SCC File No. 38286

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

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

G.F. and R.B.

Respondent
(Appellants)

APPLICANT'S REPLY TO A
RESPONSE TO AN APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156 as amended)

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(i) THE ARGUMENTS TO WHICH THE APPLICANT'S REPLY IS DIRECTED:

1. The respondents have argued in their written submissions that the applicant was not denied the opportunity to make submissions on the issues that were decisive of the appeal. They say that "in essence" the Court of Appeal accepted arguments that they had made, parting from them only on the question of remedy. If that were true, then this would not be the case to resolve the misinterpretation of *R. v. Mian*. The applicant submits that this Court should not accept the respondent's re-characterization of the argument they raised in the Court below. The Court of Appeal acknowledged that they were departing from the arguments advanced.

2. It is undisputed that the Court of Appeal addressed only the first ground of appeal raised by the respondents. That ground of appeal raised the common "unreasonable verdict" argument. The Court of Appeal rejected that ground of appeal. To the extent that the respondent now suggests that there were additional layers to their straightforward argument, those layers are nowhere to be found in the record. The facta and oral submissions from the court below leave no room for any creative re-interpretation of their unreasonable verdict argument.

3. It was the Court of Appeal, of its own motion and without notice or submissions, that introduced the arguments they characterized as "rooted in" or "components of" the arguments advanced by the respondents. Accordingly, this is the right case to resolve the misinterpretation of *Mian* described in the applicant's memorandum filed previously on this application. The error sets a very troubling precedent of national importance and should be addressed.

(ii) THE ERROR RAISED IN THE RESPONDENT'S FACTUM WAS "UNREASONABLE VERDICT"

4. In their factum at the Court of Appeal, the respondents argued that the verdict was unreasonable for two reasons. First, because the evidence was incapable of supporting the verdict, and second, because the judge had followed an illogical path to conviction. These arguments tracked the well-established jurisprudence surrounding unreasonable verdicts.

5. The portion of the respondents' factum dedicated to the unreasonable verdict argument appears at paragraphs 43 to 54. In their submissions to this Court the respondents have identified paragraphs 45-46 of that factum as the source of the argument that "the trial judge had incorrectly considered that impairment was synonymous with incapacity." No such argument appears in those paragraphs, or anywhere else. Those paragraphs are merely part of the respondents' summary of

the relevant portions of the trial transcript. In passing, the respondents commented that a submission made by the Crown might be viewed as inviting a credibility contest. The respondents did not set out their argument until paragraph 49, under the subtitle "Application of the Principles." In that paragraph they stated the first branch of their argument, which was that "the totality of the evidence could not reasonably support" the judge's finding of incapacity. [emphasis added][1]

6. At paragraph 53, the respondents discussed the second branch of their argument: that the judge's treatment of the toxicology evidence revealed an "illogical" line of reasoning. They cited this Court's decision in *R. v. Sinclair*. That paragraph concluded with another reminder of the crux of the argument advanced by the respondents: "The tapestry of the evidence, viewed as a whole, was not capable of supporting an inference that CR's alcohol intoxication was so great that she was incapable of providing her consent in law." [emphasis added]

7. The last paragraph for this ground of appeal, paragraph 54, was directed at pre-empting a *proviso* argument by the Crown surrounding an alternative path to guilt.

(iii) THE APPLICANT RESPONDED TO THE "UNREASONABLE VERDICT" ARGUMENT:

8. The succinct statement of the applicant's position in response to the unreasonable verdict argument can be found at paragraph 52 of its factum in the court below: "There was ample evidence to support findings of incapacity and factual non-consent."[2]

9. Throughout paragraphs 63 to 68, the applicant responded to the first branch of the respondents' argument by reviewing the strong basis in the evidence for the finding of incapacity. At paragraphs 69 to 70 the applicant responded to the second branch of the respondents' argument by explaining why there was nothing illogical about the judge's reasoning. At paragraphs 71 to 75 the applicant advanced the proviso argument that had been anticipated by the respondents in their factum. The applicant submitted that the judge had made the necessary findings to support an alternative route to liability. Regardless of intoxication, the complainant had not consented. In relation to that alternative route to liability, the applicant argued that the reasons were sufficient.

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[1] *Factum of the Appellant (G.F.),* Application for Leave to Appeal, at pp. 131-138
[2] *Factum of the Respondent (H.M.Q.),* Application for Leave to Appeal, at pp. 196-206

(iv) NO NEW LEGAL ERRORS WERE RAISED IN ORAL ARGUMENT

10. At paragraph 12 of the respondents' memorandum on this leave application, they acknowledge that they "made the same arguments" at the oral hearing as they did in their factum. Strangely, two paragraphs later, the respondents suggest that the transcript of the oral submissions is what "establishes that the Applicant was on notice of the issues at the appeal". The applicant agrees with the statement at paragraph 12: the oral submissions offer no additional insight into the issues that were argued on appeal. No new issues arose in oral argument.

11. At paragraph 18 of their memorandum on this leave application, the respondents included a "quote." That "quote" attempts to splice together two different submissions that were, in fact, separated by six pages of transcript. The "quote" is misleading. A full contextual reading of each of the two distinct submissions shows that neither was meant to signal any new arguments.

12. The first part of the "quote" is from page 27 of the transcript. The full passage reads:

> He did not mention any case law, nor did he set out what the test for incapacity was. Certainly, had he done so, it would have been patently obvious that the complainant's evidence did not support a finding of incapacity, and thus, that a properly instructed jury could not have made such a finding.

The second part of the "quote" is found at page 33. At that point the respondents were making submissions about the Crown's *proviso* argument. In that context Justice Pardu highlighted the evidence that the complainant had woken up to her pants being removed. Counsel said:

> It, it certainly – it's certainly open, you know, to interpretation. I, I think – the way I would – she, she says that she woke up to them entering the trailer and the next thing that happened was that her pants were being pulled down. So, I mean, if the trial judge had made a finding that she was incapacitated at that moment, we might be in a different situation. That 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, that ultimately, the verdict is unreasonable.[3]

13. The first part of the "quote" was a passing comment suggesting that the unreasonableness would have been apparent to the judge if he had written better reasons. The second part of the

[3] *Transcript of the Court of Appeal Oral Hearing*, Response to the Application for Leave to Appeal, at pp. 58 and 64

"quote" was aimed at responding to a question about one specific moment in the course of the sexual assault. Neither comment introduced any new errors of law.

14. The oral submissions tracked the written submissions closely. Following the same structure as their factum, the respondents argued first that the evidence could not support a guilty verdict, and second that the verdict was the product of an illogical reasoning process. Counsel for the respondents expressed the two branches of their argument in the following terms:

> Firstly, it was unreasonable in the sense that it is not a verdict that a properly instructed jury could have rendered. [which she elaborated for approximately two pages…]
>
> […]
>
> The second reason that the verdict is unreasonable is because it's in a sense sort of not the sort of regular unreasonable verdict sense but more so in the *Sinclair* and *Beaudry* line of cases, that it was unreasonable in the sense that, that it was reached by an illogical or irrational reasoning process.[4]

They concluded their submissions on the issue by addressing the proviso argument.

15. The applicant's submissions, too, tracked its written submissions. The panel asked no questions of the applicant during its submissions about the merit of the unreasonable verdict argument. The first questions of the panel came when the applicant turned to the *proviso* argument. Counsel signalled the shift in the focus of his argument by saying:

> This takes me to the last question in the unreasonable verdict ground of appeal, can this verdict be supported on the alternative basis that the complainant's intoxication did not reach the level of incapacity but she nonetheless did not consent? [emphasis added]

16. It was in the context of those submissions – the *proviso* submissions – that Justice Nordheimer asked the questions that are reproduced at paragraphs 23 to 24 of the respondent's memorandum in this leave application. The exchanges clearly reveal that the panel wanted assistance with the applicant's *proviso* argument. Justice Nordheimer even went so far as to seek explicit confirmation of the nature of the argument. The applicant confirmed that the submission was a *proviso* argument about an alternative path to guilt. Contrary to the respondent's submission to this Court at paragraph 23 of his memorandum, Justice Nordheimer never suggested that he was

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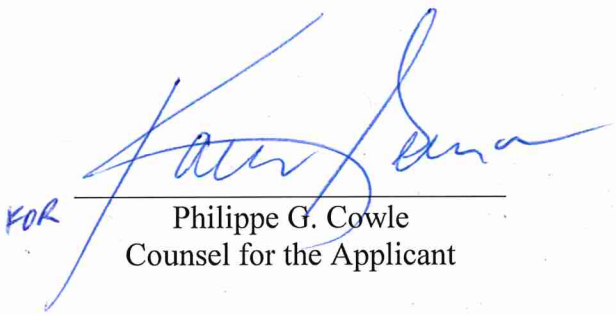
[4] *Transcript of the Court of Appeal Oral Hearing*, Response to the Application for Leave to Appeal, at pp. 57 and 59, *proviso* submissions beginning at p. 61.

concerned by the trial judge's legal analysis of capacity, nor that there was a deficiency in the reasons on capacity that might amount to reversible error. The exchange was about the *proviso*.

(v) This Case Provides an Appropriate Record for this Court to Address the Misinterpretation of *R. v. Mian*

17. The Court of Appeal unequivocally dismissed the respondents' unreasonable verdict argument at paragraphs 23 to 27 of its decision. The Court of Appeal allowed the appeal on the basis of two different errors of law which were nowhere to be found in the submissions of counsel – neither written, nor oral. The Court of Appeal acknowledged as much, and cited *Mian* as the case that enabled it to raise and decide those errors. It is that troubling interpretation of *Mian* that arises in this case and others, and that this Court should correct.[5]

All of which is respectfully submitted this 8th day of November, 2019



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[5] *R. v. G.F., 2019 ONCA 493*, Application for Leave to Appeal, at pp. 49-51

AUTHORITIES CITED

N/A

STATUTES AND REGULATIONS CITED

N/A