15, at 150, AR, Vol III [**TAB 4C**]
[149]Trial Judge's Reasons for Judgment, at 7, AR, Vol I [**TAB 1A**]; Exhibit 15, at 185 - 190 and 206 – 208, AR, Vol III [**TAB 4C**]

relationship were not disputed. In fact, subsequently in the reasons for judgment the trial judge finds the Appellant's text "You can believe whatever you want" refers to Sabrina telling the complainant that the Appellant had a wife.[150] Also the trial judge refers to the text messages from the complainant to Jessica asking if she was awake or should she play nice with this guy and saying that she feels the Appellant has a wife, so if she never gets home his last name is Bourgeois.[151]

103. It was not rational for the trial judge to conclude on this record that the Appellant's evidence regarding the complainant's reaction after the sexual intercourse was not equally consistent with the Appellant's infidelity on the basis he did not explicitly tell her he had a girlfriend.

104. Similarly, the trial judge's finding "[n]or would it make any sense for Allie to ask him if he had been abused if he had not committed sexual assault" and finding the assertion the complainant asked "Have you ever cheated before?" was not credible suffers the same logical failings.[152] His findings are demonstrably inconsistent with the evidence the complainant was preoccupied with whether the Appellant had a wife, the questions she asked the Appellant, the information she received from Sabrina and her text messages to her friends.[153] Contrary to the trial judge's reasoning, the question logically flows from the Appellant's evidence that he was upset about cheating on his girlfriend and making the complainant feel used.[154]

ii. Flawed reasoning in assessment of the complainant's disclosure to her parents

105. The trial judge finds the dispute between the complainant and her mother partially captured in the 3:13am text message and the assertion by each not to recall any details of the dispute to be irrelevant.[155] However, the trial judge proceeds to use the evidence of her mother

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[150] Trial Judge's Reasons for Judgment, at 5/26-32, AR, Vol I [**TAB 1A**]
[151]Trial Judge's Reasons for Judgment, at 9/34-36, AR, Vol I [**TAB 1A**]
[152] Trial Judge's Reasons for Judgment, at 7/39 – 8/1, AR, Vol I [**TAB 1A**]
[153] Exhibit 9 Messages #86, 182, 538, 541, 593, and 595, at 111, 123, 170, 177, AR, Vol II [**TAB 4A**]; Trial Judge's Reasons for Judgment, at 5/26-32 and 8/31-32, AR, Vol I [**TAB 1A**]
[154] Trial Judge's Reasons for Judgment, at 7/39 –8/1, AR, Vol I [**TAB 1A**]
[155] Trial Judge's Reasons for Judgment, at 8/15-24, AR, Vol I [**TAB 1A**]

being upset with her as a basis for enhancing the complainant's credibility as follows:[156]

> I am further satisfied beyond a reasonable doubt, that when Allie got home that morning, she was genuinely traumatized. She was crying and trembling and complaining that she had been raped. Allie knew that her mother was hurt and that she was mad at her. She knew that her mother did not want her to go out on this date. She knew that her mother would tell her that I told you so. If the assault had not occurred it would clearly not have been in [the complainant's] interests to say that it had.

106. This reasoning is problematic for the following reasons:

a) The finding that it would not be in the complainant's interests to lie about being sexually assaulted does not logically flow from the evidence that her mother did not want her to go out on this date. As Berger J.A. explains, "[o]n the contrary, the complainant would know that she had failed to contact her parents and had disobeyed them. What better way to deflect the expected tongue-lashing than to raise the specter of sexual assault."[157]

b) The inference is incompatible with the evidence of the complainant and her mother. The mother did not tell her "I told you so" when the complainant said she was raped. Nor did the complainant testify to having concerns about telling her mother because she would say "I told you so". The reasoning of the trial judge relied on pure speculation rather than the actual evidence of the complainant that when she got home the focus shifted from their fight to her allegation of rape.[158]

c) The inference it would not be in her best interest to say she had been assaulted if she had not been is contrary to the trial judge's earlier finding that the argument between the complainant and her mother was irrelevant.[159]

d) This flawed and speculative reasoning is particularly significant because it is used by the trial judge to completely discount the possibility the complainant was untruthful about her lack of consent, the key issue for determination.

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[156] Trial Judge's Reasons for Judgment, at 10/3-6, AR, Vol I [**TAB 1A**]
[157] Reasons for Judgment of Berger J.A., at para 67, AR, Vol I [**TAB 1C**]
[158] Evidence of the Complainant in Cross-examination, at 187/6-12, AR, Vol I [**TAB 3A**]
[159] Trial Judge's Reasons for Judgment, at 8/15-24, AR, Vol I [**TAB 1A**]

iii. Conflicting reasoning and failure to resolve material inconsistencies

107. The trial judge makes inconsistent findings regarding the complainant's evidence she had thoughts about the Appellant murdering her before she left Cody's house. In resolving the inconsistency between the complainant's decision to go home alone with the Appellant in his truck while having thoughts the Appellant might kill her, the trial judge dismisses the seriousness of her thoughts as "misgivings" and the complainant thought she would get home fine.[160]

108. Contrary to this finding however, the trial judge also found the complainant was "genuinely concerned" before leaving with the Appellant that she might be killed by the Appellant. This fear was found by the trial judge to be objectively supported by the text message to Drew stating if she dies tonight, she loves him and that death is her safe word. By death she meant never want to leave the house again. The trial judge also relied on the text to Jessica stating that she feels this man has a wife, so if she never gets home his last name is Bourgeois.[161] As identified by Berger J.A. "[t]he inconsistency is troubling".[162] The reasoning behind these findings is flawed in the following ways:

a. The trial judge's acceptance that the complainant felt she would get home alright is inconsistent with the evidence he relies upon to find the complainant had a genuine belief the Appellant would murder her. This evidence flies in the face of the trial judge's dismissal of the evidence elicited upon cross-examination about the complainant's actions being inconsistent with her stated fears.

b. The finding the complainant had a genuine concern the Appellant was going to kill her is entirely inconsistent with her deciding to leave with the Appellant alone in a vehicle after she had been consuming alcohol when she had other options to either stay or call for a taxi. This is particularly troubling when assessed in the context of the complainant's evidence and text messages about how that is how rape and murder happens.

c. The trial judge's acceptance of the text messages supporting a genuine objectively

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[160] Trial Judge's Reasons for Judgment, at 9/18-23, AR, Vol I [**TAB 1A**]
[161] Trial Judge's Reasons for Judgment, at 9/25-36, AR, Vol I [**TAB 1A**]
[162] Reasons for Judgment of Berger J.A., at para 67, AR, Vol I [**TAB 1C**]

verifiable fear is incompatible with the other text message to Drew stating "Well I'm very super hppy (sic) to be proved wrong 4000".[163] Despite referring to the other text messages, the trial judge does not refer to this message which was the last one sent and closest in time to the alleged assault.

d. The finding the complainant had a genuine fear for her safety was not objectively based. The complainant's thoughts were not based on any threats, comments, or actions of the Appellant. The flawed reasoning blinded the trial judge from considering the evidence of the complainant established bizarre thoughts and actions which must be considered in assessing the reliability and credibility of her evidence.

e. That the complainant had a genuine fear the Appellant would murder her was also incompatible with the contemporaneous playful text messages from the complainant to the Appellant while at Cody's house.[164]

109. It is not permissible for a trial judge to make inconsistent findings of fact to resolve difficulties within a complainant's evidence. The flawed reasoning applied by the trial judge prevented him from critically analysing the reliability and credibility of the complainant's assertion based on the evidence before him. This unsound reasoning contributes to the finding the verdict unreasonable requiring appellate intervention.

iv. Flawed and imbalanced assessment of the evidence of the complainant and Appellant

110. The material misapprehensions of the evidence and unbalanced approach to the evidence of the Appellant and complainant demonstrated in the trial judge's reasons help to establish the verdict is unreasonable. Firstly, as identified by Berger J.A., the trial judge mistakenly concludes on the evidence that "after a great deal of pressing [by the Appellant] she sent him a photograph of her midriff portion and part of her breasts".[165] To the contrary, the evidence of the text

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[163] Exhibit 9 Messages 1 with Drew, at 130, AR Vol III[**TAB 4A**]
[164] Trial Judge's Reasons for Judgment, at 8/29-38, AR, Vol I [**TAB 1A**]; Exhibit 9 Messages #660 – 663, 667 – 669, at 185- 188, AR, Vol II [**TAB 4A**]
[165] Trial Judge's Reasons for Judgment, at 2/40-41, AR, Vol I [**TAB 1A**]; Reasons for Judgment of Berger J.A., at para 66, AR, Vol I [**TAB 1C**]

message exchange shows the Appellant asking for the best picture of the complainant on her phone to which the complainant responds "Of my face or something else". Immediately after the Appellant replies "Of Anything" "As long as its you" "What's something else" "But know (sic) I'm curious", the complainant sends the photograph.[166]

111. During this text message discussion, the complainant was also seeking pictures of the Appellant including a "six pack photo"[167]

112. The significance of this misapprehension of the evidence is heightened when considering the complainant's testimony that her text messages to the Appellant were not sent for the purpose of demonstrating sexual interest. She disputed her comment "Of my face or something else" was a sexual reference and asserted it could be a full body shot with clothing despite the fact she sent a semi-nude picture to the Appellant.[168]

113. The evidence does not reasonably support the trial judge's one-sided view of the text messages which unfairly coloured the entirety of his assessment of the Appellant's evidence and failed to critically scrutinize the complainant's evidence.

114. This misapprehension also contributed to a further imbalance in the trial judge's analysis of the evidence. The trial judge concludes that the text messages demonstrate the Appellant "was not only interested, but anxious to have a sexual relationship" with the complainant, but fails to consider whether this very evidence demonstrated the complainant was also not only interested, but anxious to have a sexual relationship with the Appellant.[169]

115. This misapprehension of the evidence is perpetuated by the trial judge's assessment of the Appellant's evidence where he states: [170]

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[166] Exhibit 9 Messages #199-206, at 125-126, AR, Vol II [**TAB 4A**]
[167] Complainant's Evidence in Cross-Examination, at 158/31-40, AR, Vol I [**TAB 3A**]; Exhibit 9, Message #222, at 128, AR, Vol II [**TAB 4A**]
[168] Complainant's Evidence in Chief, at 70/39 – 71/13, AR, Vol I [**TAB 3A**]; Complainant's Evidence in Cross-Examination, at 159/29, AR, Vol I [**TAB 3A**]; Exhibit 9 Messages #199 - 206, at 125-126, AR, Vol II [**TAB 4A**
[169] Reasons for Judgment of Berger J.A., at para 67, AR, Vol I [**TAB 1C**]; Trial Judge's Reasons for Judgment, at AR 2/41 - 3/2, AR, Vol I [**TAB 1A**]
[170] Trial Judge's Reasons for Judgment, at 7/20-27, AR, Vol I [**TAB 1A**]

> I reject the part of the statement that his original intention was to take her home. It simply flies in the face of all the texting which took place since these two met on the evening of December 23, 2012, throughout the early morning hours of December 24 and the following day, making it clear that [the Appellant] was interested in little else than having sex with [the complainant]. I have no doubt that was uppermost in his mind when he left the house at 6:00 am and it probably had been since he picked her up at 10:15 the previous evening.

116. The trial judge reasons that since the Appellant expressed a sexual interest in the complainant in text message in the days leading up to the alleged assault, it is unbelievable that he would not take the complainant home without having sex with her. Just as it would be impermissible to conclude a complainant's expression of sexual interest in an accused person means she consented to the sexual activity, so should the reverse reasoning be forbidden. The fact the Appellant expressed a sexual interest in the complainant does not logically support the inference that he would pursue this sexual interest regardless of the wishes of the complainant.

117. Furthermore, the trial judge unfairly mischaracterises the evidence in the Appellant's statement. The only evidence on point was this brief exchange with Detective Archer where she asks, "Okay, all right. And what was the plan when you guys were leaving?" to which the Appellant responds "Uh ... just to go huh".[171] The trial judge created a false inconsistency with the Appellant's prior conduct and used it to justify disregarding the Appellant's evidence

118. This conclusion is also demonstrably incompatible with the text messages between the Appellant and the complainant while at Cody's house, including the Appellant being upset about the complainant talking about him to the other guests and the Appellant texting to the complainant "you can believe whatever you want" referring to Sabrina telling the complainant he was married, and "So I'm gonna go home as I figured you have made your mind up" "[s]o you can leave with me are say (sic) there".[172] The trial judge clearly accepts the text message evidence as he specifically references this evidence later in his reasons for judgment and describes the complainant persisting in convincing the Appellant to socialize with her and the Appellant resisting.[173] Rather than assessing the whole of the evidence, including that most contemporaneous with the Appellant's departure from Cody's house, the trial judge relies on

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[171] Exhibit 15, at 169, AR, Vol III [**TAB 4C**]
[172] Exhibit 9, Messages #652, #655-657, #678, #687, #693, and #696, at 184, 185, 188, 190, AR, Vol II [**TAB 4A**]
[173] Trial Judge's Reasons for Judgment, at 8/34-38, AR, Vol I [**TAB 1A**]

prohibited reasoning that because the Appellant expressed a prior sexual interest in the complainant it was unreasonable that he would plan to go home without having sexual intercourse with her.

119. The reasons for judgment demonstrate the trial judge also misapprehending the legal significance of the evidence the complainant lied about the Appellant having her cell phone the night of the alleged assault. In examination in chief the complainant testified to the possibility the Appellant had her phone that night. However, the complainant later admitted to sending text messages while in the truck and at no point did the Appellant take her phone away from her.[174]

120. After the alleged assault, however, the complainant falsely told her parents the Appellant had taken her phone away from her.[175] The complainant told her parents that the Appellant had taken her phone from her in response to their inquiries about why the complainant did not text them.[176]

121. In his reasons for judgment the trial judge does not refer to the complainant's demonstrated lie to her parents.[177] Just as the trial judge dismissed the relevance of his scepticism to the complainant and her mother's lack of recollection about her mother's scathing email to the complainant, the trial judge did not consider this demonstrated falsehood to be relevant to the determination of the issues before the court.[178] The trial judge misapprehended the legal significance of false statements made by the complainant to the key issue of whether her evidence the sexual intercourse was not consensual can displace the presumption of innocence. Evidence of the complainant stating falsehoods to her parents about the details of her interaction with the Appellant and her lack of forthrightness with the court regarding her memory of the text message and dispute with her mother are relevant to the proper determination of issue before the court.

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[174] Evidence of JF in Cross-Examination, at 268/27-32, AR, Vol I [**TAB 3B**]; Complainant's Evidence in Cross-Examination, at 168/36 – 169/6, 215/40 – 216/6, AR, Vol I [**TAB 3A**]
[175] Reasons for Judgement of Berger J.A., at para 66, AR, Vol I [**TAB 1C**].
[176] Evidence of DF in Cross-Examination, at 15/4 – 16/15, AR, Vol II [**TAB 3C**]; Evidence of JF in Cross-Examination, at 268/27-32, AR, Vol I [**TAB 3B**]; Evidence of the Complainant in Chief at 124/18-26, AR, Vol I, [**TAB 3A],** Complainant's Evidence in Cross-Examination, at 198/31 – 199/10, AR, Vol I [**TAB 3A**]
[177] Defence Final Submissions, at 81/17-32, AR, Vol II [**TAB 3F**]
[178] Defence Final Submissions, at 79/16-21, AR, Vol II [**TAB 3F**]

v. The verdict not supported by any reasonable review of the evidence

122. The trial judge's assessment of credibility "cannot be supported on any reasonable view of the evidence".[179] The evidence a court would have to accept to render a conviction is so incredible that verdict founded upon it would be unreasonable. [180]

123. The incredible and concerning evidence of the complainant includes the complainant's (a) bizarre preoccupation with and repeated comments about rape, murder, and television crime shows, (b) serious but entirely objectively unfounded thoughts before getting into a truck alone with the Appellant that he was going to murder her, (c) bizarre text messages to her friends referencing death and the possibility she would not make it home safe because she thought the Appellant had a wife, (d) dispute with her mother that night, (e) lack of recall of any text messages which could reflect poorly on her, (f) warning to her mother not to open the garage door because the Appellant would murder them, and (g) falsely telling her parents that the Appellant took her phone away from her.

124. When the record is critically reviewed, through lens of judicial experience, the frailties of the complainant's evidence which must be relied upon to displace the presumption of innocence forecloses a reasonable conviction.

(c) Conclusion

125. No verdict arrived through illogical reasoning can be permitted to stand, especially in this case where the reasons demonstrate illogical reasoning in combination with material misapprehension of the evidence and an unbalanced and unfairly skewed approach to the evidence of the complainant and Appellant.[181]

126. Berger J.A.'s profound concern that the Appellant may be wrongfully convicted is well founded in the record and in the flawed reasons of the trial judge. This is one of those, albeit rare, cases where the proper exercise of the Court's judicial function to provide meaningful review demands appellate intervention and the conviction to be set aside.

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[179] *W.H.*, *supra* at paras 33 and 34
[180] *W.H.*, *supra* at para 32
[181] *Biniaris*, *supra* at para 37; *Beaudry*, *supra* at para 94

PART IV STATEMENT CONCERNING COSTS

127. The Appellant makes no submissions concerning costs.

PART V ORDER SOUGHT

128. The Appellant requests that his appeal be granted and the sexual assault conviction be set aside. Although an unreasonable verdict arising from illogical or irrational reasoning will often result in the order of a new trial, the Appellant asserts given the frailties and concerning features of the evidence in this case, the verdict of guilt was not reasonably available on the record and therefore the Court should substitute an acquittal.[182]

129. In the alternative, if the Court finds appellate intervention is warranted but that the record could reasonably support a verdict of guilt, the Appellant respectfully requests a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Calgary, Alberta, this 30th day of May, 2017

Jennifer Ruttan
Counsel for the Appellant
Michael Shawn Bourgeois

[182] s. 695(1) of the *Criminal Code*

PART VI TABLE OF AUTHORITITES

Secondary Sources

STATUTORY PROVISIONS

Criminal Code, RSC 1985 c C-46, 686(1)(a)(i), 695(1)

Code criminel, LRC (1985) ch C-46, 686(1)(a)(i), 695(1)