SCC File No.: 38801

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

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT
(Respondent in the Court of Appeal)

-and-

G.F. and R.B.

RESPONDENTS
(Appellants in the Court of Appeal)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Respondents were convicted of sexual assault after a judge-alone trial. The Crown at trial sought a conviction on the basis that the complainant was incapable of consenting; the Respondents submitted at trial that the complainant consented to the sexual activity and was capable of doing so. The trial judge accepted the Crown's theory and found that the complainant was incapable of consenting. On appeal, the Respondents challenged the verdicts as unreasonable on the ground that the trial judge conducted an erroneous analysis of capacity and, if a correct legal analysis had been applied, there was insufficient evidence to support a finding of incapacity. The Court of Appeal agreed that the trial judge's finding of incapacity was based on legal errors but disagreed that convictions based on an error-free analysis of capacity would constitute unreasonable verdicts. In essence, the Court of Appeal gave a different remedy to the Respondents on the basis of the arguments before them. In a sense, the Respondents got half what they were looking for; their convictions were quashed but they did not get acquittals.

2. In so ruling, the Court of Appeal correctly applied this Court's decision in *R. v. Mian*, 2014 SCC 54. If the issues considered to be decisive on appeal are (1) "rooted in or are components of an existing issue", and/or (2) "form the backdrop of appellate litigation", the appellate court can continue and allow the parties to respond as the circumstances require. The context matters and appellate courts require flexibility. Pardu J.A., after pointing out that the trial judge erred in his analysis of consent and capacity, said:

> While this is not the precise argument advanced by the appellants, the issues related to consent and capacity were central to the arguments made on appeal by both the appellants and the Crown. As noted in *R. v. Mian,* 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 33, "issues that are rooted in or are components of an existing issue are not 'new issues'" for the purposes of appellate review.

A review of the proceedings in the Court of Appeal belies any claim that the Applicant suffered any prejudice. The issues were thoroughly canvassed in written and oral argument by the parties, and the Applicant was heard on all issues.

3. The Applicant tries to frame the issues as matters of public importance. They are not. Five years ago, this Court comprehensively decided how an appellate court should deal with issues that arise outside the four corners of the parties' presentations. Courts of appeal in other provinces have understood and followed *Mian*'s principles, and there is no "trend" that needs to be corrected.

B. Statement of Facts

4. The Respondents rely on some additional facts.

(i) The Submissions at Trial

5. It was the trial Crown who told the trial judge that he did not have to explore the degree of the complainant's intoxication. He argued that if she was intoxicated, "it's pretty much a given that 273.1 will apply on the basis that she was incapable."[1] Whether the complainant verbally consented was therefore irrelevant and the trial Crown made no submissions in this regard.[2]

6. The Respondents argued at trial that despite her intoxication, the complainant consented and her intoxication was not such as to undermine her capacity to consent. The Respondents relied, in part, on the toxicology that there was no alcohol in the complainant's blood or urine 24 hours after the incident.[3]

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[1] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at paras. 51-52.
[2] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at paras. 51-52.
[3] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at paras. 17-18.

PART II – STATEMENT OF POINTS IN ISSUE

7. This Memorandum addresses the points in issue as they are set out in the Applicant's *Memorandum*:

- The Applicant's First Point in Issue

Issue One. "Can appellate courts decide cases based on issues not raised by the parties, and without giving notice or an opportunity to respond, as long as those issues are not "new issues" pursuant to *R. v. Mian*? Or do the rules of natural justice, recognized in sections 7 and 11(d) of the *Charter*, require that the parties receive notice and the opportunity to respond to all important issues?"

The Respondents' Answer to Point One

The issues on which the appeal was allowed were fully and thoroughly argued by the parties at the appeal. The Respondents rely on the transcript of the proceedings in the Court of Appeal in this regard. This Court's decision in *Mian* was followed and no issue of public importance arises.

- The Applicant's Second Point in Issue

Issue Two. "Did the Court of Appeal for Ontario err in finding that the judge's reasons were deficient to the point of amounting to reversible error?"

The Respondents' Answer to Point Two

The Court of Appeal allowed the appeal because the trial judge did not appreciate the boundaries of a finding of incapacity to consent, and made no finding as to whether the complainant actually consented. His reasons were, therefore, deficient. There is no issue of public importance here.

- The Applicant's Third Point in Issue

Issue Three. "In the alternative, did the Court of Appeal for Ontario err in failing to apply the curative proviso to correct any errors in the judge's reasons?"

The Respondents' Answer to Point Three

Because of the trial judge's errors, the proviso was not applicable and there is no issue of public importance involved.

PART III – STATEMENT OF ARGUMENT

Issue One: Did the Court of Appeal Violate *Mian*?

A. The *Ratio Decidendi* of *Mian*

8. In *Mian*, Rothstein J. held that when an appellate court raises a new issue, it must give notice to the parties and an opportunity for them to respond. These procedural safeguards ensure there is no unfairness and no appearance of judicial partiality. The "underlying concern" is to ensure receipt of full submissions on the new issue.[4]

9. Rothstein J. explained what a new issue is not:

> [I]ssues that are rooted in or are components of an existing issue are also not "new issues". Appellate courts may draw counsel's attention to issues that must be addressed in order to properly analyze the issues raised by the parties. For example, in a case involving a claim of self-defence, the parties may argue exclusively over whether the accused's belief that his life was in danger was reasonable, but it may be necessary for the court to first analyze the issue of whether the accused subjectively believed that he was at risk of death. This is not a "new issue", but a component of the overall analysis of the grounds as raised by the parties. However, where appropriate, the court may have to be prepared to grant even a brief adjournment to allow the parties to consider and canvass the issue.[5]

For issues that are not new, but "form the backdrop of appellate litigation, such as jurisdiction, whether a given error requires a remedy **and what the appropriate remedy is,** or … the standard of review", no notice is required (emphasis added).[6] Rothstein J. suggested a practical, case-by-case method because a formalistic approach "would fail to

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[4] *Mian*, at paras. 51-59; *R. v. Barton*, 2019 SCC 33, at para. 51.
[5] *Mian*, at para. 33.
[6] *Mian*, at para. 34.

recognize that the issue may arise in different circumstances in different cases".[7] It is for the court of appeal to weigh the circumstances of an individual case. In some cases, notice and an opportunity for further response may be necessary. In other cases, like the one at bar, it will not assist an appellate court to hear further from the parties at a later date on an issue that is rooted in or a component of an existing issue that is being argued.

B. The Provincial Courts of Appeal are *Ad Idem* on the Correct Interpretation of *Mian*

10. The Newfoundland Court of Appeal[8] and the Saskatchewan Court of Appeal[9] have followed *Mian.* So have the Alberta Court of Appeal[10], the Ontario Court of Appeal[11] (prior to this case), and the Manitoba Court of Appeal[12], in criminal and civil cases. All the provincial courts of appeal exercise their discretion in accordance with *Mian*. Their decisions consider when their discretion ought to be exercised, not its existence. Factors relevant to the exercise of this discretion include: the grounds of appeal, the record below, the facta on appeal, and the oral hearing on appeal. Collectively, these decisions show that there is no wayward trend to be corrected by this Court.

11. In the Saskatchewan Court of Appeal's decision in *Branscombe* and the Newfoundland Court of Appeal's decision in *St. John's (City*), the courts reviewed issues of procedural fairness and found that no procedural prejudice was occasioned through continuing the appeal and adjudicating the issues. For example, in *St. John's (City),* both parties at trial had conceded that the *actus reus* of several occupational health and safety offences had been proven. The summary conviction appeal court ordered a new trial on the basis that

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7 *Mian*, at para. 55.
8 *R. v. St. John's (City)*, 2017 NLCA 71, at paras. 28-35; *Rubens v. Sansome*, 2017 NLCA 32, at para. 58.
9 *R. v. Branscombe*, 2017 SKCA 71, at paras. 31-32.
10 *AUPE v. Alberta*, 2014 ABCA 345, at paras. 10-14, dismissing application for leave to re-argue appeal 2014 ABCA 43, leave to appeal to SCC denied, 2015 CarswellAlta 525; *Dhillon v.Sikh Society Calgary*, 2018 ABCA 193, at paras. 16-19.
11 *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, at paras. 87-93.
12 *Grant v. Winnipeg Regional Health Authority*, 2015 MBCA 44, at para. 129.

the trial judge erred in accepting the position of the parties. On appeal, it was alleged that the summary conviction appeal court erred because having raised the issue itself, it did not provide an opportunity for written or oral submissions on it. For the majority, Welsh J.A. held it was not a new issue. The issue was sufficiently canvassed at the oral hearing. The grounds of appeal "generally [we]re broad in scope, permitting a range of specific issues to be considered in challenging the convictions."[13] The summary conviction appeal court raised the issue with counsel numerous times, "focusing on areas of the law and submissions on which (the presiding judge) sought clarification."[14]

C. The Proceedings in the Court of Appeal

12. At the Respondents' appeal, the issues on which the case was decided were fully argued on appeal:

    1. The unreasonable verdict ground of appeal, addressed by both sides in their facta, was argued as follows by the Respondents:

        (1) the trial judge had conflated impairment with incapacity in his legal analysis,

        (2) the trial judge had blended consent and capacity in his factual findings,

        (3) the verdict could not be sustained on the basis of lack of capacity to consent because the evidence did not enable such a finding,

        (4) the verdict could not, in the alternative, be sustained on the basis of lack of consent, because the trial judge made no such finding;

    2. At the oral hearing, the Respondents made the same arguments.

13. In preparing its application for leave to appeal to this Court, the Applicant obtained an Order for a transcript of the oral arguments at the appeal. The Order is attached as Tab 2A

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[13] *St. John's (City)*, at para. 33.
[14] *St. John's (City)*, at para. 31.

to this factum and the transcript of the oral argument as Tab 2B. The Applicant having obtained the transcript elected not to use it as part of its application for leave to appeal.

14. The transcript of the oral hearing establishes that the Applicant was on notice of the issues at the appeal, had ample opportunity to respond to them, and responded accordingly. The arguments which the Applicant states in its *Memorandum* it would have raised had it known of the Court of Appeal's concerns, it did in fact argue before the Court of Appeal.

(i) The Facta in the Court of Appeal

15. In their written submission that the verdicts were unreasonable, the Respondents suggested there were legal deficiencies in the trial judge's capacity analysis. They argued that the trial judge had incorrectly considered that impairment was synonymous with incapacity.[15] It was this error that led to the unreasonable verdict. Absent the error, it was submitted that there was insufficient evidence to allow for a finding that the complainant was incapable of giving her consent.

16. The Respondents further submitted that the convictions could not be upheld as reasonable based on the complainant's testimony that she did not, in fact, consent. The trial Crown had not argued for this; his submissions for conviction were exclusively based on her incapacity to consent. As a consequence, the trial judge did not address whether or not she actually consented. As the Respondents put in their factum, "[t]he trial judge did not conduct any analysis upon which this Court could make a cogent finding that the Appellants knew that CR was not consenting and/or failed to take reasonable steps to ascertain her consent."[16]

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15 *Application for Leave to Appeal*, Tab 8, Factum of the Appellant (G.F.), at paras. 45-46.
16 *Application for Leave to Appeal*, Tab 8, Factum of the Appellant (G.F.), at paras. 47-49, 54.

17. In its factum in the Court of Appeal, the Applicant directly addressed these arguments. The Applicant submitted that there was no reversible error in the trial judge's analysis of capacity:

> While it is fair to say that the judge's findings regarding capacity and his findings regarding consent are put forward together throughout his judgment, this does not represent a failure to resolve both issues. It is simply a reflection of the manner in which the issues were presented by the parties. All the necessary findings were made to find guilt from either of the two available avenues: the complainant was incapacitated, and the complainant did not consent. There were no unresolved live issues that would allow for any other conclusions. Sexual touching was admitted. Intentional touching was admitted. Mistaken belief in consent was not argued and did not have an air of reality.[17]

The Applicant further submitted that the trial judge made a finding that the complainant did not consent. The Applicant argued the convictions could therefore be upheld based on lack of actual consent.

(ii) The Oral Hearing

18. At the oral hearing, the Respondents continued to challenge the reasonableness of the verdict on the basis that the trial judge's views on the law of capacity were incorrect. One of the Respondent's counsel, Ms. Taché-Green, argued that the trial judge failed to "mention any case law, nor did he set out what the test for incapacity was … the trial judge's reasons are unfortunately quite bereft of any substantive analysis on the issue of incapacity or non-consent, and that's the reason why I say that ultimately the verdict is unreasonable."[18]

19. Ms. Taché-Green also addressed the consent argument:

> Now, I anticipate perhaps some concerns with respect to the notion that the verdict of non-consent was available on the facts of this case … It's not being raised by the panel, but I'll just address it briefly.

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[17] *Application for Leave to Appeal*, Tab 8, Factum of the Respondent, at paras. 74-75.

[18] *Respondents' Application Record (AR)*, Tab 2B, Transcript of the Court of Appeal Hearing, 27/15-20, 33/2-5

> First of all, it's my submission that a finding of non-consent on the trial judge's reasons can't really be separated from his finding of incapacity. And I'm not going to take you to it but there is a paragraph in *R v Faulkner* [(1997), 120 C.C.C. (3d) 377 (Ont. C.A.)] and that's at paragraph [9].
>
> It sets out the facts of a very similar case where a very similar situation arose where there was a finding of incapacity. And on appeal, the Crown attempted to argue is that there, there was room for this court to find that there had in fact been a finding of non-consent and this court found that that was not available.
>
> The second and perhaps most important reason that I would submit that's not available for this court is that it wasn't argued at the proceedings below. And the reason it wasn't argued at the proceedings below is because it's inherently implausible.
>
> It was not advanced by the Crown or defended against by the defence because there just was no theory of the evidence that would make sense that two people, adults in their 30s and 40s, would force themselves on the daughter of their friend when they would be so likely to get caught.[19]

20. Near the end of Ms. Taché-Green's oral submissions on this ground of appeal, Pardu J.A. put to her the Applicant's position that the verdicts could be sustained on the complainant's evidence that she expressly denied her consent to the sexual acts:

> **Pardu J.A.:** But her evidence certainly indicates that she did not consent to the sexual activity, whether or not she was incapacitated. I mean, what are we to make of that?
>
> **Ms. Taché-Green:** So her evidence that she did not consent to the sexual activity was inconsistent with her evidence that she was incapacitated. And I think in our factum, we acknowledge that, you know, it may have been open for the trial judge to make a finding of non-consent in different circumstances. That wasn't a finding that was made in this case. There's - findings with respect to non-consent are completely integrated with his findings of incapacity. And indeed, her evidence of non-consent and incapacity are also integrated and inconsistent. … And so to rely on her - on her claim of non-consent, I think would be dangerous. It's something that wasn't found in this case in any event. It wasn't really available on appeal.[20]

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19 *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 30/25-31/35

20 *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 33/5-34/5

21. The Applicant's oral submissions responded directly to these issues. The Applicant submitted to the Court of Appeal, as it does on this application, that the verdict could be supported on the basis that the complainant did not consent to the sexual activity because it seemed from the trial judge's reasons that he would have convicted based on actual lack of consent or incapacity to consent. The Applicant argued, as it does now, that the trial judge found there was no actual consent:

> The two accounts before the trial judge were polar opposites. There was no possibility on the evidence for an ambiguous middle ground. We have evidence of the complainant so profoundly intoxicated that she's in and out of consciousness, and saying stop. And on the other side, we have evidence of a very lucid, very enthusiastic sexual participant, and the judge accepted C.R.'s account.[21]

22. The Applicant further argued that the trial judge committed no error in assessing the complainant's degree of intoxication as part of the capacity analysis: that was not one of the "live issues" in this case and "the positions of the parties obviated the need to do so."[22] The Applicant submitted that the blending of the issues of consent and capacity did not result in reversible error: "if you believe the complainant's account, and if you are not left in a reasonable doubt by the appellants' account, then the appellants are guilty … The judge doesn't separate the two paths, again, because everything is based on the same facts."[23]

23. At this point, Nordheimer J.A. asked a series of questions which showed that he was concerned by the trial judge's legal analysis of capacity and the deficiency in his reasons on both capacity and consent:

> **Nordheimer J.A.**: Yeah, I'm not following. Surely it is – it's one sense, it is a fact whether or not the complainant had the capacity to consent.
>
> **Mr. Cowle**: Yes.
>
> **Nordheimer J.A**.: And it is a fact whether or not she did in fact consent.
>
> **Mr. Cowle**: Yes.

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21 *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 90/20-30
22 *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 91/10-30
23 *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 91/5-92/1

> **Nordheimer J.A**.: Yeah.
>
> **Mr. Cowle**: My point is this, and I think that maybe using the word facts was a poor choice. Maybe the word evidence, I think is, is the clearer wa[y] for me to put this. The judge could accept the same evidence and that evidence could support both. And the only difference between the two being whether the legal bar for incapacity was met or not. And if it was not met, we still have all the facts for factual non-consent.
>
> **Nordheimer J.A.**: Okay, I mean, I'll go this far. It seems to me that you could have evidence that would support a finding of incapacity. And that same evidence writ large...
>
> **Mr. Cowle**: Yes.
>
> **Nordheimer J.A**.: ...could support failure to consent.
>
> **Mr. Cowle**: Yes.
>
> **Nordheimer J.A.**: But the problem I'm having is I don't think you can have a finding that both have. And my concern is, speaking for myself, with the trial judge's reasons, is he seems to do that. He seems to treat them almost as one.[24] [Emphasis added.]

24. The Applicant continued in oral argument to assert that acceptance of the complainant's evidence covered both paths to guilt.[25] Nordheimer J.A. again interjected to clarify whether the Applicant was asserting the curative proviso:

> **Nordheimer J.A.**: And then just so I understand, so it's your position, if I understand it correctly, that if it's concluded that the trial judge was wrong in his conclusion that the complainant was incapable of consenting, the evidence would support this court saying that nonetheless, we can find that there was no actual consent?
>
> **Mr. Cowle**: Not just the evidence but the judge's findings.
>
> **Nordheimer J.A**.: Okay. Is that...
>
> **Mr. Cowle**: Yes.
>
> **Nordheimer J.A.**: ...akin to some sort of proviso argument? And in which case, is the - did the Crown assert the proviso?

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[24] *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 93/10-94/20
[25] *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, 94/15-95/5

> **Mr. Cowle**: You mean in my factum?
>
> **Nordheimer J.A.**: Yes. Or otherwise
>
> **Mr. Cowle**: I certainly made this argument i[n] my factum. I may not have cited the proviso section but I think that, Justice Nordheimer, you're right. I think it is a proviso argument. But certainly, there is no doubt that I made this argument in full in my factum.[26] [Emphasis added.]

(iii) The Court of Appeal's Decision

25. The Court of Appeal agreed with the Respondents that the trial judge had committed legal errors in his assessment of capacity and consent. While the Court of Appeal dismissed the unreasonable verdict argument, it nonetheless considered the legal errors regarding capacity were of a nature to warrant a new trial. Pardu J.A. explained that the trial judge failed to assess whether the complainant's degree of impairment was such that she really was incapable of consent, and also failed to consider the issue of consent separately from capacity:

> The difficulty with the trial judge's reasons for conviction are that he failed to assess whether the degree of impairment by alcohol was such that the complainant was incapable of consenting to sexual activity. The trial judge was led to this position in part by the submissions of the Crown suggesting that he did not have to explore the degree of intoxication versus sobriety …
>
> …
>
> The trial Crown did argue in his submissions that the complainant would not have consented to sexual contact with the appellants for a variety of reasons such as the difference in age, the fact she hardly knew them and the fact that they were her mother's friends. However, he did not invite the trial judge to convict on the ground that the complainant did not in fact consent to sexual contact, separate and apart from the issue of whether or not the complainant had the capacity to consent.
>
> This blending of the issues as to whether the complainant consented, and whether any consent was vitiated by a lack of capacity is mirrored in the trial judge's reasons for judgment, at paras. 51-52, 71-73.[27] [Emphasis added.]

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[26] *Respondent's AR*, Tab 2B, Transcript of the Court of Appeal Hearing, at. 95/15-96/1
[27] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at paras. 50-53.

26. Pardu J.A. accepted the Respondents' argument that the trial judge's reasons were deficient in this regard:

> The manner in which the reasons are structured leaves me uncertain as to whether the trial judge considered the issue of consent separately from the issue of capacity. It is clear that the trial judge did not engage the two-step analytical process I have articulated in these reasons, by first evaluating whether the complainant did not consent and then turning, if necessary, to whether or not the complainant had the capacity to consent. He also did not apply the jurisprudence discussing the level of intoxication which could result in a finding of incapacity, if it were necessary to go to that step. <u>His statement that no consent is obtained where a complainant is intoxicated suggests that in his view, any level of intoxication was sufficient to vitiate consent. It is not clear that this belief did not constitute the basis for his statement that there was no consent</u>.[28] [Emphasis added.]

As a result, Pardu J.A. allowed the appeal and declined to determine the Respondents' remaining two grounds of appeal.[29]

27. In summary, the Applicant had both notice and the opportunity to make fulsome submissions. The Court of Appeal heard counsel's submissions on each issue on which it allowed the appeal. The issues and their components were the subject of argument and adjudication. None of the procedural prejudice that troubled Green C.J.N.B. in *St. John's (City)*, or this Court in *Barton*, existed in the circumstances of the case.

<u>Issue Two: Were the Trial Judge's Reasons Deficient?</u>

28. The Applicant submits that the Court of Appeal erred in finding that the trial judge's reasons were deficient to the point of amounting to reversible error. At times in its *Memorandum*, the Applicant frames the deficiency of the reasons as an insufficiency of the reasons. In saying this, the Applicant misunderstands the Court of Appeal's judgment.[30]

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[28] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at para. 54.
[29] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at para. 56.
[30] *Application for Leave to Appeal*, Tab 3, Applicant's Memorandum of Argument, at paras. 42-43, 45.

29. The Court of Appeal found:

(a) The trial judge erroneously equated intoxication with incapacity. This is not the law. The Applicant at the appeal conceded as much. Pardu J.A. said:

> Here, I agree with the submissions of the Crown on appeal that while mere proof of drunkenness, loss of inhibitions, regret for a bad decision or some memory loss do not of themselves negate capacity for consent, some physical actions such as walking a short distance, making a phone call, speaking, and some awareness of or resistance to sexual activity do not necessarily preclude a finding of incapacity. I also agree that some memory of the events is not necessarily inconsistent with capacity.[31] [Emphasis added]

Intoxication may constitute some evidence of incapacity but it is not, in itself, conclusive of incapacity. Pardu J.A. correctly said in the same paragraph of her judgment:

> As the caselaw demonstrates, the trier of fact must consider all the evidence to make the factual determination of the complainant's capacity at the relevant time. Issues of capacity can arise in a multitude of circumstances, including sleep, intoxication, illness, and intellectual disability.[32]

(b) Having equated intoxication with incapacity, the trial judge's finding of incapacity amounted to legal error.

(c) The trial judge, at the urging of the trial Crown, had not considered whether the complainant, in fact, did not consent. There was not, therefore, an alternative factual finding made by the trial judge on which the convictions could be upheld on appeal.

It is not a case of the trial judge's reasons being deficient in the context of "insufficiency"; it was a case of them being deficient in law. As the Applicant succinctly acknowledges in para. 44 of its *Memorandum*: "[t]he judge was entitled to rely on the submissions of the

[31] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at para. 38.
[32] *Application for Leave to Appeal*, Tab 2B, *R. v. G.F.*, 2019 ONCA 493, at para. 38.

parties in deciding how to focus his judgment."[33] Because he did so, the Court of Appeal had no choice but to quash the convictions.

Issue Three: Should the Proviso have been Applied?

30. Although raised by Nordheimer J.A. in oral argument, the Court of Appeal made no reference to the proviso in its reasons and understandably so. The Court of Appeal had determined that the path to conviction advanced by the Crown at trial and accepted by the trial judge rested on legal error. The Respondents were tried and convicted on the basis that the complainant was incapable of consenting when the trial judge misapprehended the law of capacity. To allow the convictions to stand would therefore constitute a miscarriage of justice.

31. The Court of Appeal correctly rejected the Applicant's argument that the verdict could be upheld based on the lack of consent because the trial judge never cast his mind to whether the complainant consented or not. The Court of Appeal could not make their own credibility finding in this regard. This was not a case where the proviso could be engaged.

PART IV – SUBMISSION ON COSTS

32. The Respondents do not seek any order for costs.

[33] *Application for Leave to Appeal*, Tab 3, Applicant's Memorandum of Argument.

PART V – ORDER SOUGHT

33. The Respondents respectfully requests that the application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, Ontario this 1st day of November, 2019.

FOR **JAMES LOCKYER**
RIAZ SAYANI
Counsel for the Respondents

PART VI – TABLE OF AUTHORITIES

Case Law:	**Paragraph References (to Memorandum)**
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