File Number: 37461

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MICHAEL SHAWN BOURGEOIS

Appellant (on appeal)
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF ALBERTA

RULES 36 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. This appeal is nothing more than a dispute over the trial judge's credibility findings in convicting the Appellant Michael Shawn Bourgeois of sexual assault of the complainant AF. At the Alberta Court of Appeal, Bourgeois argued that the trial judge's credibility findings were the product of a number of errors including material misapprehension of evidence. Then, when the Court requested further argument on the question of whether the trial judge had engaged in irrational or illogical reasoning or rendered a verdict that was unreasonable when viewed through the lens of judicial experience, Bourgeois further argued that those errors had also been committed. The Respondent Crown argued that the trial judge's credibility findings were not tainted by palpable and overriding error and did not contain any errors that made the conviction unreasonable.

2. The majority of the Court essentially agreed with the Crown's position and dismissed the appeal. However, in dissent, Berger, J.A. found there were "flaws, errors and defects" in the trial judge's analysis that, when viewed through the lens of judicial experience, led him to conclude the guilty verdict was unreasonable and a new trial was required. He did not specifically identify which branches of unreasonable verdict were violated by the trial judge and the language he used in describing the alleged errors was an amalgam of different unreasonable verdict concepts.

3. Bourgeois now suggests his appeal to this Court is a struggle between a restrictive standard of review on findings of fact such as credibility and the necessity of avoiding wrongful convictions, but it is not. He simply disagrees with the trial judge's fact findings and their endorsement by the majority of the Court of Appeal. The Respondent submits that neither the trial judge nor the majority of the Court of Appeal erred in what they found. Further, despite Berger, J.A.'s comments about this being a possible wrongful conviction, he ordered a new trial and not an acquittal. This demonstrates that his actual conclusion was that the evidence in this matter was capable of supporting Bourgeois' conviction. Bourgeois now argues that the trial judge's reasons for decision are irrational and illogical, contain material misapprehensions of

evidence and that a properly instructed jury acting judicially could not reasonably convict him on the trial evidence. The Respondent submits none of these complaints have been made out and this appeal must be dismissed.

Statement of Facts

4. The Respondent adopts the facts set out by Bourgeois in paragraphs 6, 7, 9 – 31, 33 – 36, 38 – 42 and 44 – 58 of his Factum with the exception of any argument that is contained in the same. The facts contained in paragraphs 8, 32, 37 and 43 are not agreed to and will be elaborated on in argument. The Respondent does not adopt Bourgeois' summary of the decisions of the trial judge or the majority and minority decisions of the Court of Appeal. As his complaints are entirely based on errors he alleges were committed by the trial judge in his reasons for decision, those reasons, along with the reasons of the majority and dissent in the Court of Appeal on the issues Bourgeois now raises will be summarized in detail. References to relevant testimony or other evidence introduced during the course of the trial will be made in the argument proper. The key evidence in the trial was the complainant AF's testimony, Bourgeois' statement to police and text messages between AF and Bourgeois and between AF and her parents and friends.

Trial Judge's Reasons for Decision

5. In convicting Bourgeois the trial judge found as follows:

(a) Counsel agreed the only issue was whether he was satisfied beyond a reasonable doubt that Bourgeois had sexual intercourse with AF without her consent.[1]

(b) In his statement Bourgeois confirmed AF's evidence that intercourse took place but said it was with her consent.[2]

(c) Bourgeois and AF were introduced to each other at a bar on December 23, 2012 and exchanged phone numbers. After AF had gone home they began texting each other at about 1:30 a.m. on December 24. This went on for three and one-half hours with 326 text messages. They also spoke on the phone while exchanging pictures. The tenor of the messages was for the most part sexual.

[1] Trial Judge's Reasons for Judgment [Appellant's Record "AR" Vol. I, Tab 1A at p. 1/32 – 35]
[2] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 1/37 – 38]

Bourgeois made several attempts to have AF meet him although she had gone to bed before they started texting.[3]

(d) AF testified Bourgeois was aggressive and did not easily take no for an answer. The text messages bore this out. When he was unable to get her to leave the house he began pressing her for pictures. She sent him pictures of herself after a lot of badgering. Initially they were headshots and after a great deal of pressing she sent him a photograph of her midriff and part of her breasts. Those text messages cannot be reviewed without an appreciation that Bourgeois was anxious to have a sexual relationship with AF.[4]

(e) Then, from approximately 1 PM on December 24 to 2 AM on December 25 they exchanged 279 text messages. At about 8 PM (December 25) he texted her about what she was doing that evening and invited her to play beer pong and watch the Team Canada junior hockey game. She accepted the invitation after getting a commitment from him to take her home afterwards. He arranged to pick her up at about 10:15 PM.[5]

(f) The house party was in northeast Calgary and they arrived between 11 PM and midnight. When they got out of Bourgeois' vehicle he kissed AF without warning which she testified she found a little off-putting but not overly so. After a tour of the home they played beer pong. AF said after that she was probably six out of ten on the inebriation scale.[6]

(g) They left the house at about 5AM. She felt Bourgeois was sober enough to drive and thought he was going to take her home. She testified that after a few minutes he told her he couldn't keep his hands off her. He kept rubbing her leg and wanting her to rub his. He wanted to stop and make out and she told him she wanted to go home. He stopped the truck and she was not sure where they were. She thought she could see Christmas lights in the distance but recalled no traffic. He began touching himself and trying to grab her hand to get her to touch his

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[3] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 2/22 – 35
[4] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 2/37 – 3/2]
[5] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 3/4 – 11]
[6] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 3/13 – 19]

erection. She kept pulling her hand away and he said she should help him and he would go quick. She testified she said no again and that she wanted to go home.[7]

(h) She said he then came over the console between them and straddled her with his knees. He began grinding on top of her while she was trying to get him off. He told her to get in the back but she did not recall whether she did this or whether he pushed her between the two front seats. She repeatedly said she wanted him to take her home. He took his pants off and was touching himself and also her; trying to arouse her to the point where she would consent.[8]

(i) AF kept telling Bourgeois to stop, that she didn't want to have sex and was having her period. He reached inside her pants, pulled out her tampon and threw it outside the car. He pulled down her pants. She tried to keep her legs closed, telling him she didn't want him to touch her. She was crying. He inserted his penis into her vagina. She was unsure of the position she was in or how long it went on but it seemed like about ten minutes. At one point she said something like "just get it over with."[9]

(j) She said that afterwards he said he was sorry and was worried she was never going to talk to him again. She did not know where she was, it was cold and she did not want him to throw her out of the vehicle so she did not want to appear upset. She cried but told him it was fine and she would not tell anyone - this sort of thing happens all the time. He said he did not know how he could live with himself and she held his hand to reassure him. She reiterated she did this because she did not want to be left at the side of the road.[10]

(k) AF said she asked Bourgeois what made him think he could do this and he said he was sexually assaulted when he was a boy. At this point they were approaching Calgary from the south and she recognized a place where the highway divided with the west fork becoming MacLeod Trail and the east fork Deerfoot Trail. They took Deerfoot towards MacKenzie Lake and exited onto

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[7] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 3/22 – 32]
[8] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 3/34 – 41]
[9] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 4/2 – 10]
[10] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 4/15 – 24]

Hwy. 22X. He dropped her off at her house and she accessed the house through the garage.[11]

(l) Bourgeois said he and AF were in his truck driving home at around 6 AM and started kissing and petting. He pulled over because he could not concentrate on both activities. After further making out he grabbed her and put her in the back or let her in the back. When he put his hand down her pants she said she was having her period so he grabbed her tampon and threw it outside. He put his hand inside her vagina and she said it felt good. She was playing with his penis; saying she wanted it inside her. He put his penis inside her but she didn't seem to be much into it so he stopped.[12]

(m) He said after more discussion they began making out again and she consented to him inserting his penis in her. She became animated, began talking dirty and urged him to ejaculate inside her. After he ejaculated he said he became overcome with guilt because he had been dating a girl for two years and felt badly that he had been unfaithful. AF comforted him by holding his hand and asking him whether he had been abused before. She said she wasn't going to tell anyone, nothing was going to happen and she still thought he was hot and wanted to have sex with him.[13]

(n) AF's mother testified she was up most of that night in part because she was worried about AF and texted her several times. She and her husband were asleep when AF got home just after 7 AM. AF was very agitated, trembling, yelling and screaming and said she was raped. Her shirt or tank top was ripped and she was covered in dog hair. AF's mother phoned 911. AF's father essentially corroborated that testimony.[14]

(o) The Crown introduced Bourgeois' statement as part of its case and it was agreed it must be assessed in accordance with *R. v W. (D.)* as if he had testified. In assessing his credibility, the trial judge cautioned himself that he must not confuse the issue of whether he believes Bourgeois' statement with the issue that

[11] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 4/26 – 33]
[12] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 4/35 – 5/3]
[13] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 5/3 – 13]
[14] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 5/23 – 33]

the burden is always on the Crown to prove guilt beyond a reasonable doubt. An accused is presumed innocent unless the offence is proved beyond a reasonable doubt on all the evidence. He set out the *W. (D.)* decision making framework.[15]

(p) The defence position was that at the very least Bourgeois' evidence was reasonably capable of belief and he should acquit on that basis. They also maintained AF's evidence was full of inconsistencies and contradictions and was the work of a good actress. Bourgeois' theory was that the sex had been consensual and AF only cried rape because he rejected what she hoped to be the possibility of a longer-term relationship.[16]

(q) The trial judge thought AF was telling the truth or at least attempting to do so. She was subjected to a very long cross-examination and there were some inconsistencies. The most significant one related to the position she was in during the incident which changed from her preliminary inquiry testimony. He watched her closely during this questioning and was satisfied she was genuinely confused and could not remember the exact position. She was not acting and was upset with her lack of memory but was absolutely clear intercourse took place without her consent.[17]

(r) On the main issue of whether the sex between AF and Bourgeois was consensual he found her evidence convincing. He was also mindful of her parent's evidence. AF was yelling from the time she came into the house on December 26 and was crying and trembling. Her mother thought AF was clearly traumatized and was afraid of her parents opening the garage or confronting Bourgeois because she was fearful of what he might do to all of them.[18]

(s) He had considerable difficulty with Bourgeois' statement and rejected his claim that his original intention was to take AF home. It flew in the face of all of the texting that took place since they met on the evening of December 23, 2012, which made it clear he was interested in little else than having sex with her. He

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[15] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 5/35 – 6/10]
[16] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 6/12 – 17]
[17] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 6/35 – 7/3]
[18] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 7/12 – 18]

had little doubt this was uppermost in Bourgeois' mind when he left the house at 6 AM and probably had been since he picked her up at 10:15 PM.[19]

(t) Bourgeois described a conversation with AF after he parked, where this incident took place. In this conversation, he told her she should not worry, that he did not think they were going to have sex. She said he should not kill her and leave her there. He said this was produced by her watching TV. The trial judge concluded this conversation would absolutely not have occurred if they were considering making out. While Bourgeois had denied being married he never said anything about having a girlfriend and his statement that she consoled him because of his infidelity was not believable. It would also not make sense for her to have asked him if he had been abused if he had not committed a sexual assault. Him saying she asked if he had cheated before was not credible.[20]

(u) Bourgeois' description to Det. Archer of the conversation he said he had with AF after the incident, where he said he was so attracted to her that if they did this again the same thing would happen and she told him she wasn't going to tell anybody, was only consistent with him having taken advantage of her against her will. Why else would she say she would not tell anyone? His statement to her was only consistent with him not taking no for an answer. His description of his remorse and her reaction was consistent with guilt or it was simply not credible.[21]

(v) The email AF's mother sent to her at 3:13 AM (December 26) was clear evidence she was thoroughly upset with something she read from AF on her father's phone. She was clearly hurt. Neither AF nor her mother could remember the specifics of the fight but confirmed this sort of thing happened two or three times a year. The suggestion that the message had anything at all to do with what subsequently occurred was speculation and not at all persuasive.[22]

(w) AF testified to finding Bourgeois naked in the bathroom when she went upstairs at his request. She said she was not expecting to find him naked or would have

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[19] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 7/20 – 27]
[20] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 7/29 – 8/1]
[21] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 8/3 – 13]
[22] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 8/16 – 24]

expected him to warn her before telling her to come in. She said this was a weird thing for him to do and a strong indication she did not want to have anything more to do with him. His statement provided an explanation for what had occurred but the point was that AF was upset or thought it was weird. His subsequent text to her complaining that he could hear her telling the other people at the party that he was naked indicated she was concerned enough about the incident to describe it to people that were virtual strangers to her.[23]

(x) In cross-examination AF agreed she could have phoned her parents and asked for a ride or stayed where she was. She said she had misgivings about Bourgeois because he was acting strange and she was concerned. Nevertheless, she felt she would get home all right with him. Defence also pointed to her thoughts at some point during the night that he might kill her and said this was an example of her sense of melodrama or instability. However, there was evidence that she was genuinely concerned for her safety. This was evident from the texts to her friend D saying that if she died tonight she loved him and that death was her safe word, along with the texts to her friend J asking whether she should play nice with this guy and telling J that if AF never got home his name was Bourgeois.[24]

(y) The trial judge was satisfied beyond a reasonable doubt on the evidence he had heard that between 5 and 7 AM AF was not interested in furthering her relationship or having sex with Bourgeois. He was further satisfied she was genuinely traumatized when she got home that morning. AF knew her mother was hurt and mad at her and had not wanted her to go on this date. She knew her mother would tell her "I told you so." If the assault had not occurred it would clearly not have been in her interests to say it had. He was satisfied beyond a reasonable doubt that Bourgeois had sex with AF without her consent and found him guilty as charged.[25]

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[23] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 8/38 – 9/16]
[24] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 9/18 – 36]
[25] Trial Judge's Reasons for Judgment [AR, Vol. I, Tab 1A at p. 9/38 – 10/11]

Reasons for Decision in the Alberta Court of Appeal

6. A majority of the Court of Appeal dismissed Bourgeois' appeal. They found, among other things, that Bourgeois was challenging the trial judge's credibility findings and had not demonstrated they were affected by palpable and overriding error. In dissent, Berger, J. A. concluded the trial judge's reasons for decision contained "errors, flaws and defects" that left him "with considerably more than a "lurking doubt" or a "feeling of unease"" and, as a result, warranted appellate intervention. He concluded the verdict was unreasonable and would have allowed Bourgeois' appeal and ordered a new trial.

Majority Judgment

7. The majority dismissed Bourgeois' appeal for the following reasons:

(a) The standard of review is critical to the outcome of this appeal. This is not a second trial. An appellate court's function is not to reassess credibility, find new facts, reweigh the evidence, draw inferences from it and render the decision the appeal judges might have rendered if they were the trial judge.[26]

(b) Trial judges have considerable leeway in the appreciation of the evidence and their ultimate assessment of whether the Crown's case is made out beyond a reasonable doubt. Findings of fact and credibility assessments are entitled to great deference and should only be interfered with if they are unreasonable or display palpable and overriding error. The standard for appellate intervention on the basis of evidential misapprehension is stringent. A difference of opinion with the trial judge is not enough.[27]

(c) A trial judge is not required to give reasons mentioning and resolving every possible discrepancy in the evidence. Just because they might have weighed it differently doesn't mean they ignored or failed to consider parts of the evidence the appeal judge finds more compelling. Appeal courts should not ignore the Supreme Court decisions emphasizing the limit of appellate intervention.[28]

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[26] Memorandum of Judgment "MOJ" *R v Bourgeois*, 2017 ABCA 32 [AR, Vol. I, Tab 1C at p. 16/para 11]
[27] MOJ [AR, Vol. I, Tab 1C at pp. 16 and 17/paras 12 and 13]
[28] MOJ [AR, Vol. I, Tab 1C at p. 17/para 14]

(d) The majority of Bourgeois' arguments take issue with fact finding. Such determinations are resistant to appellate intervention unless they are the result of palpable and overriding error. Bourgeois has dissected the trial judge's reasons for judgment and at times emphasized certain portions which standing alone may raise concern. When taken in context and in particular, considered in light of the exchanges between counsel and the trial judge during closing submissions, the initial concern dissipates. Numerous alleged deficiencies in the trial judge's assessment and understanding of the evidence have been raised. Those that are inconsequential or trivial will not be addressed.[29]

(e) The trial judge found confirming evidence in AF's emotional and physical appearance immediately after leaving Bourgeois' truck and in conversation he admitted having with her after intercourse. He was convinced Bourgeois would not have made those comments if the sex was consensual. Numerous comments were also found in his police statement inconsistent with his assertion that the sex was consensual. Finally he considered that Bourgeois wanted to have sex with AF from the "get-go" (admitted by defence counsel) which was inconsistent with some explanations offered for his actions before and after intercourse.[30]

(f) Bourgeois offered eight examples of the trial judge failing to consider material evidence impacting AF's credibility. They have considered each and do not agree. While the trial judge may have addressed some in greater detail or come to a different conclusion than he did, they are satisfied he committed no error either in the manner he addressed the issues or the conclusions he reached. To illustrate they will address one omission Bourgeois argued was fatal to AF's credibility assessment.[31]

(g) In a text sent at 3:00 a.m. (December 26) AF's mother berated her regarding something she had earlier told her father, and called her a liar. Neither her mother nor AF could recall the underlying dispute at trial but both acknowledged they had arguments of this kind two or three times per year. Bourgeois' counsel

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[29] MOJ [AR, Vol. I, Tab 1C at p. 17/paras 15 – 17]
[30] MOJ [AR, Vol. I, Tab 1C at pp. 18 and 19/para 22]
[31] MOJ [AR, Vol. I, Tab 1C at p. 19/paras 24 and 25]

urged the trial judge to take the mother at her word that AF was a liar and also that both of them were not credible when they denied recalling the dispute that led to the text. While the trial judge was sceptical about the claim that neither of them could recall the details of the dispute, he declined to conclude on the basis of this evidence that AF was lying when she said she did not consent to sex with Bourgeois. In fact he did not refer to this evidence in his judgment. Bourgeois says this was a fatal error. They disagree.[32]

(h) Defence counsel stressed this point in his closing address. It prompted a lengthy exchange between he and the trial judge which culminated in the trial judge noting he did not accept the submission that just because in these circumstances AF's mother called her a liar meant he should say she was not worthy of belief.[33] The entire exchange demonstrated that the submissions were understood, reservations were expressed, counsel was allowed to address the same and the trial judge then indicated he did not agree with the suggested implication of that evidence. In that circumstance it was unnecessary for him to repeat what he had already said to perfect his reasons.[34]

(i) Similar exchanges occurred elsewhere during both counsel's closing arguments addressing many other issues Bourgeois now argues were not addressed in the reasons for judgment. Again, the trial judge addressed them with counsel and after discussion usually offered his assessment of the evidence. Although perhaps desirable it was not necessary for him to address these matters again in his reasons and his failure to do so was not fatal. Bourgeois advances numerous other arguments to support the trial judge's ignoring or misapprehending the evidence. On review, it is not seen that way. This was a straightforward case with only one issue. Bourgeois was well-represented and strenuously defended at trial. The trial judge was alive to the arguments of counsel. The reasons were at least adequate and there is no basis to interfere.[35]

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[32] MOJ [AR, Vol. I, Tab 1C at p. 19/para 26]
[33] Final Submissions by Mr. Archer [AR, Vol. II, Tab 3F at pp. 77/30 – 79/25]
[34] MOJ [AR, Vol. I, Tab 1C at pp. 19 and 20/paras 27 and 28]
[35] MOJ [AR, Vol. I, Tab 1C at p. 20/paras 29 and 30]

(j) They have read the draft judgment of Berger, J.A. and it raises concerns they feel compelled to address. They note that the appellant raised numerous grounds of appeal but unreasonable verdict was not among them. That is understandable as cases such as this where the parties offer conflicting accounts are rarely susceptible to that disposition. They require adjudication that is resistant to judicial intervention.[36]

(k) They are not satisfied that this was an appropriate case for unreasonable verdict to be raised as a new issue and they disagree with the conclusion that the verdict was unreasonable.[37]

Dissenting Reasons of Berger J.A.

8. The reasons for which Berger, J.A. would have ordered a new trial are as follows:

(a) There has always been tension between an appellate court's deference to a trial judge's findings and its duty to prevent a miscarriage of justice. In some cases the test for unreasonable verdict constrains appellate review and serves as the genesis of wrongful convictions.[38]

(b) The Supreme Court has noted that the review for unreasonableness on appeal from a judge alone is different and somewhat easier than from a jury verdict. The 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. The Court of Appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. Setting aside a verdict as unreasonable on appeal would be justified when the reasons of the trial judge reveal they were not alive to an applicable legal principle or entered a verdict inconsistent with the factual conclusions reached. Such defects will in many cases warrant appellate intervention without use of the unreasonable verdict provisions.[39]

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[36] MOJ [AR, Vol. I, Tab 1C at pp. 24 and 25/para 47]
[37] MOJ [AR, Vol. I, Tab 1C at p. 25/para 50]
[38] MOJ [AR, Vol. I, Tab 1C at p. 26/para 52]
[39] MOJ [AR, Vol. I, Tab 1C at pp. 27 and 28/para 60]

(c) The Supreme Court urges that appellate courts overturn a conviction if the conclusion reached conflicts with the bulk and collection of judicial experience of the panel whose members might identify features of a case that will give experienced jurists cause for concern. Because (an unreasonable verdict conclusion) purports to identify features of a case that will give experienced jurists cause for concern it is imperative the reviewing court articulate as precisely as possible what features of the case suggest the verdict reached was unreasonable.[40]

(d) Reference was made to eleven uncontested facts that were said to emerge from AF's testimony. They included:

(i) Asking Bourgeois if he wanted a picture of her face or something else when he requested a picture from her during texting. She disputed this was a sexual reference but forwarded a "semi-nude" picture of her midriff and lower portions of her breasts. The trial judge mistakenly concluded this occurred after a great deal of pressing by Bourgeois. (For reasons to be provided in argument this was not a mistake by the trial judge.)

(ii) She also asked for photos of him including a six-pack photo.

(iii) AF's messages were replete with references to her thoughts and preoccupation with rape and murder. In cross-examination she added she had imagined her own rape.

(iv) She recalled her friend D's message to wear a condom.

(v) While at the party she had thoughts about Bourgeois murdering her and agreed this was a serious thought.

(vi) She agreed she had her phone and was texting while in his truck and that he never took her phone from her.

(vii) On AF's return home she told her parents she had been raped. Both parents agreed that when she was asked why she had not texted back she said Bourgeois had taken her phone. She agreed that when she got home and said she had been raped the focus shifted from the argument with her mother to her rape allegation. In direct examination she said Bourgeois

[40] MOJ [AR, Vol. I, Tab 1C at pp. 28 and 29/paras 63 and 65]

might have had her phone at some time during the evening but in cross-examination admitted she had no recollection of this or of being without it. The investigating officer said AF did not tell her that Bourgeois had the phone at any time during the evening.

(viii) Her text messages are replete with enquiries on whether Bourgeois had a wife including telling her friend J she felt he did. She also told her that if she never got home his last name was Bourgeois.[41]

(e) When the stated factual underpinnings were considered in light of six errors, flaws and defects he identified in the trial judge's reasons he was left with considerably more than a lurking doubt or feeling of unease.[42] (The Respondent will discuss these purported errors identified by Berger, J.A. in argument.)

(f) These flaws, errors and defects in the analysis warrant appellate intervention. Upon careful consideration of the record through the lens of judicial experience and mindful of the advantage of the trial judge, he has concluded the verdict was unreasonable. He expressed profound concern that Bourgeois may have been wrongfully convicted. He would allow the appeal, quash the conviction and, given the analytical flaws, direct a new trial.[43]

[41] MOJ [AR, Vol. I, Tab 1C at pp. 29 – 32/para 66]
[42] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]
[43] MOJ [AR, Vol. I, Tab 1C at pp. 34 and 35/paras 68 and 70]

PART II – ISSUES

Question in Issue: 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 *Criminal Code*.

Respondent's Position with regard to Question in Issue: The trial judge committed no errors in his analysis of the evidence and his conclusion that the Appellant was guilty was not unreasonable.

PART III – ARGUMENT

Question in Issue - Unreasonable Verdict

9. Whether the Crown had proven that Bourgeois sexually assaulted AF was dependent on the determination of their respective credibility. The key evidence with regard to her credibility was her testimony and the text messages she had sent to him, her parents and two friends. The key evidence with regard to his credibility was his police statement introduced into evidence by the Crown and the text messages he had sent to her.

10. As AF's credibility was essentially the entire Crown's case, the overwhelming focus of defence was that she was not credible. This argument focused on two points. The first was that her evidence was unreliable because she was obsessed with murder and rape. The second was that her claim of rape was a deliberate lie as revenge against him for rejecting any further relationship after they had consensual sexual intercourse, coupled with an attempt at deflecting her mother's anger towards her for her actions that produced the 3:13 AM message.

11. Bourgeois now argues his conviction was flawed because the trial judge committed errors under each possible basis that could make his verdict unreasonable: materially misapprehending evidence resulting in a miscarriage of justice; irrational and illogical reasoning, and arriving at a verdict that could not reasonably be reached by a properly instructed jury acting judicially.

12. The Respondent's position is that the majority of the Court of Appeal was correct and Bourgeois' complaints all related to fact finding subject to the palpable and overriding error standard of review. The trial judge committed no such errors and none of his actions amounted to any form of unreasonable verdict. Further, while we will reply to each of Bourgeois' complaints it is our position that, despite the less than clear language used by Berger, J.A., his decision was based solely on the conclusion that the trial judge engaged in irrational and illogical reasoning in finding Bourgeois guilty of sexually assaulting AF. Again, our position is that none of the trial judge's reasons for decision were illogical or irrational in any way.

Applicable Principles

Credibility

13. Credibility is a factual issue.[44] The standard of review for a finding of fact or an inference from proven facts is "palpable and overriding error." This Court has defined that as:

> Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm.[45]

14. On issues of credibility, great deference must be shown to the unique position of the trial judge. In *R. v. R.W.*, McLachlin J. (as she then was), speaking for the majority of this Court, addressed this principle as follows:

> …in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility. ... The Trial Judge has the advantage denied to the appellate court, of seeing and hearing the evidence of witnesses.[46]

Further, a court of appeal that reviews a trial court's assessments of credibility cannot interfere with them unless they cannot be supported on any reasonable view of the evidence.[47]

15. Credibility cannot be determined by following any rigid set of rules. It depends not only on the truthfulness of witnesses, but also on their reliability. Factors that go to determining these components are many and cannot be exhaustively enumerated. Reliability factors can include: general integrity, intelligence, power to observe, capacity to remember and accuracy in statement. Some of this can be determined from demeanour on the witness stand.[48] As the majority of this Court stated in *R. v. Gagnon*:

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[44] *R c R.P.*, 2012 SCC 22 at para 10 [Appellant's Authorities "AA", Tab 5]
[45] *R v Clark*, 2005 SCC 2 at para 9
[46] *R v R.W.*, [1992] SCJ No 56 (SCC) at para 20 [AA, Tab 9]
[47] *R v Burke*, [1996] 1 SCR 474 at para 7 [AA, Tab 4]; *R c R.P.*, 2012 SCC 22 at para 10 [AA, Tab 5]
[48] *White v R*, [1947] SCR 268 at p. 272; 1947 CanLII 1 (SCC)

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *L. (H.)*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.[49]

Unreasonable Verdict

16. Here Bourgeois argues that the trial judge erred in his credibility findings thereby producing an unreasonable verdict. There are three possible bases on which an appellate court may find that a verdict of guilty is unreasonable in a trial conducted before a judge sitting alone. They are: that the verdict was not one that a properly instructed jury acting judicially could reasonably reach[50], that it was the product of a material misapprehension of evidence that produced a miscarriage of justice[51] or that it was the product of irrational or illogical reasoning.[52]

17. The first basis is described in *R. v. Biniaris*,[53] where Arbour, J. detailed the review analysis required to determine whether a verdict reached by a trier of fact was unreasonable and identified particular considerations that applied to verdicts reached by judges sitting alone:

(a) The unreasonable verdict test imports an objective assessment and to some extent a subjective one. The appeal court must determine what verdict a reasonable jury, properly instructed, could have arrived at and in doing so, review, analyse and, within the limits of appellate disadvantage weigh the evidence rather than simply examine its bare sufficiency. (Para. 36)

(b) The *Yebes* test is equally applicable to the judgment of a judge without a jury. The review for unreasonableness on appeal, however, is different and somewhat easier if the judge has provided reasons of some substance. The reviewing court may be able to identify a flaw in the evaluation of the evidence or the analysis that will explain the unreasonable conclusion reached and justify the reversal. "(I)n trials by judge alone, the court of appeal often can and should identify the

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[49] *R v Gagnon*, 2006 SCC 17 at para 20 [AA, Tab 7]
[50] *Corbett v The Queen*, [1975] 2 SCR 275; (1973) 14 C.C.C. (2d) 385 at p. 386 (S.C.C.)
[51] *R v Lohrer*, [2004] 3 S.C.R. 732 at paras 1 – 3
[52] *R v Beaudry*, 2007 SCC 5 at paras 97 and 98 [AA, Tab 2]. See also *R c R.P.*, 2012 SCC 22 at paras 9, 11 – 12 [AA, Tab 11]
[53] *R v Biniaris*, 2000 SCC 15 [AA, Tab 3]

> defects in the analysis that led the trier of fact to an unreasonable conclusion." They will then be justified to intervene and set aside a verdict as unreasonable when the reasons for decision show the trial judge was not alive to an applicable legal principle or entered a verdict inconsistent with the factual conclusions reached. These errors are sometimes like a separate error of law. (Para. 37)
>
> (c) Respecting the evaluation of a jury verdict; a determination that the verdict reached was unreasonable means that the conclusion reached conflicts with the bulk of judicial experience. The assessment does not simply involve whether twelve properly instructed jurors, acting judicially, could have come to that result but "doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction." (Para. 40)

18. However, in *R. v. A.G.*, Arbour J. made it clear that, where a judge in a judge alone trial gives reasons that reveal that he or she was alive to the relevant issues, a court of appeal can bring no special insight to the assessment of the evidence.

> However, where a trial judge gives detailed reasons for judgment and when, as in this case, the reasons reveal that he or she was alive to the recurrent problems in this field of adjudication, the court of appeal brings no special insight to the assessment of the evidence.[54]

19. Further in *R. v. C.L.Y.*[55] this Court quoted the comment contained in *R. v. Morrisey*[56] cautioning appellate courts "not to dissect, parse or microscopically examine the reasons of a trial judge" with approval.

20. The second basis was described in *R. v. Lohrer*[57] where this Court affirmed the principles again set out in *R. v. Morrissey*[58] regarding misapprehension of evidence, calling it a stringent standard. The criteria to be applied must include all of the following:

> (a) Misapprehension of evidence must go to the substance rather than to the detail.
>
> (b) It must be material rather than peripheral to the reasoning of the trial judge.

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[54] *R v A.G.*, 2000 SCC 17 at para 29 [AA, Tab1]
[55] *R v C.L.Y.* 2008 SCC 2 at para 11 [AA, Tab 5]
[56] *R v Morrissey*, (1995) 97 C.C.C. (3d) 193 (Ont CA) [AA, Tab 10]
[57] *R v Lohrer*, *supra*, at paras 1 – 3
[58] *R v Morrissey*, *supra*, [AA, Tab 10]

(c) The errors thus identified must play an essential part not just in the narrative of the judgment but also in the reasoning process resulting in a conviction.

Given that the error must be essential to the reasoning process the mere fact of an error without that connection will not affect a conviction.

21. In *R. v. Sinclair* Lebel, J., writing for the majority of the Court on this point, noted that for an appellate court to order a new trial on the basis of a miscarriage of justice resulting from a misapprehension of evidence more is needed than an apparent mistake by the trial judge in the reasons for decision. Under *Lohrer* an appeal court should not order a new trial unless the trial judge has made a real error. Their decision must not be speculative. The reasons must disclose an actual mistake and appellate courts will have no difficulty in explaining where the errors appear and why they caused the trial judge's reasoning process to be fatally flawed.[59]

22. The third basis was originally articulated by Fish, J. (speaking for the majority of this Court on that point) in *R. v. Beaudry*.[60] He succinctly re-stated it in *R. v. Sinclair* as follows:

> An appellate court will thus be justified in intervening, pursuant to *Beaudry*, 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.[61]

23. However, as Fish, J. made clear in *Beaudry,* this does not allow an appellate court to substitute its own view of the facts for that of the judge or intervene on the ground that the reasons for decision should have been expressed more fully or clearly.[62] This was also seen to be an exceedingly rare occurrence[63] and one that only resulted in an acquittal if, in the end, a verdict was found to be unavailable on the evidence as per *Biniaris.*[64]

24. Bourgeois also suggests the trial judge employed a skewed assessment of the respective credibility of AF and himself that may have contributed to the alleged unreasonable verdict. The Ontario Court of Appeal has described this argument as follows:

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[59] *R v Sinclair,* 2011 SCC 40 at para 53 [AA, Tab 12]
[60] *R v Beaudry, supra,* at paras 97 and 98 [AA, Tab 2]
[61] *R v Sinclair, supra,* at para 16 [AA, Tab 12]
[62] *R v Beaudry, supra,* at para 98 [AA, Tab 2]
[63] *R v Sinclair, supra,* at para 22 [AA, Tab 12]
[64] *R v Sinclair, supra,* at para 23 [AA, Tab 12]

> The "different standards of scrutiny" argument is a difficult argument to succeed on in an appellate court. It is difficult for two related reasons: credibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge's credibility determinations.[65]

They have also noted that to succeed in this type of argument an appellant must be able to point to something in the reasons of the trial judge or elsewhere in the record that made it clear the trial judge applied the different standards the appellant complains about.[66]

Errors, Flaws and Defects Leading to an Unreasonable Verdict

Overview

25. The sole trial issue was whether the Crown had proven beyond a reasonable doubt that the complainant had not subjectively consented to sexual intercourse with him which was entirely dependent on the credibility findings of the trial judge. That makes this a very difficult matter to appeal because of the deferential standard of review that attaches to such findings. As a result, Bourgeois does not challenge the findings directly on the basis that they demonstrate palpable and overriding error but rather complains that they were tainted by erroneous reasoning resulting in an unreasonable verdict.

26. The majority of the Court of Appeal found that the trial judge committed no palpable and overriding errors in his fact finding. The dissenting justice also did not disagree with the direct facts found by the trial judge. His dispute was with the inferences the trial judge drew respecting Bourgeois' intentions in his relationship with AF and the accompanying conclusions on the respective credibility of their accounts of the events after they left the party including whether or not she had consented to the admitted sexual intercourse. This was where he concluded the "errors, flaws and defects" in the trial judge's reasoning had occurred.

27. To the extent Bourgeois contends that somehow the current scheme of standard of review respecting credibility findings is insufficient to guard against the spectre of potential wrongful conviction, he is mistaken. The expansion of the scope of appellate review that he actually seeks extends beyond what this Court has set out as appropriate when similar issues have arisen in the

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[65] *R v Aird,* 2013 ONCA 447 at para 39
[66] *R v Howe,* 2005 CanLII 253 (ONCA) at para 59

past. He seeks to turn trial by judge alone into trial by appellate court on the written record. This Court has recently made it clear that such an expansion is not appropriate for jury verdicts[67] and the Respondent submits it is no more applicable to this judge alone trial.

28. The deferential standard of review on findings of fact (particularly as it relates to witness testimony) exists because of the inherent advantages possessed by the triers of fact having seen and heard all of the evidence. This Court has shown no inclination to override that advantageous position and has restrained appellate courts from interfering with credibility findings of triers of fact for inappropriate reasons.[68] Bourgeois has provided no reason for this Court to change this approach.

29. Further, the reasoning process employed by the dissenting justice in concluding that a new trial was required because of the "errors, flaws and defects" in the reasoning of the trial judge contained significant flaws of its own. It mistakenly combined different unreasonable verdict concepts that are not designed to be employed in concert. This meant that, ultimately, his order for a new trial is based on a test and a standard of review that does not appear in any of this Court's jurisprudence, and his reasoning does not accord with prior decisions of this Court. Neither he nor Bourgeois have acknowledged that this is what occurred.

30. While the Respondent does not quarrel with the assertion that an appellate court should overturn a conviction if it conflicts with the bulk and collection of judicial experience of the panel whose members might identify features of a case that will give experienced jurists cause for concern, this is not actually what the dissenting justice has done. Firstly, that jurisprudence is applicable to finding that a guilty verdict could not be supported on the evidence and that the appropriate remedy at the appellate level would be an acquittal, not an order for a new trial, as suggested by the dissenting justice in this case. Secondly, it is clear that when *Biniaris* discusses use of the "lens of judicial experience" it is literally talking about flawed jury verdicts that are not apparent to the non-judicial eye: a case with no legal errors, some evidence on the relevant points and a guilty verdict that, while it appeared to have been available, had something fundamentally amiss with it that could only be perceived by the highly trained judicial eye.

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[67] *R v W.H.,* 2013 SCC 22 at para 34 [AA, Tab 13]
[68] See *R c R.P., supra,* [AA, Tab 11] and *R v W.H., supra* [AA, Tab 13]

31. That is clearly not the situation that exists if the problem resulting in an unreasonable verdict is misapprehension of evidence or illogical or irrational reasoning. Misapprehension of evidence is a stringent standard with definite criteria. The trial judge's reasons must reveal an actual mistake leaving appellate courts with no difficulty explaining where the error appears and why it caused a fatally flawed reasoning process. Similarly, for an appellate court to find that the trial judge's reasoning was irrational or illogical the errors must be plain or demonstrable; something that will be an exceedingly rare occurrence. The Respondent submits the primary difficulty with the reasons of the dissenting justice is that he has determined that the reasons of the trial judge contain errors, flaws and defects only once they are viewed through the lens of judicial experience. However, to actually suffice as irrational or illogical reasoning they would have to be obvious. Therefore, the dissenting justice has applied the wrong test and his complaints are simply mistaken. This becomes obvious when his various complaints are examined in more detail. Bourgeois has also used Berger, J.A.'s complaints about the guilty verdict to raise further complaints about it. However, his complaints are also without substance and essentially repeat the complaints the majority properly rejected.

Analysis

32. Bourgeois' argument begins with a fundamentally flawed premise - that deference to the findings of the trial judge here is reduced for three reasons: the evidence was not contentious with the exception of whether sexual intercourse between the parties was consensual, the text messages and Bourgeois' statement were documentary evidence and the testimony that raised concerns about the verdict's reasonableness was provided by the complainant.

33. His assertion of reduced deference is simply not correct. Firstly, the dispute about whether sexual intercourse was consensual was the sole trial issue so the fact that most of the other evidence was not contentious did not reduce the trial judge's advantage in viewing all of the evidence first-hand. Secondly, his statement was video-recorded but was not provided to the Court of Appeal or this Court in that form. Finally, given it was AF's **testimony** that was attacked at trial and both levels of appeal, there is no question the trial judge enjoyed a significant advantage in its assessment. Contrary to Bourgeois' argument there is nothing in the composition of the evidence in this case that reduces the deference that would normally be accorded to the trial judge's credibility findings in any way.

Flawed Reasoning in Assessing the Evidence of the Conversations Between the Parties in the Truck

34. Bourgeois takes significant issue with some of the trial judge's conclusions regarding the meaning of conversations discussed by Bourgeois in his statement to police, these conversations having occurred in his truck with AF both before and after sexual intercourse occurred. The trial judge's conclusions also caused concern for Berger, J.A. In his view, the first erroneous conclusion arose from a conversation that occurred prior to the sexual intercourse and ended with AF telling Bourgeois not to kill her and leave her at the side of the road.

35. Berger, J.A. noted that Bourgeois told police that when he pulled over and parked at the location where the sexual intercourse occurred he said something to AF like "Don't worry, I don't think we're going to have sex" and she replied "just don't kill me and leave me here." Bourgeois said this response was a product of her TV watching and he replied he was not going to kill her and leave her at the side of the road. The trial judge concluded this conversation would not have occurred if they were considering making out. Berger, J.A. disagreed and found it certainly would have occurred. He further held that this conclusion by the trial judge did not logically follow from the evidence upon which it was based, because the record was replete with the complainant's preoccupation with being murdered. He observed that her raising the fear of being murdered at that time was entirely consistent with that preoccupation.[69]

36. Bourgeois adopts this complaint in arguing that the trial judge's conclusion does not logically flow from the evidence on which it is based and is plainly contradicted by it, given that Bourgeois talked about AF consistently talking about rape and murder and described this as an attempt by her to be funny. It should be noted that Berger, J.A. does not actually describe this error as failing to logically flow from the evidence it is based on, or that it was plainly contradicted by the same.

37. Additionally, Berger, J.A. and Bourgeois are mistaken in their assessment that this conclusion is in error because it was in no way contrary to the evidence before the trial judge. Firstly, it would seem truly unusual if AF had previously agreed to sexual contact with Bourgeois for him to start a conversation by telling her not to worry about having sex. Secondly,

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[69] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]

identifying this as an error ignores AF's testimony about how she had lost any interest in Bourgeois because of his conduct at the party[70]and the complete absence of evidence indicating any discussion or communication about consensual sexual activity between them, during or following the party. Thirdly, it ignores Bourgeois' description of the initial sexual contact between them involving him alone making an aggressive advance towards her immediately prior to the conversation he now complains was misinterpreted.[71] In the end, nothing about this conclusion by the trial judge is plainly contradicted by the entirety of the evidence before him. This complaint seems to be a product of what the majority referred to as dissecting the trial judge's reasons and emphasizing certain portions that "standing alone" might be cause for concern.[72]

38. Further, it cannot be said that this conclusion by the trial judge is plainly contradicted by the evidence that AF expressed thoughts about rape and murder on a number of occasions from the time she met Bourgeois until the disputed sexual intercourse occurred, or resulted from the trial judge forgetting or ignoring that testimony in reaching his decision. He simply did not give it the weight Bourgeois wanted. Given the testimony[73], text message evidence[74] and argument[75] devoted to this topic, it cannot be said that his failure to mention it was in any way an indication that it had not been considered by him in reaching his conclusions. Sufficiency of reasons was also not a ground of complaint on appeal or a basis for Berger, J.A.'s dissent. The trial judge was entitled to find as he did regardless of the extent to which Bourgeois argued against that conclusion.

39. The texts and comments by AF dealing with rape and murder also do nothing to suggest that the trial judge's conclusion about the meaning of her asking Bourgeois not to kill her was in error. He concluded that when she had accepted a ride home with Bourgeois she did not actually

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[70] Testimony of AF [AR, Vol. I, Tab 3A at pp. 116/5 – 117/19; 162/3 – 29; 167/24 – 26; 214/23 – 35; 215/1 – 4; 217/3 – 20; 217/34 – 37; 235/2 – 32 and 243/27 – 244/5]
[71] Exhibit 15, Transcript of Statement of Bourgeois, [AR, Vol. III, Tab 4C at pp. 172/11 – 174/3]
[72] MOJ [AR, Vol. I, Tab 1C at p. 17/para 16]
[73] Testimony of AF [AR, Vol. I, Tab 3A at pp. 59/25 – 41; 61/37 – 62/17; 165/28 – 166/11; 166/13 – 167/21 and 243/1 – 18]
[74] Exhibit 9, Printed Copy of Report by Shane Cross "Exhibit 9" [AR, Vol. II, Tab 4A at p. 109/Message 75 and p. 115/Message 120]
[75] Final Submissions by Ms. Juzwiak [AR, Vol. II, Tab 3E at pp. 27/26 – 28/4] and Final Submissions by Mr. Archer [AR, Vol. II, Tab 3F at p. 75/33 – 35; p. 80/5 – 6 and p. 82/4 – 11]

think he would murder her. This was not an error because she testified in cross-examination that she thought maybe she was just being too sensitive,[76] then stated she felt uncomfortable leaving with him but did not think anything was going to happen and that she was just being sensitive.[77]

40. Bourgeois is further mistaken in suggesting that his statement falls under evidence not rejected by the trial judge and that the trial judge's conclusion, that AF would not have made the "Don't kill me" comment if she was consenting to sexual touching, was incompatible with non-rejected evidence. Clearly, the trial judge rejected portions of Bourgeois' statement. Also, the fact he accepted that AF said certain things about rape and murder did not mean he erred in concluding that her expressions of concern about Bourgeois' statements and actions (both at the party and then in the truck) were either indications that she had not consented, or indications there was no pre-existing understanding between them about engaging in sexual activity. Bourgeois' argument suggests that AF's actions prior to sexual intercourse somehow meant she had already given irrevocable consent to the same - an argument that is clearly wrong in law and seemed to underpin much of what Bourgeois argued at trial. This complaint has simply not been made out.

41. Berger, J.A. also found error in the trial judge's conclusion about the meaning of Bourgeois' statement that he told AF after the sexual intercourse that he was so attracted to her, that if they went out again they were going to end up doing the same thing over again (having sex), and that she replied that he was really nice and good looking and she was not going to tell anybody about it. The trial judge viewed this as only being consistent with Bourgeois having taken advantage of her against her will and the only reason for her telling him she would not tell anyone. Further, the trial judge found this statement to be consistent only with not taking no for an answer, and Bourgeois' description of remorse and AF's reaction was consistent only with guilt if it was to be credible. Berger, J.A. said this involved the trial judge ignoring the plethora of evidence touching on Bourgeois' marital status and that given this infidelity, the other details here were both equally consistent with innocence. As a result, the idea of the statement being consistent only with not taking no for an answer simply did not follow. It was equally consistent

[76] Testimony of AF [AR, Vol. I, Tab 3A at pp. 216/41 – 217/3]
[77] Testimony of AF [AR, Vol. I, Tab 3A at p. 218/32 – 34]

with innocence and accorded with AF's text to her friend J asking whether she should play nice with this guy.[78]

42. Bourgeois adopts the concerns expressed by Berger, J.A., by arguing that the trial judge's conclusions about the reasons for these comments ignored that the evidence was equally consistent with his actions being motivated by unfaithfulness to his long-term girlfriend and that AF was reacting to that. The Respondent submits the trial judge's conclusions about the motivation for Bourgeois' comments were not in error. The suggestion that AF consoled him because of distress he was feeling from infidelity was certainly not undisputed, as there was no evidence he ever told AF he was in any relationship and she did not testify to asking him if he had a girlfriend. Further, the strongest comment he made to Det. Archer (the investigating officer) was that he thought from AF's reaction to his behaviour after sexual intercourse ended that she obviously knew he might have had a girl. Even at that, he also said he had not told AF that and didn't know if she knew or not.[79] He also denied all suggestions from AF that he was married or had children. What he now asks this Court to conclude is that the trial judge was mistaken not to adopt his after-the-fact speculation about AF's knowledge during their post-intercourse conversation.

43. This argument requires this Court to place an interpretation on the evidence that is not the only available interpretation the trial judge could properly have placed upon it. There was evidence that AF made inquiries and accused Bourgeois of being married (and/or having children) but there was also evidence that he never confirmed her accusations, never told her that he had a girlfriend and that she never asked him if he was in a relationship other than marriage. While his position in his statement to police was that despite his failure to confirm any of her suspicions of having an existing relationship she might have concluded his distress was because of his infidelity, that was nothing more than speculation on his part unsupported by AF's testimony. This meant the trial judge's failure to adopt the same was neither irrational nor illogical. He simply did not engage in the speculation Bourgeois urged upon him.

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[78] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]
[79] Exhibit 15,Transcript of Statement of Bourgeois [AR, Vol. III, Tab 4C at p. 187/4 – 21]

44. Berger, J.A. found it was unreasonable for the trial judge to conclude that Bourgeois' comment that he could not go out with AF again because they would end up having sex was consistent only with him not taking no for an answer. Berger, J.A.'s conclusion was in error as it was based on the idea that his distress was equally consistent with infidelity to his girlfriend. However, as explained, the trial judge was not in error in refusing to endorse that speculation, meaning there was also no error in the meaning he attached to Bourgeois telling AF that they could not go out again. Similarly, the conclusion he drew from AF's comment that she would not tell anyone was also not in error. Criticism of it is again premised on the idea that the trial judge should have accepted Bourgeois' speculation that AF was aware both that he was in an existing relationship and that his distress was a product of guilt over his infidelity. The trial judge did not err in arriving at his conclusion. For the same reason, he also did not err in his conclusion regarding the reason for Bourgeois' remorse.

45. In addition to the errors Berger, J.A. identified in this portion of the conversation, Bourgeois argues the trial judge further erred by rejecting his assertion that AF had not asked him if he had cheated before. The Respondent submits this is not the case. A review of his statement indicates he provided two versions of AF's questions of him after intercourse. In the first he said only that she asked if he had ever done this before (which he took as possibly referring to being unfaithful) and then asked about him being abused.[80] When he returned to this interaction later in his statement he then included her asking him if he had ever cheated before or had been abused.[81] Further, Bourgeois' complaint about this finding again relies on the same mistaken complaint about the trial judge's rejection of AF's knowledge that he had a girlfriend discussed in detail above.

46. There were a number of inconsistent items of evidence about whether Bourgeois did or did not have a wife. AF testified that she thought that C, the mutual friend that introduced them, said something about Bourgeois being married but she didn't remember.[82] She also testified about S, one of the residents of the house where the party was going on, telling her that she

[80] Exhibit 15, Transcript of Statement of Bourgeois [AR, Vol. III, Tab 4C at p. 149/1 – 20]
[81] Exhibit 15, Transcript of Statement of Bourgeois [AR, Vol. III, Tab 4C at p. 189/4 – 9]
[82] Testimony of AF [AR, Vol. I, Tab 3A at pp. 91/41 – 92/10]

thought he was married and that he subsequently told AF to believe what she wanted.[83] There was other evidence already discussed which involved him never confirming AF's questions about whether he had a wife or children and never telling her he was in a relationship.

47. Given all of this information the trial judge committed no errors in concluding Bourgeois' assertion that AF asked him if he had cheated before (which would have involved acceptance that she was aware of a pre-existing relationship) was not credible. Again, he simply reached a factual conclusion Bourgeois disagrees with. Nothing about that was illogical or irrational. Finally, based on the facts the trial judge properly found with respect to this matter, there was no error in his conclusion that it would not have made sense for AF (on Bourgeois' telling of what had occurred) to ask him if he had been sexually abused if he had not assaulted her. None of the complaints of Berger, J.A. or Bourgeois with regard to the trial judge's handling of the conversations he had in his vehicle with AF have been made out.

Flawed Reasoning in assessment of the complainant's disclosure to her parents

48. Berger, J.A. was also of the opinion that the trial judge erred in his interpretation of AF's emotional state after Bourgeois dropped her off at home. He noted the trial judge thought she was genuinely traumatized and found she knew her mother did not want her out on this date. Berger, J.A. disagreed with his view that it would not have been in AF's interest to make a false complaint of sexual assault, saying she would have known she had failed to contact her parents and had disobeyed them. His view was "What better way to deflect the expected tongue-lashing than to raise the specter of sexual assault."[84]

49. In addition to the error alleged by Berger, J.A., Bourgeois further complains that the trial judge improperly found that the unknown dispute evidenced in the 3:13 AM text from AF's mother to her and the assertion by each that they did not recall the details of the same was irrelevant, but then used the fact AF's mother was upset with her to enhance her credibility. This is not a correct characterization of his assessment of that text. The trial judge did not find that the 3:13 AM text or their stated inability to remember the same was irrelevant. He simply found that when the evidence was looked at as a whole, that particular information did not lead him to

[83] Testimony of AF [AR, Vol. I, Tab 3A at p. 113/ 14 – 30]
[84] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]

conclude that AF's testimony about the events in Bourgeois' truck and her non-consent to sexual intercourse lacked credibility. He also concluded that Bourgeois' suggestion that this message somehow contributed to AF's complaint against him was speculative and did not raise a doubt about her lack of subjective consent. He also did not err in reaching this conclusion.

50. Bourgeois now says this was problematic because the trial judge's finding that it would not have been in AF's interest to lie about being sexually assaulted did not logically flow from the evidence that her mother did not want her to go out. He says this is because, as Berger, J.A. pointed out; knowing that she had disappointed her parents there was no better way to deflect their anger than to raise the spectre of a sexual assault. This complaint is without merit as it advances the discredited sexual assault myth that AF would be prepared to condemn Bourgeois to incarceration to avoid her mother's disapproval,[85] an event which the trial judge noted, based on the evidence, occurred two to three times a year.

51. Bourgeois also says this conclusion by the trial judge was incompatible with the actual evidence of AF and her mother, because her mother did not remind AF she was against her going out with Bourgeois and AF did not testify to worrying about being told that. He complains this was pure speculation as AF's evidence was that the focus shifted to her rape allegation once she got home. Again, the inference the trial judge drew about it not being in AF's interest to lie about having been sexually assaulted was not incompatible with the evidence and flowed logically from the fact her mother did not want her to go out. It did not become irrational because her mother did not actually raise that with her at the time. Also, as previously noted and contrary to Bourgeois' submissions, the trial judge did not find that the argument between AF and her mother was irrelevant. He simply did not give it the weight Bourgeois sought. Nothing suggests he did not consider all of the evidence in reaching his decision. A trial judge does not fall into error simply because the weight he gives to particular pieces of evidence differs from the weight the accused has urged him to give. This complaint has no merit.

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[85] *R v Seaboyer, R v Gayme,* [1991] SCR 577 (Minority opinion of L'Heureux-Dube) See also *R v A.G.,* 2000 SCC 17 at para 3 [AA, Tab 1] (Minority concurring opinion of L'Heureux-Dube)

Conflicting Reasoning and Failure to Resolve Material Inconsistencies

52. Berger, J.A. further found troubling inconsistency in the trial judge first stating AF had misgivings but thought she would get home alright with Bourgeois, only to then find that she was genuinely concerned before leaving that she might be killed by him.[86] Contrary to that conclusion, the trial judge did not make inconsistent findings about AF's evidence in describing her thoughts that Bourgeois might kill her as "misgivings" while also finding that despite those concerns she felt she would get home fine when she agreed to a ride home with him.

53. In cross-examination she testified that she thought maybe she was just being too sensitive[87], then said she felt uncomfortable leaving with Bourgeois, but did not think anything was going to happen and that she was just being sensitive.[88] Further the conclusion that she was "genuinely concerned" about what Bourgeois might do to her before she left with him was not in error. Bourgeois said the trial judge found this concern was objectively supported, but that was not a finding he made as it would have been irrelevant to the question of whether she subjectively consented to sexual intercourse with him.

54. Contrary to Berger, J.A.'s conclusion and Bourgeois' current argument, the trial judge's reasoning on this point was not flawed. It can best be summarized by saying he concluded AF had thoughts about Bourgeois harming her. The fact they existed prior to the trip home were corroborated by messages sent to third parties and despite having these thoughts she did not actually believe he would harm her. The fact the trial judge's findings recognized ambivalence in AF's view of Bourgeois at that time did not demonstrate any illogical reasoning. In fact, his reasoning would have been illogical if it followed the pattern Bourgeois suggests, which was that her feelings and opinions about him had to be completely consistent, and if they were negative, they could only be entirely negative without any level of doubt in her own mind about whether her fears were correct.

55. Further, this finding by the trial judge does not represent a flawed rejection of the argument that AF's agreement to go home with Bourgeois was inconsistent with her stated fears

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[86] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]
[87] Testimony of AF [AR, Vol. I, Tab 3A at pp. 216/41 – 217/3]
[88] Testimony of AF [AR, Vol. I, Tab 3A at p. 218/32 – 34]

or the existence of alternate modes of transportation. It is not in error because it failed to mention the fact that she sent a "super happy to be wrong" text message to her friend D while in Bourgeois' truck. Bourgeois' actual complaint here is that the trial judge wrongly found AF's testimony about her concerns with him, coupled with her airing those concerns in texts with her friends, to be relevant to the assessment of her assertion that she had not consented to sexual intercourse with him. This was not an error.

56. Further, his reasons for decision made it clear he was well aware of the entirety of the evidence. He simply did not agree with Bourgeois' contention that AF's concerns about rape and murder meant her assertion of non-consent was incredible and could not contribute to proof beyond a reasonable doubt. Bourgeois' further complaint, that the finding that AF was genuinely concerned about him was at odds with the "playful" text messages sent by her during the party, is also without foundation. A review of the texts exchanged at the party demonstrate a shifting of emotions that included: Bourgeois and AF trying to persuade each other to come to the part of the house the other was in,[89] him telling her she can believe what she wants, that he is going home because he thinks she made up her mind and that she can stay or go,[90] and complaining about being able to hear her talking about him.[91] There was nothing to suggest that all of their interactions were positive so as to make the finding that AF had misgivings about him illogical.

57. Finally, Bourgeois argued at trial that if she held these fears, they were irrational. In other words, her assertion of non-consent was not credible, or alternatively, her acceptance of a ride home with him meant she was lying about having these fears, so again her assertion of non-consent was not credible. The trial judge did not accept these arguments and again his rejection of them and his conclusion that her assertion of non-consent was credible was not the result of palpable and overriding error or irrational or illogical reasoning.

58. This complaint also appears to contain a sufficiency of reasons argument concerning the "super happy" text. The trial judge's failure to mention the same was not an error, given it was

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[89] Exhibit 9 [AR, Vol. II, Tab 4A at p. 185/Message 654; p. 186/Messages 662, 665 - 667; p. 187/Messages 668 – 675; p. 188/Messages 676 – 683; p. 189/Message 687 and p. 190/Message 697]

[90] Exhibit 9 [AR, Vol. II, Tab 4A at p. 185/Messages 652 and 655 – 657]

[91] Exhibit 9 [AR, Vol. II, Tab 4A at p. 189/Messages 685 – 687 and p. 190/Messages 693 – 696]

sent before Bourgeois parked and began sexual contact with AF at a point where the truck radio had been turned on and she had picked a station of her choice at his offering.[92] The failure to mention this text was also not an error given that the only trial issue was whether AF consented to sexual intercourse and the matter was extensively argued, with the trial judge's comments and questions during final argument making it clear he understood the argument and the evidence it was based on. This point was correctly made in some detail in the majority decision.[93]

59. When looked at as a whole, the trial judge's fact findings on AF's concerns about Bourgeois during and after the party were not inconsistent or in error. Bourgeois argues that they relied on the presumption that all of the evidence at trial could only be interpreted in one way. This was simply not the case and this complaint has not been made out.

Flawed and Imbalanced Assessment of the Evidence of AF and Bourgeois

60. As previously noted, Berger, J.A. determined the trial judge mistakenly concluded the "semi-nude" midriff photo AF texted to Bourgeois was sent after a great deal of pressing. He also found that when the trial judge concluded the initial text messages exchanged between them could not be reviewed without an appreciation that Bourgeois was anxious to have a sexual relationship with AF, he erred by failing to consider whether the sexual character of the text messages AF authored and her choice to forward that photo to Bourgeois showed she was also anxious to have a sexual relationship with him.[94]

61. Bourgeois contends the actions identified by Berger, J.A. demonstrate that the trial judge followed an imbalanced approach to his texts and statement as compared to the approach taken with AF's texts and testimony. He says this is also shown by the trial judge ignoring her requests for photos from him. He calls this a misapprehension about the nature of his actions (although he does not engage in a *Lohrer* analysis) and says it was heightened by the fact she testified that her messages to him in the first text message exchange were not sent to demonstrate sexual interest. His view of the text messages is then criticized as one-sided, leading to an unfair assessment of Bourgeois' evidence coupled with a failure to critically scrutinize hers. Bourgeois

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[92] Testimony of AF [AR, Vol. I, Tab 3A at p. 130/21 – 39]
[93] MOJ [AR, Vol. I, Tab 1C at pp.19 – 20/paras 24 – 31]
[94] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]

complains that while the trial judge concluded he was anxious to have a sexual relationship with AF, he mistakenly failed to consider whether she felt the same way.

62. Berger, J.A. also concluded the trial judge committed reasoning errors by rejecting Bourgeois' assertion in the statement tendered by the Crown that his original intention was to take AF home because it flew in the face of all of the texting that made it clear he was interested in little else than having sex with her and by stating he had no doubt this was uppermost in Bourgeois' mind when he left the house (with AF after the party). Berger, J.A. concluded when the trial judge did this he ignored the context of the text messages authored by AF that evidenced her keen interest in having sexual contact with Bourgeois.[95]

63. Bourgeois again agrees with those concerns saying this misapprehension of his interest in having a sexual relationship with AF by the trial judge led to the mistaken rejection of his assertion that the plan was simply to go home when they left the party. He says this is an error because if a prior expression of interest in sexual activity by a complainant is irrelevant, the same should be the case for an accused.

64. These complaints were rejected by the majority of the Court of Appeal as being without merit. The trial judge did not err in finding that the midriff photo sent by AF to Bourgeois came after a great deal of pressing as there was ample evidence in their initial text message exchange to support that conclusion, beginning with the fact that they exchanged messages for 85 minutes before it was sent. Bourgeois' argument regarding the photo is based on a very small sample of their messages. When their communication is looked at as a whole, it is evident the trial judge's conclusion was not mistaken.

65. The relevant messages go from Bourgeois saying he should come to her house at 1:39 AM;[96] to asking at 1:56 if he should just come over or go out to have something to eat;[97] to telling her at 2:00 that he could pick her up in five minutes;[98] to asking her for her address at

[95] MOJ [AR, Vol. I, Tab 1C at pp. 32 – 34/para 67]
[96] Exhibit 9 [AR, Vol. II, Tab 4A at p. 102/Message 14]
[97] Exhibit 9 [AR, Vol. II, Tab 4A at p. 103/Message 25]
[98] Exhibit 9 [AR, Vol. II, Tab 4A at p. 105/Message 41]

2:03;[99] to a number of further suggestions that they should go out for something to eat from 2:05 through to 2:23.[100] Throughout this string of requests AF is either telling him "No" and that she is already in bed or asking him for personal details like his last name or his occupation.

66. At 2:26 AM Bourgeois' messages turn to saying he does not believe she is in bed and wants a photo to prove it.[101] When no photo is sent he asks at 2:29 and again at 2:35 where his photo is, after she tells him what she is wearing.[102] When she then sends him two facial photos, he informs her at 2:40 he wants a full body shot[103] and then asks for his pj shot at 2:44.[104] He again asks for a picture at 2:48 to see if she is telling the truth and tells her this time she can cut the head out.[105] She then sends him a photo of her in sweatpants at 2:50[106] and his comment is "that is not a very revealing tank top."[107]

67. After further messaging where she makes inquiries about his life history he asks her what the best pic is that she has on her phone. She replies by asking of her face or something else; he indicates of anything and then indicates he is curious and at 3:04 she sends him the "semi-nude" photo of her bare midriff and the bottom of her breasts.[108] She follows that by saying "goodnight", indicating she is going to bed to question why she sent that photo to him.[109]

68. It is after that and the phone call between them that they exchange further photographs. Given that history, the fact AF that sent a message asking if he was asking about the best photo of her face or something else did not mean the trial judge was mistaken in his conclusion that the midriff photo was sent after a lot of badgering. Bourgeois was clearly not taking "No" as a final

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[99] Exhibit 9 [AR, Vol. II, Tab 4A at p. 106/Message 47]
[100] Exhibit 9 [AR, Vol. II, Tab 4A at p. 107/Messages 54, 55 and 59; p. 108/Message 64; p.109/ Messages 72 and 74 and p. 114/Message108]
[101] Exhibit 9 [AR, Vol. II, Tab 4A at p. 115/Messages 118 and 119]
[102] Exhibit 9 [AR, Vol. II, Tab 4A at p. 116/Message 126 and p.118/Message 138]
[103] Exhibit 9 [AR, Vol. II, Tab 4A at p. 119/Message 148]
[104] Exhibit 9 [AR, Vol. II, Tab 4A at p. 120/Message 157]
[105] Exhibit 9 [AR, Vol. II, Tab 4A at p. 121/Messages 164, 165 and 168]
[106] Exhibit 9 [AR, Vol. II, Tab 4A at p. 122/Message 170]
[107] Exhibit 9 [AR, Vol. II, Tab 4A at p. 122/Message 173]
[108] Exhibit 9 [AR, Vol. II, Tab 4A at p. 125 and 126/Messages 199 – 201 and p. 126/Messages 204 – 206]
[109] Exhibit 9 [AR, Vol. II, Tab 4A at p. 126/Message 207 and p. 127/Message 210]

answer from her about anything he was requesting of her in that interaction and the trial judge's assessment of that was not in error.

69. Bourgeois also mischaracterizes AF's testimony about her interest in him when viewed as a whole and fails to acknowledge the trial judge's assessment of the same. In cross-examination she agreed she was demonstrating sexual interest in him, knew he was interested in her and wanted to entice him in the first text message exchange.[110] Nothing suggests the trial judge committed a reversible error in concluding that the entirety of AF's testimony and the text message exchanges had not left him with a doubt about her lack of subjective consent at the time the sexual intercourse occurred. The fundamental problem with Bourgeois' argument that her sexual interest in him prior to leaving the party meant the trial judge was in error in finding she had not consented to the subsequent sexual contact is that her prior interest says nothing about whether it continued to the point of sexual intercourse. If the trial judge had actually accepted that argument he would have been endorsing one of the twin myths and would have committed a legal error.

70. There was also no imbalance in the trial judge's analysis of the meaning of the text messages demonstrated in his conclusion that they indicated Bourgeois was anxious to have a sexual relationship with AF. This was conceded by his trial counsel in final argument[111] and he confirmed in his police statement that his interest continued to the point of sexual intercourse. This meant there was no error in the trial judge's conclusion that Bourgeois' interest in a sexual relationship continued from essentially their first contact until the events that led to the charges against him. However, as consent to sexual activity is a present state of mind, AF's interest in him on December 24 or 25 was not determinative of her state of mind when sexual intercourse actually occurred, even though the trial judge concluded that most of their text messages after their initial meeting were sexual in nature. After all, she testified her interest in him ended prior to leaving the party because of his behaviour there. Because of that, the sexual tone of her prior messages did not mean she had to have consented to sexual intercourse in Bourgeois' truck and certainly did not suggest the trial judge erred in accepting her assertion that she had not.

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[110] Testimony of AF [AR, Vol. I, Tab 3A at pp. 155/32 – 156/22 and pp. 159/27 – 160/29]
[111] Final Submissions by Mr. Archer [AR, Vol. II, Tab 3F at pp. 95/39 – 96/9]

71. He also did not err in rejecting Bourgeois' assertion that his intention when they left the party was just to go. Bourgeois conceded he had a continuing interest in a sexual relationship and admitted sexual intercourse happened with his consent. The question for the trial judge was whether it happened with AF's consent as well. To decide that, he was obliged to consider all of the evidence on the topic. The Respondent submits in doing so he did not engage in inadmissible reasoning or misapprehend any evidence. Bourgeois' sexual interest in AF did not automatically mean he would have engaged in sexual contact with her irrespective of her wishes but it was something the trial judge could properly consider in assessing the credibility of his assertion that the plan on leaving the party was just to go.

72. Bourgeois also seems to suggest the trial judge's finding that he sexually assaulted AF was based solely on the finding that he was sexually interested in her. This is not what occurred. The trial judge considered his sexual interest in AF in concluding that he was lying when he said the plan when they left the party was just to go. While this did contribute to his eventual rejection of Bourgeois' assertion that AF had consented, it was not the sole basis for that conclusion and was not in error.

73. The trial judge's conclusion about Bourgeois' intentions towards AF after the party is also not demonstrably incompatible with the entirety of the evidence before him. Bourgeois argues that if the text messages between them at the party are examined in their entirety his error is obvious. The difficulty with this argument is that Bourgeois argues the trial judge has erred by not considering all of the evidence and bases that argument on far less than all of the evidence. If the evidence is looked at as a whole it can be seen that once he and AF drove away from the party he began touching her in a sexual manner without any evidence of prior discussion about engaging in any activity of that sort at that time. Further, while the original comments in his statement implied mutual contact, his subsequent comments clearly set out that he initiated sexual contact that included touching her vagina over her clothing. Given all of the evidence, the trial judge did not err in rejecting his assertion that she had consented to the sexual activity that occurred and believing her testimony that she had not. He properly looked at all of the evidence in reaching his conclusions. In contrast, Bourgeois has pointed to pieces of evidence in isolation to argue that his analysis was flawed. This is not proper assessment of evidence and does not demonstrate fact finding errors by the trial judge.

74. Finally, on Bourgeois' complaint of misapprehensions in the trial judge's handling of the evidence there is nothing in the reasons for decision coupled with his interaction in argument with defence counsel[112] that suggests he missed the potential significance of AF falsely telling her parents that she was unable to reply to their texts while at the party because Bourgeois had her phone. While any falsehoods she told were clearly relevant to her credibility, including her assertion of non-consent, there is simply nothing in the record to suggest the trial judge did not recognize this. At trial, Bourgeois argued that this incident and the 3:13 AM text incident demonstrated that AF was a liar who should not be believed about anything. The trial judge was well aware of this argument and the evidence it was based on and in the end concluded that this did not leave him in doubt on the essential elements of the offence. Yet again, this was a conclusion he could reach and he did not err in doing so. The complaints of misapprehension of evidence have simply not been made out.

The verdict was not supported by any reasonable view of the evidence

75. Bourgeois' final argument is essentially that AF's testimony was so incredible that any guilty verdict based on it had to be unreasonable. This is simply unfounded. The key evidence from AF that had to be accepted by the trial judge was her assertion that she did not subjectively consent to sexual intercourse with Bourgeois. Nothing in the evidence as a whole suggested she was such an incredible witness that her evidence could not reasonably found a conviction. None of the members of the Court of Appeal came to that conclusion and further, as the majority pointed out, cases where the parties offer conflicting accounts are rarely susceptible to a finding of unreasonable verdict.[113] Nothing about this case suggests it was one of those rare cases.

76. Bourgeois has set out a number of examples of AF's testimony that he says lead to the conclusion that she was simply incredible. They repeat evidence he has previously mistakenly pointed to as demonstrating irrational or illogical reasoning or misapprehension on the part of the trial judge with two additions, neither of which supports the suggestion that this verdict cannot be reasonably sustained on the evidence.

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[112] Final Submissions by Mr. Archer [AR, Vol. II, Tab 3F at pp. 80/20 – 81/37]
[113] MOJ [AR, Vol. I, Tab 1C at pp. 24 and 25/para 47]

77. The first is her alleged lack of recall of any text message that could reflect poorly on her and the second is her warning her mother not to open the garage door upon her return home because Bourgeois would kill them all. Again, while any reluctance that she had to acknowledge evidence that might reflect poorly on her would be something the trier of fact needed to consider in making his credibility findings, this was raised with him in detail by Bourgeois' trial counsel,[114] leaving nothing to suggest it was overlooked in his overall reasoning process or that it could properly produce an acquittal. Further, while warning her mother that Bourgeois was going to kill them was again a point to be considered in assessing her credibility, the trial judge was clearly aware of this because his reasons for decision discussed what occurred on her arrival home. This again is not evidence that would make her testimony unquestionably incredible. It too offers no support for the argument that this verdict cannot be supported on the evidence before the trial judge. This argument also fails and this appeal must be dismissed.

CONCLUSION

78. In the end this appeal is nothing more than complaints by the Appellant about the trial judge's credibility findings – findings that can only be overturned if they were the product of palpable and overriding error. At the Court of Appeal the dissenting justice concluded that there were a number of errors made by the trial judge in arriving at those findings that had produced an unreasonable verdict. As a result, he ordered a new trial. The Appellant has adopted those findings and supplemented them with additional complaints as to why the trial judge's verdict of guilty was unreasonable.

79. However, none of the conclusions made by the dissenting justice or the further complaints of the Appellant have any merit. All of the credibility conclusions that are the subject of complaint were available to the trial judge, based on the whole of the evidence. The Appellant has failed to demonstrate that any of them were the product of any error that would permit appellate intervention. This appeal should be dismissed.

PART IV – COSTS

80. The Respondent makes no submissions regarding costs.

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[114] Final Submissions by Mr. Archer [AR, Vol. II, Tab 3F at p. 75/6 – 8 and pp. 75/37 – 77/28]

PART V – ORDER SOUGHT

81. That this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 25th day of July, 2017.

BRIAN R. GRAFF
COUNSEL FOR THE RESPONDENT

BRG/cw

PART VI – TABLE OF AUTHORITIES

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