Court File No. 38026

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

KINGSLEY YIANOMAH QUARTEY

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

FACTUM OF THE RESPONDENT

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

TROY L. COUILLARD
Appellate Counsel
Justice and Solicitor General
Appeals, Education & Prosecution Policy Branch
3rd Floor, Bowker Building
9833 – 109 Street
Edmonton, AB T5K 2E8
Phone: (780) 422-5402
Fax: (780) 422-1106
Email: troy.couillard@gov.ab.ca

COUNSEL FOR THE RESPONDENT

D. LYNNE WATT
Gowling WLG (Canada) LLP
Barristers & Solicitors
2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

OTTAWA AGENT FOR THE RESPONDENT

KATHRYN QUINLAN
Dawson Duckett Garcia & Johnson
300, 9924 – 106 Street
Edmonton, AB T5K 1C4
Phone: (780) 424-9058
Fax: (780) 425-0172
Email: kquinlan@dsscrimlaw.com

COUNSEL FOR THE APPELLANT

COLLEEN BAUMAN
Goldblatt Partners LLP
Barristers & Solicitors
500 30 Metcalfe Street
Ottawa, ON K1P 5L4
Phone: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

OTTAWA AGENT FOR THE APPELLANT

TABLE OF CONTENTS

Page No.

PART 1: OVERVIEW AND FACTS

A. Overview

1. The complainant alleged that the appellant would not take "no" for an answer when he forced himself on her; the appellant portrayed himself as an extremely considerate and skilled lover who had sexual intercourse with the complainant even though he did not want to, after having every opportunity to avoid it. The trial judge gave several reasons for rejecting the appellant's version, and explained why he found the allegation was proven beyond a reasonable doubt. On appeal to the Alberta Court of Appeal, the appellant argued, among other things, that the trial judge shifted the burden of proof and improperly relied upon stereotypes. Consistent with this Court's jurisprudence, the Court of Appeal was unanimous in observing that a trier of fact cannot rely upon stereotypes when assessing credibility. The majority (Wakeling and Strekaf JJ.A.) found no error in the trial judge's reasons. Berger J.A., in dissent, opined that the trial judge had misapplied *R v W(D)*[1] and improperly relied upon generalizations/stereotypes. The issues in this appeal as of right are therefore whether the trial judge's reasons disclose a shift in the burden of proof, and whether the trial judge improperly relied on stereotypes when weighing the evidence.

2. By isolating a few phrases from the context of the trial judge's complete reasons, the appellant argues that the trial judge erred by presuming the appellant's guilt and relying on stereotypes. But, when the reasons are read in their entirety, in the context of the evidence and argument at trial, it is clear that the trial judge's comments pertain to *this* appellant and *this* complainant rather than to assumptions about men and women generally. The majority correctly recognized that the trial judge did not shift the burden of proof or improperly rely on stereotypes; the trial judge properly weighed the evidence and convicted the appellant based on the evidence the judge accepted.

---

[1] ***R v W(D)***, [1991] 1 SCR 742, 1991 CanLII 93 [***W(D)***].

B. Facts

The Complainant's Evidence

3. The complainant was a 26-year-old woman working in a 7-11 store in Lloydminster, Alberta. The appellant was a 41-year-old man who was a regular customer at the store. She had helped him with finding a place to live through the classified ads, but they did not know each other outside of her work; she did not know his name until he asked her out for coffee on March 12, 2008.[2]

4. The two exchanged text messages on March 13 which led to the appellant meeting the complainant outside her friends' house at 10:30-11:00 p.m.[3] She went outside to waive him down because he was actually about a block away, in the middle of the road.[4] She initially did not recall if she had asked him to not come to the door, but in cross-examination she agreed that she had earlier testified that she did not want to have somebody come to the door at her friends' house and she did not want the appellant to see her car ("… I didn't know who he was really … I didn't want him to be a – turn out to be a stalker or something, you know, see my car and then see it at work, come bug me at work and – just trying to be safe").[5]

5. Instead of going for coffee, the appellant asked the complainant if she would come to his place for a beer, and she agreed; she thought perhaps he was more comfortable in that situation.[6] While he drove, he repeatedly put a hand on her thigh; she repeatedly removed his hand, and eventually held his hand because she did not want it on her leg.[7]

---

[2] Trial Transcript pp 3–4 [Appellant's Record ('AR') Tab 9 pp 48–49].
[3] Trial Transcript p 20/28 [AR Tab 9 p 65/28].
[4] Trial Transcript p 21/13–17 [AR Tab 9 p 66/13–17].
[5] Trial Transcript pp 31/35–32/10 [AR Tab 9 pp 76/35–77/10].
[6] Trial Transcript pp 6/3, 22/4–15 [AR Tab 9 pp 51/3, 67/4–15].
[7] Trial Transcript pp 6/22, 22/28 [AR Tab 9 pp 51/3, 67/28].

6. They pulled up to the house. He asked if she wanted to "come in and talk, visit, you know, conversation, he promised me conversation." They went in. Upstairs, she said hello to a woman she assumed was the landlady. The appellant said "come down and see my place", which was a room in the basement. The complainant noticed other doors but a lot of them were closed, so she did not get to see into the basement. He opened a door and she believed she went into his room first; she was trying to find a place to sit and couldn't find anything, so she sat at the foot of the bed. The appellant "came in" and offered her a beer.[8]

7. The appellant came over, leaned over her, and started kissing her. She moved her head away. He said he was sorry and backed off a little bit, and said she was pretty. He kissed her again and "I couldn't move my head because my back and my head were against the wall." He sat beside her on the bed. He kept saying he was sorry and that she was pretty, and started kissing her neck and touching her as she pushed him away; "… I didn't want him to kiss me and he must – he must've taken the hint, but then he sat beside me and then he came at me again, kissing and touching me and I was trying to push his hands away and get them off my body."[9] She told him it wasn't what she wanted, and told him repeatedly that she was shy.[10] She became "scared. Just really scared. I didn't – I didn't know what to think. I – I was worried that if I put up too much of a fuss I'd get hurt."[11]

8. The complainant told the appellant that she did not want to have sex. He told her not to worry, that he just wanted to see her body. "… He was touching me again and trying to pull up my sweater. We kind of – I got pushed back, kind of laying down, like my legs were still over the end of the bed … he was kind of on me but not all the way on me and just touching me and

[8] Trial Transcript pp 8–9 [AR Tab 9 pp 53–54].
[9] Trial Transcript pp 9/17–37, 10/35–40 [AR Tab 9 pp 54/17–37, 55/35–40].
[10] Trial Transcript p 10/5–26 [AR p 55/5–26].
[11] Trial Transcript p 11/17 [AR Tab 9 p 56/17].

trying to kiss me. And I – pushed on his chest and I said, I don't want this, no … every time I grabbed his hands he would tell me, he was like, I'm sorry, you're pretty."[12]

9. The appellant eventually succeeded in removing her clothing. He went to shut the light off "… and I was just laying there. I didn't know what to do. And then when – when he came back to the bed, he was taking his clothes off. And I said, I don't want to have sex. He's like, 'we're just going to lay here, we won't have sex.' But he was between me and – and the door …" He got on the bed and digitally penetrated her; she said that it hurt and told him to stop. "Then he got over top of me and he had my legs in his hands and he … put it in me and it was rough and it hurt and I told him, No, I don't want this … I just kind of blanked out really bad after that, I just stared at the ceiling. I didn't think to yell or anything. I just wanted it to be done, over, so I could go …"[13]

10. The complainant testified that the appellant did not use a condom. After he ejaculated he was "quite insistent" that she stay the night. She lied and said her friends would be upset if she did not come home – "I didn't want to make him angry". She explained to the trial judge that she thought "I need to get out of here with my life … so I just kept being really insistent, I need to go …" Her friend "K" called her cell phone while this discussion went on, and then the appellant agreed to take her home.[14]

11. The appellant took the complainant back to her friends' house; he tried to talk to her but "to be honest, it wasn't really registering."[15] She stayed the night at her friends' and then she had a "breakdown at work" the next day. She obtained the "morning after" pill, and then left Lloydminster to be with her mother in Estevan, Saskatchewan.[16]

---

[12] Trial Transcript p 11/33–40 [AR Tab 9 p 56/33–40].
[13] Trial Transcript pp 15/15–16/18 [AR Tab 9 p 60/15–61/18].
[14] Trial Transcript pp 16/35–17/34 [AR Tab 9 pp 61/35–62/34].
[15] Trial Transcript p 18/4 [AR Tab 9 p 63/4].
[16] Trial Transcript pp 18/23–19/10 [AR Tab 9 pp 63/23–64/10].

12. The complainant agreed in cross-examination that she had become scared despite the fact that the appellant had neither hit nor threatened her: "… his words were kind but there was no kindness in his touch. You know, like – force. He was between me and the door and he's not a small man"; "… It was nice things that he said but it wasn't meant nice, you know, more just like to calm me down like you shush a baby, you know, when they're crying …". She had not asked to leave after the appellant began kissing her: "I didn't think to be that polite instead I was telling him my wishes, that I didn't want to have sex …". She had not used her cell phone: "No, it was in my pocket. I was too busy trying to keep his hands off me."[17] "If I freak out, what if he hits me." She agreed that she might have sent the appellant a text message afterward; it was possible it said "thanks hon, hugs and kisses", but she did not remember what the message might have been.[18] She said her cell phone would have erased the messages automatically, and that in any event the phone was gone.

The Appellant's Evidence

13. The appellant said that he moved to Lloydminster in November, 2007, and met the complainant at the 7-11 the first day he was there. They discussed his need to find a place to live. He became a regular customer of the store. He recalled asking the complainant out to a nightclub within a week of March 13; she declined going to the nightclub because she had to work, but she suggested that she was available to go for coffee the following day (the appellant's testimony does not include an explanation for why the plans changed from going for coffee to going to his basement suite). They scheduled their meeting for about 8:00 p.m. but he was "… tired, you know, I'm on the phone calling China and I'm doing this, so I was kind of too much … on my plate. And I was trying to clean up the place before she came." By 10:00 p.m. he "started to get up" and she was repeatedly texting him "when are you going to come".[19] She

[17] Trial Transcript p 26/8–25 [AR Tab 9 p 71/8–25].
[18] Trial Transcript pp 27/20–28, 29/10–13, 30/7 [AR Tab 9 pp 72/20–28, 74/10–13, 75/7].
[19] Trial Transcript pp 39/1–40/2 [AR Tab 10 pp 84/1–85/2].

texted that she did not want her friends to know that she was going out with a guy so he should text when he was nearby. He could not find the house and she went out and waved.[20]

14. The complainant sat in his car. He thought maybe he kissed her on the cheeks and she kissed his cheeks. He touched her thigh, "but it was a very fleeting touch like this and that was it. And then I said thank you."[21] They discussed her career plans. He thought that he told her that he had big dreams and did not want to be tied down by a serious relationship with any woman.[22] Upon arriving at his house, he left the complainant upstairs speaking to the landlady and he went downstairs; the complainant followed. He offered her beer; she stood by the kitchen area door watching him, but did not enter the kitchen area (the complainant was not asked if she ever saw the kitchen/living area – she said she "never got to see the basement or anything"; the appellant did not say that the complainant entered the kitchen as indicated in para 68 of the appellant's factum, but he said instead that she stood by the door and watched him[23]). Then he opened the bedroom door and led her in. He thought he opened her beer for her. He started telling her about a perfume he was developing but she did not want to talk about it.[24]

15. They started talking but he eventually had no choice but to kiss her because she did not hold up her end of the conversation:

> Q: […] you commenced hugging and kissing right away?
> A: Pretty much. We didn't talk much because, like I wanted to talk but she didn't want to talk. Like, she didn't want to talk at all. I – I tried to start a conversation with her, you know, and she was like, okay, okay. And that's what she was saying, just okay, okay. So there wasn't anything I could have done.
> […]
> Like even if – after that, that was the problem I had with her, like she wants to talk for a

[20] Trial Transcript p 40/2–11 [AR Tab 10 p 84/2–11].
[21] Trial Transcript p 40/17 [AR Tab 10 p 84/17].
[22] Trial Transcript p 40/21–33 [AR Tab 10 p 84/21–33].
[23] Trial Transcript p 42/16–19 [AR Tab 10 p 87/16–19].
[24] Trial Transcript pp 8/30–35, 42/16–23 [AR Tab 9 pp 53/30–35; Tab 10 p 87/16–23].

> long time but she just wants to say, okay, okay, and she wanted me to keep talking and I got tired of it.[25]

16. He kissed her, and she kissed back (he agreed in cross-examination that he started kissing her "right away"). He touched her breasts and she put her hands on his shoulders; "we are fooling around a little bit." He said he wanted to see her body. She said she was too shy because the light was on. He switched the light off. She asked for help removing her blouse; he complied and lay next to her. He started touching her more and then lay on top of her, "and we kissed more and then I asked her what does she wanted to do", to which she replied "something like, whatever." He told her he thought he had a condom.[26]

17. The appellant testified that he was very tired and had to work the next day, so he was "trying to figure a way out of the situation. I was hoping she would no [*sic*], or whatever, she wants to go home and then I would be free, you know to drop her off and go to sleep. And then I said to her, okay, I think I have a condom. I'm going to go look for it, if I find a condom, then we're going to have sex, if I don't have a condom, we don't have sex. She goes, okay."[27] "So I look for the condom and I found a condom, unfortunately …"[28]

18. He gave the complainant a condom and they laughed about her inability to put it on him. He asked her three times "are you sure this is what you want to do", and she said "yes, it's time." He put on a condom and they had intercourse with the complainant on top. She was "very happy" and said she "came three times." At some point before the intercourse the complainant tried to perform fellatio but he pushed her head away because "I don't like that, you know" (counsel did not suggest to the complainant in cross-examination that she had attempted to perform fellatio).[29]

---

[25] Trial Transcript p 52/10–23 [AR Tab 10 p 97/10–23].
[26] Trial Transcript pp 42/26–39, 66/27 [AR Tab 10 pp 87/26–39, 111/27].
[27] Trial Transcript pp 42/39–43/4 [AR Tab 10 pp 87/39–88/4].
[28] Trial Transcript p 43/6 [AR Tab 10 p 88/6].
[29] Trial Transcript p 43/11–27 [AR Tab 10 p 88/11–27].

19. He did not want her to sleep because he had to go to work at 4:00 a.m. If she slept they would probably have more sex, and he did not have any condoms left, and he did not want the responsibility of a pregnancy. If he let her sleep and left her in the house then she would go through his things. So, he made the "difficult choice" and suggested maybe she could sleep next time.[30]

20. On the way back to the complainant's friends' house, he told the complainant that he did not want anything serious. The complainant said she understood. She said she was hungry and accepted his offer of $20. They talked and held hands. After he returned home, he sent her a text message worded in a way that she would not respond to right away because he could sense she wanted to talk more ("she can talk and talk. All she does is talk.") His text message was only "thanks" (he did not explain why he would send *any* text message if he did not want a reply). The complainant replied, "You're welcome, honey. Hugs and kisses. XOXOXO, night-night."[31]

21. He had been looking for "… like a fuck buddy with her, a convenience relationship. She calls me when she wants it, I call her when I want it. I didn't want anything overly serious." But, when he first brought her to his room, he was hoping to avoid having sexual intercourse with the complainant and just wanted to "fool around" (which he defined as "maybe kiss her and hug her a few times and that kind of stuff, but nothing really too deep, you know, or too serious.")[32] He did not explain why he did not want or expect to have intercourse with a "fuck buddy".

22. Sometime after March 13, his landlady suggested he should "get serious" with the complainant. So, he called the complainant and said "if you want us to get serious you'll have to

---

[30] Trial Transcript p 44/1–8 [AR Tab 10 p 89/1–8].
[31] Trial Transcript p 44/11–41 [AR Tab 10 p 89/11–41].
[32] Trial Transcript pp 53/2–15, 60/37–40 [AR Tab 10 pp 98/2–15, 105/37–40].

stop using those tattoos and earrings and all those things and then we can get serious."[33] He did not explain why his position regarding "getting serious" had changed, beyond having had a conversation with the landlady.

23. The appellant testified that he gave his cell phone to the police. Neither the phone, nor evidence of any attempt to obtain it, was produced at trial.

Procedural History

24. The procedural history is as follows:

- March 13, 2008 — Offence date;
- December 10, 2008 — Preliminary inquiry;
- November 24–25, 2009 — Trial and conviction;[34]
- December 17, 2009 — The appellant failed to appear for sentencing;
- April 20, 2016 — The appellant was again before the Court;
- May 13, 2016 — The appellant was sentenced (36 months less credit for time served, leaving 34.5 months to serve);
- September 5, 2017 — The Court of Appeal heard the appeal;
- January 18, 2018 — The appeal was dismissed, Berger J.A. dissenting.[35]

[33] Trial Transcript p 45/4–19 [AR Tab 10 p 90/4–19].
[34] ***R v Quartey*** (25 November 2009), Edmonton 080424443Q1 (Alta QB) [***Quartey QB***] [AR Tab 1].
[35] ***R v Quartey***, 2018 ABCA 12 [***Quartey ABCA***] [AR Tab 2].

The Dissenting Judgment of Berger J.A.

25. In dissent, Berger J.A. opined that the trial judge erred by "misconstruing his judicial function and, in so doing, impermissibly relied on generalizations about how people behave or are expected to behave in his assessment of credibility."[36]

26. Berger J.A. devoted much attention to the text message the appellant claimed to have received, and the continued communication thereafter. The trial judge did not comment on the "thanks hon" text message the appellant claimed to have received. The only evidence of the existence of the message was the appellant's testimony, which the trial judge rejected (the complainant's acknowledging the possibility that she sent it is not evidence that she did send it ("… a proposition put to a witness during cross-examination does not constitute evidence of the proposition, unless the witness adopts it as true."[37])). Despite the trial judge's wholesale rejection of the appellant's testimony, Berger J.A. appears to have made a positive finding of fact that the complainant *did* send the text message, and continued to communicate with the appellant thereafter. The complainant said in cross-examination that she responded to some text messages while she was in Estevan ("… I know one I had said I was sorry but I think it was he was upset that I wasn't at work the next day, because my co-workers threw him out of the store that I worked at …") but that she called the police "both" times the appellant called her after she returned to Lloydminster.[38] The appellant said he called her with an offer to get "serious", and agreed in cross-examination that they exchanged "a few" text messages.[39]

---

[36] ***Quartey ABCA*** at para 64.
[37] ***R v Simpson***, 2015 SCC 40 at para 37.
[38] Trial Transcript p 31/24 [AR Tab 9 p 76/24].
[39] Trial Transcript pp 45/4–19, 64/28 [AR Tab 10 pp 90/4, 109/28].

PART 2: ISSUES

27. There are two issues in this appeal:

A. Did the trial judge err by misconstruing his judicial function?

Respondent's position: No. The majority in the Court of Appeal correctly held that the trial judge's reasons, read in totality, demonstrate a correct application of the principles in *W(D)*.

B. Did the trial judge err by impermissibly relying on generalizations (or stereotypes) about how people behave or are expected to behave, when assessing credibility?

Respondent's position: No. The majority in the Court of Appeal correctly held that the trial judge's reasons demonstrate that he drew legitimate inferences from the trial record.

PART 3: STATEMENT OF ARGUMENT

A. The trial judge did not misconstrue the judicial function / the burden did not shift.

28. The majority in this case correctly held that the trial judge's reasons reflect a correct application of the *W(D)* principles and do not reflect a shift of the burden of proof to the appellant.

29. The respondent concedes that the trial judge's comment that "someone here is not telling the truth" could, without more, suggest a credibility contest. But, the concern evaporates when the passage is reviewed in the context of the reasons as a whole. As Lamer CJC adopted in ***R v Davis***:

> It is not sufficient to "cherry pick" certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages. This is especially true in the case of a judge sitting alone where other comments made by him or her may make it perfectly clear that he or she did not misapprehend the import of

> the legal principles involved. As McLachlin J. said in [*R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 at p. 737]: "[t]he fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence."[40]

30. An accused's evidence is not considered in isolation.[41] The trial judge was required to assess the appellant's evidence together with the complainant's evidence. It is unsurprising that the assessment of internally inconsistent and fanciful evidence was coloured by evidence the trial judge found to be "sincere and candid".[42] It is not legal error for a trial judge to contrast an accused's evidence against the complainant's in explaining why one person's evidence is accepted over another's.

31. An example of a trial judge presupposing the truthfulness of the Crown's witness occurred when assessing the accused's credibility is found in ***R v Geddes***,[43] which is unlike this case**.** The issue in *Geddes* was whether the Crown proved the accused was the drug trafficker in question; the officer said that he recognized the accused, but the accused said it was not him. The trial judge said "I assume that he is a trained officer with respect to knowing the players in the game", and "I assume organized crime people, and I cannot assume this, but they know the players in the sense of dealings and things along this line", and also found confirmatory evidence where there was none. The Manitoba Court of Appeal found the trial judge erred when he proceeded to assess the accused's evidence in light of the truth of the Crown's evidence. But the trial judge's reasons in this case do not resemble what was said in *Geddes*.

32. It is worth noting that the Court in *Geddes* referred only to Fish J.'s minority reasons in ***R v CLY***.[44] In *CLY,* the trial judge had considered the evidence of the complainant first. The majority in this Court held that this was not an error; the paramount consideration remains

---

[40] ***R v Davis***, [1999] 3 SCR 759 at para 103, 1999 CarswellNfld 291.
[41] ***R v JWA***, 2010 ABCA 406 at para 22; leave to appeal to SCC refused 34106 (14 July 2011).
[42] Trial Transcript p 86/2–11 [AR Tab 1 p 8/2–11].
[43] ***R v Geddes***, 2011 MBCA 44 [***Geddes***].
[44] ***R v CLY***, 2008 SCC 2 [***CLY***].

whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt. Similarly, in ***R v Carrière***, the Ontario Court of Appeal noted that:

> The instruction suggested by Cory J. does not advise the jury to begin with the evidence of the accused. Rather, it tells them that when assessing the credibility of the accused, they should approach it in the three stages outlined in the model charge. Properly understood, *R. v. W.(D).*, *supra*, does not impose any limits on how the jury proceeds with its deliberative process. [45]

Respectfully, Berger J.A.'s concern regarding a shift in the onus of proof in this case is based on isolating certain passages from the trial judge's reasons from their larger context, rather than reading the reasons in their entirety. The majority in this case correctly found no error in the trial judge's approach.

33. An unfavourable finding of fact is not a reversal of the burden of proof. The trial judge's conclusion that "I find that he did not obtain her consent before he had intercourse with her" does not suggest a reversal of the burden of proof. Rather, it is a response to the evidence and the submissions. The appellant claimed as a fact that he *did* obtain the complainant's consent three times; the judge found as a fact that he *did not* obtain that consent. The impugned passage does not bear the interpretation the appellant would have this Court give it.

34. Sanderman J.'s rejection of the appellant's evidence is unlike what occurred in ***R v Dari***.[46] That case involved confused evidence of witnesses describing a fight outside a bar after boisterous words were spoken inside the bar; the complainant could not recall the event and the accused did not testify. The trial judge said he was "unable to conclude there was a consensual fight. The gap in time and circumstances outside do not lead to that conclusion." The summary conviction appeal judge in *Dari* found that the trial judge had shifted the burden of proof by requiring the accused to prove the existence of a consensual fight. That is not the

---

[45] ***R v Carrière*** (2001), 159 CCC (3d) 51, 2001 CarswellOnt 3722 at para 50 (CA) [cited to WL].
[46] ***R v Dari***, 2006 BCSC 248 [***Dari***].

situation in this case; as the majority correctly noted, Sanderman J. simply made a finding of fact that the appellant did not obtain the complainant's consent as the appellant had described, and then he proceeded to describe the particulars of the complainant's evidence which supported that finding of fact.

35. Sanderman J.'s statement that "the Court really has to determine whose evidence can be accepted, which evidence is credible, and which is not" does indeed preface the statement that the appellant tried to sell a version to the Court. But, a correct *W(D)* self-instruction precedes these two impugned statements. The reasons between the two impugned statements include a correct statement that the Court takes into consideration "every possible piece of evidence that's been led to try and determine what really did happen."[47] Rather than indicating a credibility contest, the impugned passages indicate a correct understanding of the law: the trier of fact (a) can believe all, some, or none of what a witness says; (b) must consider all of the evidence in order to *try* to determine what happened. The trial judge's use of the word "try", coupled with his correct self-instruction regarding *W(D)*, indicates a correct understanding that rejection of the appellant's evidence did not mean the complainant was truthful. The impugned passage reflects nothing more than the fact that the search for truth remains an important purpose of a criminal trial.

Conclusion

36. In this case, the preponderance of the trial judge's reasons demonstrate a proper understanding and application of the *W(D)* principles. The trial judge explicitly referred to *W(D)* and correctly instructed himself. Specifically, he noted that even disbelieved evidence may raise a reasonable doubt, and that he must still examine the Crown's evidence to determine whether it meets the criminal standard of proof. He examined the appellant's evidence and provided reasons for disbelieving it, and reasons for believing the complainant. His reasons do not in any

[47] ***Quartey QB*** p 83/36 [AR Tab 1 p 5/36].

way suggest that the appellant was required to prove that the complainant did consent, or that the complainant was believed simply because the appellant was not.

B. The trial judge did not impermissibly rely upon stereotypes.

37. The issue in this appeal is not whether a trier of fact can apply broad stereotypes when assessing credibility; the Court of Appeal was unanimous in the opinion that it is "… inappropriate for a court to apply or rely on generalizations or stereotypes about sexual behaviour whether assessing the conduct of an accused person or a complainant."[48] Rather, the issue is whether the trial judge improperly relied upon stereotypes *in this case*. Berger J.A. found that the trial judge had done so, but the majority found that the trial judge's considerations were based on *this* appellant, and *this* complainant, in view of all of the evidence. The respondent argues that the majority's assessment is correct.

38. The trial judge explicitly instructed himself against applying the myths of what behaviour could be expected of a sexual assault victim, and he explicitly said that he was considering the "nature and characteristics" of the two witnesses he observed.[49] He did not opine that no woman would be the sexual aggressor, that no man would repeatedly confirm consent, or that no man would refuse fellatio. He did rely on his observations of the appellant and complainant, and the evidence that each provided.

39. The trial judge's assessment that the appellant put a "spin" on the evidence to portray himself as the reluctant responder to the complainant's sexual aggression is consistent with the evidence. The trial judge did not reject the appellant's claim that the complainant was the aggressor because no woman would behave as the appellant claimed. He rejected the appellant's claim because, on an assessment of all of the evidence, the appellant's version was incredible. The appellant, older and much larger than the complainant: (a) changed the plans from going for

---

[48] ***Quartey ABCA*** para 21 [per the majority].
[49] ***Quartey QB*** p 83/27–30 [AR Tab 1 p 5].

coffee to going to his room; (b) kissed the complainant because he had "no choice" when she did not hold up her end of the conversation; (c) wanted a "fuck buddy" but only wanted to "fool around" instead of having intercourse; (d) did not want to have intercourse but asked the complainant three times whether she wanted to have intercourse; (e) did not want to have intercourse but searched for a condom; (f) had intercourse even though he did not want to; and (f) did not want a serious relationship but offered to have one anyhow. Essentially, the appellant claimed he was somehow robbed of the autonomy to say "no". The record amply supports the trial judge's weighing of this evidence and finding it unworthy of belief; the majority correctly found no palpable and overriding error in that assessment, which was entitled to deference. One does not have to rely upon generalizations or stereotypes to recognize that the appellant's version is internally inconsistent and fanciful.

40. The trial judge was correct that the appellant attempted to portray himself as a "considerate lover", who thanked the complainant after touching her leg in the car, and then confirmed the complainant's consent repeatedly. The trial judge did not say that the appellant's story about reading body language was fanciful because people do not generally rely upon body language when engaging in sexual activity. Berger J.A.'s concern ("And why would it necessarily be 'very fanciful' for a man to be alert not only to his partner's vocal expression of consent but also her so-called 'body language'[50]) takes the trial judge's comment out of context. When the reference to body language is read together with the entirety of the reasons and the trial record, it is apparent that the trial judge thought it fanciful that this appellant would ask this complainant whether she wanted to proceed, receive her affirmative response, check her body language to ensure that it matched the verbal response he had already received, and then repeat the process two more times.[51] The majority correctly deferred to the trial judge's reasonable weighing of this evidence.

---

[50] ***Quartey ABCA*** para 76.
[51] ***Quartey QB*** pp 84/36–85/7 [AR Tab 1 pp 6/36–7/7].

41. The trial judge did not say that the appellant's claim that he was not interested in sex but was only interested in undressing and lying next to the complainant in bed to "fool around" was unbelievable because no man would behave that way. The appellant's claim was unbelievable because it is inconsistent with his assertion that he wanted a "fuck buddy", etc.

42. The trial judge's characterization of the appellant's claimed refusal of oral sex must also be read in context. The trial judge did not say that the appellant's claim was unbelievable because no man would refuse, as Berger J.A. and the appellant suggest.[52] When considered with the entirety of the evidence and the reasons given, this impugned passage suggests only that the trial judge thought the appellant's claim was unbelievable because he thought it unlikely that the appellant would refuse in these circumstances. It does indeed seem unlikely that the appellant, looking to make a "fuck buddy" of a virtual stranger, would not be open to the act. Again, the majority correctly rejected the appellant's argument in the court below. Further, even if this Court finds the impugned passage does imply that the trial judge erred in law by placing reliance on a generalization that no man would refuse, this is only one of the many reasons the trial judge gave for disbelieving the appellant's evidence; if this error was committed, it did not affect the verdict.

[52] ***Quartey ABCA*** at paras 81–82.

Conclusion

43. Trial judges are entitled to rely upon common sense and human experience in assessing witnesses' credibility. For example, the trial judge in ***R v GH***[53] considered the fact that neither the accused nor the complainant climaxed during sexual intercourse: "That seems at odds with what one would expect if the two of them were such willing partners to such a novel encounter."[54] The Ontario Court of Appeal found no error in that observation, opining that the trial judge had "assessed the evidence that was before him about how the appellant said he and the victim behaved and measured that against a common sense understanding of human behaviour in the context of whether the sex was consensual."[55] Sanderman J. in this case did no more than that.

PART 4: COSTS

44. The respondent does not seek costs.

PART 5: ORDERS SOUGHT

45. The respondent asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 21st day of June, 2018.

TROY COUILLARD
COUNSEL FOR THE RESPONDENT

---

[53] ***R v GH***, 2018 ONCA 349.

[54] *Ibid* at para 3.

[55] *Ibid* at para 5.

PART 6: TABLE OF AUTHORITIES

AUTHORITIES	Cited at Paragraph No.
R v Carrière (2001), 159 CCC (3d) 51, 2001 CarswellOnt 3722 (CA) [cited to WL].	32
R v CLY, 2008 SCC 2.	32
R v Dari, 2006 BCSC 248.	34
R v Davis, [1999] 3 SCR 759, 1999 CarswellNfld 291.	29
R v Geddes, 2011 MBCA 44.	31, 32
R v GH, 2018 ONCA 349.	43
R v JWA, 2010 ABCA 406.	30
R v Simpson, 2015 SCC 40.	26
R v W(D), [1991] 1 SCR 742, 1991 CanLII 93.	1, 27, 28