File No. 40095

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

BETWEEN

HIS MAJESTY THE KING

Appellant
(Respondent)

and

CHRISTOPHER JAMES KRUK

Respondent
(Appellant)

RESPONDENT'S FACTUM

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The respondent was convicted on the basis of an ungrounded and speculative generalization by the trial judge that was central to his acceptance of the complainant's evidence. The judge reasoned: this complainant is not mistaken because no woman would be mistaken. The British Columbia Court of Appeal (BCCA) reviewed the reasons functionally and contextually and unanimously found the trial judge erred. It committed no error. This appeal should be dismissed.

2. No accused should be convicted on the basis of a generalization that is untethered to the facts. While the trier of fact may draw inferences from the evidence using common sense and human experience, neither is a substitute for evidence.

3. The use of common sense in place of evidence carries with it significant dangers. 'Common' sense readily conceals prejudicial reasoning and stereotypes. A judge's invocation of common sense cannot be refuted by the accused as they receive no notice until judgment is given. A 'common' sense proposition may also undermine the presumption of innocence and the burden of proof. In this case, the trial judge's finding that it was "extremely unlikely" any woman would be mistaken about the feeling of penile penetration eliminated any potential doubt regarding the *actus reus* of the offence. Once the trial judge made this speculative and wide-sweeping generalization, the respondent's conviction was inevitable.

4. The circumstances of this case illustrate why factual findings made outside of the evidence must be strictly controlled and only countenanced if they meet the very high threshold for judicial notice. The appellant's suggestion that trial judges should be permitted more latitude to engage in 'common' sense reasoning must be rejected.

B. Statement of Facts

5. On May 26, 2017, the complainant attended a party and consumed a "great deal" of alcohol.[1] She drank five to six shots of vodka, two glasses of sangria, and two beers from approximately 2:30 p.m. to 7:30 p.m.[2] She then attended a restaurant and had another beer.[3] The complainant was already intoxicated and according to her friends was crying at various points that evening, seemingly for no reason.[4] She went to a bar at approximately 9:30 or 10:00 p.m. and had another shot or possibly two of tequila, a shot of schnaps, and another beer.[5] She estimated her intoxication level was 8 out of 10 with 10 requiring hospitalization.[6] She volunteered "[e]verything was blurry until around 11:00 a.m." the next day.[7]

6. After leaving the bar, the complainant became disoriented and found herself lost and crying on the sidewalk. The respondent offered her assistance to get home and the two walked to a SkyTrain station. The complainant recalled changing stations at some point and had a recollection of calling her mother while on the train using the respondent's cellphone, because her battery was dead. Thereafter, she had an alcohol-induced blackout.[8]

7. The complainant's mother testified she spoke with the respondent while he and the complainant were on the SkyTrain. The respondent told her his first name, and the two discussed how to get the complainant home. At 2:14 a.m., the respondent phoned the complainant's mother and told her the complainant was in a cab on her way home.[9]

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[1] *R.* v. *Kruk*, 2020 BCSC 1480 paras. 4-5: A.R. Vol. 1 - Tab 1D p. 27 (BCSC Reasons)
[2] AR Vol II – Tab 17, *Complainant's evidence*, 8(28)-10(12)
[3] AR Vol II – Tab 17, *Complainant's evidence*, 10(45)
[4] AR Vol I – Tab 1D p. 28 (BCSC Reasons at para. 7(1))
[5] AR Vol II – Tab 17, *Complainant's evidence*, 12(24-29) & 23(33-39)
[6] A.R. Vol. I - Tab 1D p. 27 (BCSC Reasons, paras. 4-5); AR Vol II – Tab 17, *Complainant's evidence*, 23(44)-24(4)
[7] AR Vol II – Tab 17, *Complainant's evidence*, 25(23-24)
[8] A.R. Vol I – Tab 1D p. 27-28 (BCSC Reasons, paras. 5-7)
[9] A.R. Vol I – Tab 1D p. 29-30 (BCSC Reasons, paras. 14-17)

8. The respondent testified he gave the complainant's mother his full name and address. Both his phone and that of the complainant ran out of batteries. The two took a cab from Coquitlam station to his home in Maple Ridge. He paid the cab driver to take the complainant home to Langley. He plugged his phone in and called the complainant's mother to tell her the complainant was in a cab on her way home.[10] Approximately five to ten minutes later, the cab driver returned the complainant to the respondent's home because she was so intoxicated.[11]

9. The respondent's father who lived with the respondent testified he was woken up by a knock at the door, which the trial judge inferred was the taxi driver returning the complainant to the respondent's home.[12] He witnessed the respondent helping the complainant upstairs; she was having difficulty. His son got the complainant a glass of water. The respondent called his father upstairs and told him the complainant had spilled water on herself and went and got the complainant some sweatpants or pajamas.[13] He saw the respondent walk the complainant into a bedroom. The respondent came back downstairs to discuss what to do with the complainant. The respondent and his father went back upstairs to try to rouse the complainant. She was laying at the foot of the bed with a blanket on top of her. The respondent's father shook the complainant's hip to try to wake her up but couldn't do so. Mr. Kruk Sr. told the respondent he would drive her home in the morning, and went back to bed.[14]

10. The complainant testified she woke up with the respondent on top of her, her pants were off, and the respondent's penis was in her vagina.[15] She pushed him off and asked "Where's my dad?". The respondent didn't get off the first time, so she pushed him again. She did not feel him moving at all inside of her when she woke up, and the

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[10] A.R. Vol I – Tab 1D p. 32 (BCSC Reasons, paras. 26-28)
[11] A.R. Vol. I – Tab 1D, p. 32 (BCSC Reasons para. 29)
[12] A.R. Vol. I – Tab 1D, p. 35 (BCSC Reasons para. 45)
[13] A.R. Vol. II – Tab 24, *Evidence of Robert Kruk*, 288(42-46)
[14] A.R. Vol. I – Tab 1D, p. 35 (BCSC Reasons paras. 45-46); A.R. Vol. II – Tab 24, *Evidence of Robert Kruk*, 289(28-32)
[15] A.R. Vol II – Tab 17, *Complainant's Evidence*, 15(47)-16(7)

second time she pushed him he was not inside of her.[16] Despite testifying she pushed the respondent's chest on two occasions with her hands, she could not say whether or not he was wearing a shirt, nor could she say what if anything he was wearing on his bottom half.[17] The complainant testified with certainty that she knew at the time she was wearing her underwear, but later admitted she did not know that at the time.[18] She agreed it was a "very confusing time" and that she was still feeling the effects of alcohol.[19]

11. The complainant got up to look for her phone, and noticed she was wearing her sweatshirt and her underpants, but was not wearing shoes or pants. She was disoriented when she woke up, and wandered throughout the house looking for a phone charger. She was unable to work the light switches and surmised that the electricity did not work.[20]

12. The complainant agreed she suffered from confusion, and that her perception of reality that evening was a little bit distorted on account of her intoxication. Her vision, balance, and coordination were all affected, as was her ability to process information. She was disoriented and confused when she woke up. She didn't know where she was or what was going on, and was scared.[21] The complainant's ethyl alcohol concentration was still 222 mg % or nearly three times the legal limit to drive a motor vehicle when a urine sample was taken from her between two and a half and seven hours after the alleged assault.[22] She assumed she had been drugged that evening and maintained that

[16] A.R. Vol II – Tab 17, *Complainant's Evidence*, 16(15-37)
[17] A.R. Vol I - Tab 1D p. 28, (BCSC Reasons, para. 8); A.R. Vol. II – Tab 17, *Complainant's Evidence*, 47(9)-48(3)
[18] A.R. Vol II – Tab 17, *Complainant's Evidence*, 45(19-30)
[19] A.R. Vol II – Tab 17, *Complainant's Evidence*, 45(4-7)
[20] A.R. Vol – Tab 1D p. 29, (BCSC Reasons, para. 12); A.R. Vol. II – Tab 17 *Complainant's Evidence*, 17(1-9).
[21] A.R. Vol II – Tab 17, *Complainant's Evidence*, 27(21-23); 30(14-19); 40(15-27); 44(14-27)
[22] A.R. Vol I – Tab 9 p. 111, Admissions of Facts, para. 2; A.R. Vol. I- Tab 1C p. 13 (BCCA Reasons, at para. 18)

belief in the face of a toxicology report that showed only alcohol and marihuana in her system.[23] She agreed she was "pretty out of it".[24]

13. The complainant's father and brother arrived at the respondent's home shortly after she woke up. The complainant rushed out the door. She advised her brother she had been sexually assaulted. The respondent retrieved the rest of the complainant's clothes and gave them to her father. The complainant's father confronted the respondent who denied having sexually assaulted the complainant.[25]

14. The respondent testified he woke up at approximately 5:30 a.m. the morning prior to go to work which started at 7:30 a.m.[26] He denied having sex with the complainant. He testified he gave her a glass of water which she spilled on herself, and then offered her pajamas to change into. When he subsequently found her passed out in his bedroom, he covered her with a blanket. He was unable to wake her, even with the assistance of his father. He then fell asleep as he had been awake for almost 24 hours.[27] When he woke up, he again tried to wake the complainant up, at which point she came to in a startled fashion.[28]

15. Later that morning, the complainant attended the hospital. The nurse who examined her found a one-centimeter linear abrasion on the posterior fourchette extending into the complainant's vagina. The nurse offered no evidence that injury was consistent with sexual intercourse whether consensual or otherwise, and the complainant gave no evidence about the injury in her testimony.[29]

[23] A.R. Vol II – Tab 17, *Complainant's Evidence*, 25(7-12)
[24] A.R. Vol II – Tab 17, *Complainant's Evidence*, 25(4-6)
[25] A.R. Vol I – Tab 1C p. 13, (BCCA Reasons, para. 17)
[26] A.R. Vol. II – Tab 23, *Respondent's Evidence*, 226(5-10)
[27] A.R. Vol. II – Tab 23, *Respondent's Evidence*, 238(23-37)
[28] A.R. Vol 1 – Tab 1C p. 12, (BCCA Reasons, para. 14)
[29] A.R. Vol. 1 – Tab 1C, p 13, (BCCA Reasons, para. 19)

16. Swabs taken of the complainant's vagina and her underwear were tested for DNA. The complainant's DNA was found upon analysis of those items; however, no other DNA (at all) was identified.[30]

BCSC Reasons

17. The trial judge delivered oral reasons after reserving for approximately seven weeks.[31] He found the complainant had "massive gaps in her memory" on account of her "extreme intoxication". He also found that despite the fact the complainant must have been conscious for reasonably long periods of time, she had no memory as a result of alcohol-induced blackout of the taxi ride, arriving at the respondent's home, walking to the second level of the home, or falling asleep. Nor could the complainant say when her state of consciousness changed.[32]

18. The trial judge noted the complainant's inability to say whether the respondent was wearing a shirt despite testifying she twice placed her hands on his chest while pushing him off. She could not see the respondent's penis and the room was dark.[33] She was asleep immediately prior to her realization that the respondent's penis was inside her. She was disoriented and there was a lot of weight on her.[34]

19. The complainant was "still disoriented" when she was wandering through the respondent's house, and was unable to work the light switches.[35]

20. The trial judge expressly found the complainant was an "obviously unreliable witness" on account of her extreme intoxication and the massive gaps in her memory.[36]

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[30] A.R. Vol. I – Tab 1C, p. 14 (BCCA Reasons, para. 20); A.R. Vol. I – Tab 9, p. 111, Admissions of Fact, para. 1
[31] A.R. Vol I- Tab 1D, p. 26 (BCSC Reasons). Submissions were made January 23, 2020 and judgment was delivered March 12, 2020.
[32] A.R. Vol I -Tab 1D, p. 28, (BCSC Reasons, para. 7(2))
[33] A.R. Vol I -Tab 1D, p. 28 (BCSC Reasons, para. 8)
[34] A.R. Vol I – Tab 1D p. 29 (BCSC Reasons, para. 9)
[35] A.R. Vol I – Tab 1D p. 29 (BCSC Reasons para. 12)
[36] A.R. Vol I – Tab 1D p. 36 (BCSC Reasons para. 48)

21. The trial judge rejected parts of the respondent's evidence and turned his attention to assessing the credibility or reliability of the complainant's evidence:

> Having rejected important parts of the accused's evidence, I must assess the entire body of evidence to determine if I am satisfied beyond a reasonable doubt that the offence occurred. In particular, I must assess the core assertion made by the complainant that when she woke up, the accused's penis was inside her vagina. Her evidence is devoid of detail, yet she claims to be certain that she was not mistaken. She said she felt his penis inside her and she knew what she was feeling. In short, her tactile sense was engaged. It is extremely unlikely *that a woman would be mistaken* about that feeling.[37] [Emphasis added.]

22. The trial judge also reasoned there was some circumstantial evidence consistent with the occurrence of a sexual assault, for example, the state of undress of the complainant and of the respondent, but did not further assess the reliability of the complainant's evidence beyond the paragraph reproduced above.[38]

Reasons of the Court of Appeal

23. The BCCA acknowledged that the complainant's allegation could have been accepted by the trial judge by agreeing there was a body of evidence upon which the trial judge could have convicted.[39]

24. After reviewing the whole of the record and the reasons, the Court found the trial judge's conclusion "regarding the extreme unlikelihood of any complainant, in all circumstances, being mistaken about the feeling of a penis in their vagina [was not] the proper subject of judicial notice or common sense".[40] The trial judge's finding was not sought by the parties, was not grounded in the evidence, and engaged questions that would require expertise to definitively opine upon.[41] Despite finding the trial judge in this case erred in law by taking judicial notice of that fact, the Court very clearly stated

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[37] A.R. Vol I – Tab 1D, p. 40 (BCSC Reasons, para. 68)
[38] A.R. Vol I – Tab 1D, p. 29 (BCSC Reasons, para. 12)
[39] A.R. Vol. I – Tab 1C, p. 23 (BCCA Reasons, para. 61)
[40] A.R. Vol. I – Tab 1C, p. 24 (BCCA Reasons, para. 67)
[41] A.R. Vol. I – Tab 1C, p. 24 (BCCA Reasons para. 67)

it was not saying "that highly intoxicated complainants are incapable of giving reliable testimony about the invasive feeling of penises in their vaginas".[42]

[42] A.R. Vol. I – Tab 1C, p. 24 (BCCA Reasons, para. 68)

PART II: QUESTIONS IN ISSUE

25. **ISSUE 1:** The BCCA did not err in concluding the trial judge's acceptance of the complainant's allegation was tainted when he took judicial notice that it would be "extremely unlikely that a woman would be mistaken about that feeling". The trial judge had significant concerns about the reliability of the complainant's core allegation. He was not entitled to reach outside of the evidence and rely without notice on *his* 'common sense' as to what *a woman* would necessarily feel. The trial judge's acceptance of the complainant's evidence depended upon this error in law. His reliance on 'common sense' was not entitled to deference. The appropriate remedy is to dismiss this appeal and uphold the order for a new trial.

26. **ISSUE 2:** Before this Court the respondent is not relying on his second ground of appeal argued at the Court of Appeal regarding material misapprehensions of the evidence.

PART III – STATEMENT OF ARGUMENT

27. The BCCA correctly overturned the respondent's conviction. Although the trial judge implicitly accepted the complainant's allegation, he did so by reaching outside of the evidence to make a speculative generalized finding that guaranteed that result. The Court of Appeal reviewed the record and reasons functionally and contextually and found it could not ignore this obvious legal error.

28. The Court of Appeal did not provide any comment on the degree or type of evidence necessary to secure a conviction for sexual assault. Nor did the BCCA find a "presumption of unreliability" applies to the evidence of an intoxicated complainant. The Court responded to the issue raised on appeal and discharged its mandate to intervene to correct a clear-cut error in law.

A. The BCCA Read the Reasons Functionally and Contextually

29. The BCCA correctly stated the law on the scope of appellate review. It noted reasons are to be read functionally and contextually as a whole in light of the live issues at trial, the record, and the positions of the parties.[43] The Court cautioned itself not to finely parse the reasons in search for error, and acknowledged any ambiguities must be interpreted in favour of the trial judge's correct application of the law.[44] The Court also reminded itself of the particular deference shown to a trial judge's assessment of credibility.[45]

30. The Court thoroughly reviewed the evidence,[46] the reasons given by the trial judge,[47] and the submissions of counsel.[48]

[43] A.R. Vol. I – Tab 1C, p. 16 (BCCA Reasons, para. 35-36)
[44] A.R. Vol. I – Tab 1C, p. 16 (BCCA Reasons, para. 37-38)
[45] A.R. Vol. I – Tab 1C, p. 17 (BCCA Reasons, para. 39)
[46] A.R. Vol. I – Tab 1C, pp. 11-13 (BCCA Reasons, paras. 7-21)
[47] A.R. Vol. I – Tab 1C, pp. 13-16 (BCCA Reasons, paras. 22-33)
[48] A.R. Vol. I – Tab 1C, p. 22 (BCCA Reasons, paras. 57-60)

31. Having done all of the above, the Court found the trial judge unambiguously erred. The primary reason the trial judge accepted the core of the complainant's evidence was contained in one sentence: "It is extremely unlikely that a woman would be mistaken about that feeling".[49] The trial judge's reasoning was not grounded in the evidence, was not responsive to the submissions of counsel, and was not the proper subject of judicial notice or common sense.[50]

The BCCA Did not Impute Reliability Concerns to the Trial Judge

32. Although the intoxication of a witness is not necessarily a determinative factor, it is always relevant to reliability or lack thereof. As this Court noted in ***R.* v. *C.P.***, the "effect of intoxication on a witness' testimony is not all or *nothing*".[51] In this case, there was evidence supporting the defence theory that the complainant may have been mistaken including: her own descriptions of her state of disorientation and extreme intoxication; her emotional lability seemingly for no reason; that she could not be roused when shaken by the respondent's father; her inability to determine what she felt with her hands at the crucial moment; that she felt no movement despite pushing the respondent off of her; her inability to operate a light switch in the immediate aftermath; her erroneous assumptions that there was no electricity in the house and that she had been drugged; her after-the-fact certainty she was wearing underwear despite not knowing so at the time; and, that her blood alcohol content was nearly three times the legal limit to operate a vehicle between two and a half and seven hours after the alleged assault.[52]

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[49] A.R. Vol. I – Tab 1C, p. 23 (BCCA Reasons, para. 65)
[50] A.R. Vol. I – Tab 1C, p. 24 (BCCA Reasons, paras. 67-69)
[51] ***R.* v. *C.P.***, 2021 SCC 19 at para. 34 [emphasis added]
[52] The complainant's BAC at the time of the assault was significantly higher. The complainant had her last drink before 11:30 p.m. The general rate at which alcohol is eliminated from the human body (between 10-20 mg/100ml per hour) is something courts have taken judicial notice of. See: ***R.* v. *Paszczenko***, 2010 ONCA 615 at paras. 65-66.

33. It is not surprising in these circumstances that the trial judge's concerns about the complainant's reliability cut to the core of her assertion, contrary to the appellant's argument.[53] In fact, the trial judge explicitly said so. He noted during submissions that all of the evidence pointed to the complainant being "very, very intoxicated"[54] and specifically agreed there was a "sound and really obvious" basis to infer an "overarching element of unreliability to all of her evidence… including her perceptions of what was happening at all the critical times".[55] The trial judge in his reasons observed the complainant's tactile perception was impaired as she was unable to say whether the respondent was wearing a shirt when she placed her hands on his chest on two occasions.[56] The trial judge repeated the complainant was an "obviously unreliable witness".[57] He found she was in a state of "disorientation and extreme intoxication" when she woke up.[58] The trial judge also characterized the complainant's core allegation as "devoid of detail".[59] The BCCA did not "impute" these concerns to the trial judge[60]. He clearly had them on any fair reading of the reasons and record as a whole.

34. The main explanation given by the trial judge for nonetheless accepting the complainant's allegation was contained in the impugned sentence. The trial judge's reasoning process is crystal clear: this complainant cannot be mistaken because no woman would be mistaken.

35. The respondent agrees no presumption of unreliability applies to the evidence of an intoxicated witness whether or not the witness is a complainant in a sexual assault prosecution. The BCCA's assertion that it was not making a general statement to this

[53] *Appellant's Factum*, p. 15, para. 41-42
[54] A.R. Vol. II – Tab 25, *Defence Closing Submissions*, 312(8-9)
[55] A.R. Vol. II – Tab 25, *Defence Closing Submissions*, 320(27-35)
[56] AR. Vol. I – Tab 1D p. 8 (BCSC Reasons, para. 8)
[57] A.R. Vol I – Tab 1D p. 36 (BCSC Reasons, para. 48)
[58] A.R. Vol I – Tab 1D p. 36 (BCSC Reasons, para. 60)
[59] A.R. Vol I – Tab 1D p. 36 (BCSC Reasons, para. 68)
[60] *Appellant's Factum*, para. 44, p. 13

effect has to be respected.[61] It also acknowledged the trial judge was entitled to accept the complainant's evidence despite her extreme intoxication.[62] The Court was correct to find the trial judge erred in law in his handling of the central issue by making a speculative finding not tethered to the evidence which was not the proper subject of judicial notice or common sense.[63]

The BCCA did not ignore factual findings or evidence that supported the judge's acceptance of the complainant's allegation as most of that evidence detracted from her reliability

36. The appellant states the obvious when it says the trial judge believed the complainant.[64] The question, however, is not whether the trial judge believed her, but why he did so. Virtually every comment the trial judge made about the complainant's evidence in his reasons, apart from the impugned sentence, highlighted the concerns he had with respect to her reliability.

37. The trial judge found there was "*some* circumstantial evidence consistent with a sexual encounter having occurred".[65] The trial judge also used remarkably equivocal adjectives such as "consistent with" and "likely" to describe the inferences he drew from that evidence.[66] The BCCA specifically canvassed all of those findings before determining "the primary reason the judge accepted the complainant's core assertion [was] contained in a single sentence".[67] That finding was sound. The circumstantial evidence added very little to the strong presumption of reliability that the trial judge artificially constructed when he found it extremely unlikely that any woman would be mistaken about the feeling of penile penetration. Once the trial judge made that finding, a conviction was certain.

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[61] A.R. Vol. I – Tab 1C, p. 24 (BCCA Reasons, paras. 67-69)
[62] A.R. Vol. I – Tab 1C, p. 23 (BCCA Reasons, para. 61)
[63] A.R. Vol. I – Tab 1C, p. 23 (BCCA Reasons, paras. 68-70
[64] *Appellant's Factum*, para. 48
[65] AR. Vol. I – Tab 1D, p. 41 (BCSC Reasons, para. 69) [emphasis added]
[66] AR. Vol. I – Tab 1D, p. 41 (BCSC Reasons, paras. 69-70)
[67] A.R. Vol. I – Tab 1C, pp. 15-16; 23 (BCCA Reasons, paras. 31-32; 65)

38. The appellant also restates an argument it made before the BCCA, namely: that the complainant engaged in purposeful and goal-driven behaviour when she awoke, disclosed the assault immediately to her family, attended a sexual assault examination, and that the examination revealed an injury to her vagina.[68]

39. The complainant testified she was "panicking" once she woke up, and started running around the house.[69] The "most concerning" part was that she had no pants on.[70] She was "freaking out".[71] She tried to turn light switches on but could not, and therefore assumed there was no power in the house which made her more freaked out.[72] She saw some children's toys in the respondent's home which freaked her out even more.[73] She was inside the house for five to ten minutes after she woke up and before she heard her father at the door[74] but ran outside without pants or shoes on, and wasn't sure whether or not she had her purse with her.[75] Not surprisingly, the trial Crown did not rely on the complainant's behaviour after the alleged assault and the trial judge likewise did not reference any of this evidence as supporting the complaint's reliability. This evidence does not change the materiality of the error that the trial judge made. The BCCA specifically referenced this evidence in its decision[76] and further considered the arguments restated by the appellant here.[77] To the extent that the BCCA had to consider this evidence, it undoubtably did so.

40. The rest of the alleged "ample" support listed by the appellant is equivocal *vis a vis* the reliability of the complainant's evidence. The complainant's disclosure to her family, the police, and her attendance at the hospital may have been relevant to the sincerity of

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[68] *Appellant's Factum*, at para. 54; A.R. Vol. I – Tab 5 p. 93-94, *Appellant's Factum at BCCA*, para. 78 & 80
[69] A.R. Vol II – Tab 17, *Complainant's Evidence*, 52(24-26 & 35-37).
[70] A.R. Vol II – Tab 17, *Complainant's Evidence*, 45(36)
[71] A.R. Vol II – Tab 17, *Complainant's Evidence*, 53(1)
[72] A.R. Vol II – Tab 17, *Complainant's Evidence*, 53(2-10)
[73] A.R. Vol II – Tab 17, *Complainant's Evidence*, 53(31-35)
[74] A.R. Vol II – Tab 17, *Complainant's Evidence*, 21(13-17)
[75] A.R. Vol II – Tab 17, *Complainant's Evidence*, 55(6-23)
[76] A.R. Vol I – Tab 1C, p. 12 (BCCA Reasons, para. 15)
[77] A.R. Vol I – Tab 1C, p. 23 (BCCA Reasons, para. 60)

the complainant's belief that she had been sexual assaulted, but that was not a live issue at trial or on appeal. That evidence said nothing about the reliability of her assertion, which was the primary issue. Perhaps that is why the trial judge did not cite any of this evidence as supporting the accuracy of the complainant's assertion. Also noteworthy on this point is the trial judge's finding that the complainant's emotional state after the alleged offence was of "little or no assistance" because of evidence that she was emotional "seemingly for no reason" throughout the evening.[78] In any event, the BCCA again specifically cited this evidence.[79] The trial judge's error went to the heart of his assessment of the complainant's reliability, which rendered this credibility related evidence of no assistance to the BCCA in its assessment of the materiality of that error.

41. Finally, the BCCA did consider the injury observed by the nurse examiner, but correctly noted the nurse provided no evidence that injury was consistent with intercourse (whether consensual or not) and also that the complainant provided no evidence about any injury whatsoever.[80] Again, the trial judge noted this evidence in his summary of the testimony,[81] but did not explicitly rely on it as supporting the complainant's reliability.

42. In short, the BCCA did not "ignore" any evidence. It carefully reviewed the record and reasons as a whole before correctly finding the trial judge erred in law.

The BCCA Could Not Ignore the Patent Error Disclosed by the Trial Judge's Reasons nor Speculate Regarding Reasons that Could Have Been Given

43. The respondent acknowledges an appellate court must not search for error by seizing upon "imperfect" or "ambiguous" language on the part of a trial judge.[82]

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[78] AR. Vol. I – Tab 1D p. 28 (BCSC Reasons, para. 7(1))
[79] A.R. Vol. I – Tab 1C, p. 13 (BCCA Reasons, paras. 17-19)
[80] A.R. Vol. I – Tab 1C, p. 13 (BCCA Reasons, para. 19)
[81] A.R. Vol. 1 – Tab 1D, p. 31 (BCSC Reasons para. 24)
[82] ***R.* v. *G.F.***, 2021 SCC 20 at para. 76

44. On the other hand, where the reasons for judgment disclose an unambiguous error, an appellate court must be able to intervene. Otherwise, an appellant's rights are rendered illusory, which is of particular concern where liberty and significant stigma are at stake.

45. Despite the need to assess reasons functionally and contextually, "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome".[83] Nor can a reviewing court ignore the reasons actually given, or speculate as to the reasons that might have been given but were not.[84]

46. The appellant asks this Court to ignore the trial judge's flawed reasoning process and to consider an alternate reality involving reasons the trial judge did not give.[85] It says the trial judge would not have erred if he found it extremely unlikely this complainant as opposed to "a woman" could be mistaken. It further argues the BCCA's focus on those specific words (which were used by the trial judge) amount to a 'parsing' of the reasons.[86]

47. Appellate review is a qualitative as opposed to quantitative exercise that must focus on the actual reasons to determine whether an error was made. What a trial judge could have said is irrelevant. The number of sentences wherein a trial judge falls into error is insignificant provided the error is material, or as in this case, central to the trial judge's reasoning process.

48. The BCCA fairly summarized the position of defence counsel – that the complainant's testimony was unreliable on account of her intoxication, disorientation, and panic when she first woke up, and that she assumed the worse when she found she had no pants

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[83] ***Canada (Minister of Citizenship and Immigration)* v. *Vavilov***, 2019 SCC 65 at para. 96

[84] ***R.* v. *Pastro***, 2021 BCCA 149 at para. 54; ***Vavilov***, *supra*, at paras. 97-98

[85] *Appellant's Factum*, paras. 57-58 and footnote 80

[86] *Appellant's Factum*, para. 57

on.[87] Defence counsel never posited a "theory" that any woman in general could be mistaken about the feeling of penile penetration. Likewise, Crown counsel made no submissions concerning the improbability of a woman (or even this complainant) being mistaken about that feeling. Crown counsel simply asked the trial judge to accept the complainant's evidence and made very few submissions about her reliability.[88] The fact trial Crown could not think of almost anything to say about the reliability of the complainant's evidence in a case where reliability was the central issue is itself telling.

49. It is important to recall that it was the Crown's burden to prove the *actus reus* of the offence beyond a reasonable doubt. The trial judge's determination of that issue was entirely bound up with his assessment of the reliability of the complainant's evidence. The respondent had no burden to prove the complainant was an unreliable witness, or to establish why the trial judge should have been left with a reasonable doubt on the whole of the evidence or lack of evidence.

50. The trial judge was not responding to a "defence theory" when he found it "extremely unlikely a woman could be mistaken about that feeling". The trial judge was determining the central issue: whether the complainant's evidence was sufficiently reliable to discharge the Crown's burden to prove the *actus reus*. He answered that question in the affirmative, not based on evidence led at trial, but by impermissibly taking judicial notice of the extreme unlikelihood that any woman would be mistaken about such matters. The finding was central to the crucial issue in this case. It was not responsive to the submissions of either party and was made without notice to them.

51. The respondent "was entitled to a determination of his guilt or innocence based on the evidence at trial",[89] but was convicted on speculation not grounded in the evidence that

[87] A.R. Vol. I – Tab 1C, p. 22 (BCCA Reasons, para. 57)
[88] A.R. Vol. II – Tab 26, *Crown's Closing Submission*, 327(37-38)
[89] ***R.* v. *MacIsaac***, 2015 ONCA 587 at para. 49;

"figured directly" into the trial judge's conclusion that the complainant was a reliable witness[90]. The BCCA had to intervene to correct that error.

52. The appellant cites this Court's decision in ***R.* v. *Van*** to argue the trial judge's manner of expression "*could not have had any impact on the verdict*".[91] Properly understood, this argument hints at a tacit concession by the appellant that the trial judge erred in law. In the paragraph the appellant cites from ***Van***, this Court discussed the applicability of the *curative proviso* which can only apply if an error of law is found. In such cases, the Crown bears a heavy onus to show a legal error is "so harmless or minor that it *could not have any impact on the verdict*".[92] "Otherwise, the law should follow its course and a new trial result".[93]

53. The respondent will not address the very significant burden that must be discharged by the Crown to justify the application of the *curative proviso.* The appellant here and in the court below did not raise the *proviso* and it is an error in law for any court to apply the *proviso* on its own motion.[94]

B. The Trial Judge Unreasonably Substituted "Common" Sense for Evidence

54. The trier of fact is entitled to apply common sense and life experience to the evidence to assist in the drawing of inferences. The trier of fact is not entitled, however, to introduce new considerations into the decision-making process, nor rely on life experience as "a substitute for evidence".[95]

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[90] ***R.* v. *Morrissey***, 1995 CanLii 3498 (ON CA)
[91] *Appellant's Factum,* at para. 60 [emphasis added] citing ***R.* v. *Van***, 2009 SCC 22 at para. 34 [emphasis added]
[92] ***R.* v. *Van***, *supra*, at para. 34
[93] ***R.* v. *Sarrazin***, 2011 SCC 54 at para. 27
[94] ***R.* v. *McMaster***, [1996] 1 S.C.R. 740, 1996 CanLii 234 at para. 37
[95] ***R.* v. *S. (R.D.)***, [1997] 3 S.C.R. 484, 1997 CanLii 324 at paras. 13 & 129 See also: ***R.* v. *J.M.H.***, 2011 SCC 45 at para. 25 citing ***Schuldt* v. *The Queen*** ,[1985] 2 S.C.R. 592 at 604; ***R.* v. *J.C.***, 2021 ONCA 131 at paras. 58-61; ***R.* v. *Perkins***, *supra*, at para. 36; ***R.* v. *Kodwat***, 2017 YKCA 11 at para. 41; ***R.* v. *D.B.*** ,2022 SKCA 76 at para. 35; ***R.* v. *Roth***, 2020 BCCA 240 at paras. 64 & 73

55. The BCCA appreciated the distinction between permissible application of life experience to assess credibility and speculative reliance on 'common sense' assumptions not grounded in the evidence.[96] The Court also adroitly observed the difference between a trial judge applying life experience to questions of human behaviour, and the application of personal experience to questions involving the functioning or tactile perception of the human body and the effect of alcohol consumption on the same.[97] The examples given and the cases cited by the appellant on this issue involve the former. That distinction is important. Life experience may equip a judge to better understand human behaviour in a given situation. Such experience does not equip a judge to form definitive and wide-sweeping opinions about the functioning of the human body or the impact of alcohol on human perception.

56. This is particularly the case where, as here, the trial judge has no personal experience regarding the matter.

57. The extreme improbability of "a woman" being mistaken about the feeling of penile penetration (in any circumstance) is not a 'rational observation' as argued by the appellant.[98] There was no evidence at trial that was capable of supporting this generalized assumption. The BCCA did not err by finding it was not properly the subject of judicial notice or common sense.[99]

C. The Extreme Improbability that Any Woman Would Be Mistaken About Penile Penetration is not "Common Sense"

58. The *extreme* improbability that a woman (even a "very, very intoxicated" one) would be mistaken about the feeling of vaginal-penile penetration is not a matter of "common sense".

[96] A.R. Vol. I – Tab 1C, p. 17 (BCCA Reasons, para. 41)
[97] A.R. Vol. I – Tab 1C, p. 18 (BCCA Reasons, para. 43)
[98] *Appellant's Factum*, at para. 68
[99] A.R. Vol. I – Tab 1C, p. 24 (BCCA Reasons, paras. 67-69)

59. Credibility and reliability are two different concepts. An incredible witness cannot give reliable evidence, but a finding that a witness is credible does not end the analysis. A witness no matter how credible may be mistaken. In fact, the sincerity or honesty of a witness's belief may be "deceptively" convincing which is why jurors must be instructed on the difference between these two concepts.[100]

60. A trial judge has to assess the reliability of a complainant's evidence no matter how credible the complainant appears to be. If a trial judge is entitled to find (without evidence) that any complainant would not, absent exceptional circumstances, be mistaken about an alleged penetrative sexual assault, no reliability assessment would generally be required. This "common-sense" inference risks displacing the presumption of innocence and reversing the burden of proof with respect to an essential element of the offence (namely the *actus reus*) by creating a strong presumption that favours acceptance of a complainant's evidence solely on the basis of the type of assault alleged.

61. Characterizing as common sense the extreme improbability that a complainant could be mistaken also risks invalidating the experience of a complainant who does not fit that "common" mold. The evidence of complainant who is uncertain as to penetration would defy this 'common sense'. Her evidence would be extremely implausible and by extension, incredible.

62. The appellant's approach does not leave room for a trial judge to find an otherwise credible assertion of penetration is unreliable, nor does it allow for the possibility that a complainant can be uncertain about penetration but still be a credible witness. The following cases illustrate the difficulty with this black and white view:

[100] ***R.* v. *Hibbert***, 2002 SCC 39 at para. 50; ***R.* v. *Grant***, 2022 ONCA 337 at para. 83

- ***JM***.[101] The complainant, K.B. testified she woke up to find the accused had penetrated her vagina. She was 100% certain. The trial judge found her to be a generally credible witness but concluded her evidence was not sufficiently reliable to ground a conviction.

- ***Allale***.[102] The complainant was very intoxicated. She testified the accused, a taxi driver, sexually assaulted her while driving her home, and further penetrated her in her garage once she arrived home. The trial judge convicted the appellant with respect to the alleged sexual assault in the taxi-cab but acquitted the appellant with respect to the incident alleged to have occurred in the garage.

- ***C.A.M.***[103] The complainant was uncertain whether or not the accused vaginally penetrated her in relation to one of several alleged incidents which occurred while she was intoxicated. Notwithstanding her uncertainty in relation to that transaction (which would defy common sense if the appellant is correct), the trial judge found her evidence to be "consistent, convincing, and credible" and convicted the appellant with respect to separate allegations.

- ***Scinocco***.[104] The complainant initially told a police officer that she "did not believe" she had been penetrated. The trial judge accepted the complainant initially told the police she was uncertain as to whether or not she had been vaginally penetrated, but that stated uncertainty did not detract from the judge's assessment of her credibility as he ultimately believed her and convicted the accused.

The point is that each case must be assessed on its unique facts, not on an ungrounded "common sense" presumption that it would be "impossible [for a complainant] to be mistaken" about the manner of penetration.[105]

63. The appellant also puts the cart before the horse by arguing a complainant is unlikely to be mistaken by virtue of the profound impact of a sexual assault. A trial judge must presume an accused is innocent unless and until proven guilty. An appellate court that reviews the reasonableness of a conviction once that presumption has been displaced is in a very different position.[106] Furthermore, a complainant who genuinely (though

[101] ***R.*** **v.** ***JM***, 2021 NSSC 307
[102] ***R.*** **v.** ***Allale***, 2019 ABCA 154 at paras.
[103] ***R.*** **v.** ***C.A.M.***, 2017 MBCA 70 at paras. 7, 26 & 56
[104] ***R.*** **v.** ***Scinocco***, 2017 ONCJ 358 at paras. 14-16
[105] *Appellant's Factum*, at para. 70
[106] *Appellant's Factum,* at para. 71 and footnote 103 citing ***R.*** **v.** ***Hunter***, 2016 MBCA 2

mistakenly) believes they have been sexually assaulted would similarly be profoundly impacted by that state of belief.

64. The appellant is correct that an ordinary person, or for that matter a trial judge, does not need specialized knowledge to assess the likelihood that a complainant is mistaken about an alleged assault.[107] No ordinary person, and in particular no ordinary male, could confidently state that it would be "extremely unlikely that a woman would be mistaken about [the] feeling" of penile penetration, no matter what the circumstances are. That is the finding that has to be measured against 'common sense' because that is the finding that the trial made in this case.

D. The BCCA's Ruling Does Not Justify a Relaxation of the Rule Against Ungrounded "Common" Sense Reasoning

65. This case underscores the importance of jealously guarding against the use of ungrounded assumptions as a substitute for evidence. The BCCA's decision illustrates the difference between permissible and impermissible use of common sense and human experience by a trial judge.

66. The litmus test is whether a judge uses experience and common sense to draw inferences from the evidence or to import new considerations untethered to the evidence into the reasoning process. The former is permitted and even encouraged. The latter must be strictly controlled especially where (as here) the ungrounded assumption is relied upon to convict an accused person and thereby deprive them of their liberty.

67. It is axiomatic that an accused must be judged only on the basis of admissible evidence tendered at trial. While reasonable doubt can be based on the absence of evidence, a conviction cannot.

[107] *Appellant's Factum*

68. Jurors take an oath to decide the case before them "solely on the evidence" and are further instructed to do so by the trial judge.[108] They are admonished not to reach decisions based on "generalizations, gut feelings, prejudices, sympathies, or stereotypes".[109] They are told the presumption of innocence "remains throughout the case unless the Crown, *on the evidence put before you*, satisfies you beyond a reasonable doubt that s/he is guilty".[110] These principles apply equally to a trial judge sitting without a jury. The expectation that the trier of fact will remain impartial by deciding the case only on the evidence is a fundamental norm of our system of justice: "What is required is not the personal opinion of the judge, but the application of reason and principles bounded by the limits and structures of the law".[111]

69. Trial judges are permitted and encouraged to "rely on their background knowledge in fulfilling their adjudicative function".[112] They are also "not required to check their common sense at the courtroom door".[113] A judge can use common sense or human experience to identify or draw inferences from the evidence before them.[114] Juries are also routinely instructed to use their "common sense" to draw inferences.[115]

70. The use of "common" sense or human experience constitutes error when used to "introduce new considerations, not arising from the evidence, into the decision-making

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[108] Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions", 3. Opening Instructions to the Trial Jury, 3.1 Introduction & 3.2 Duties of Jurors

[109] Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions", 3.1.1. General Anti-Bias Instructions

[110] Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions", 5.1 Presumption of Innocence, Burden of Proof and Reasonable Doubt [emphasis added]

[111] Sheilah Martin, *Juries Today* 85:1 2022 Sask Law Rev, 2022 CanLiiDocs 1413

[112] ***R.* v. *S.(R.D.*)**, *supra*, at para. 39 (Reasons of Justice L'Heureux-Dubé)

[113] ***Russell* v. *R.***, 2021 NBCA 19 at para. 45.

[114] ***R.* v. *JC***, *supra*, at para. 59-60

[115] ***R.* v. *Hall***, 2022 ONSC 3746 at paras. 39-46. The wisdom of instructing a jury to use common sense has recently been questioned because of the risk jurors will use 'common sense' to import stereotype, ungrounded assumption, and unconscious bias into the reasoning process: see ***R.* v. *Douse***, 2022 ONSC 3228, at paras. 105-106

process…" In Justice Cory's words: "the judge must avoid judging the credibility of the witness on the basis of *generalization or upon matters that were not in evidence*".[116] A trial judge is "not justified in acting on [their] own personal knowledge of or familiarity with a particular matter, alone and without more".[117]

71. The words that a judge uses are obviously an important indicator as to whether or not this line has been crossed: "Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being based on generalizations".[118] Appellate courts also need "to keep in mind how easily 'common sense' masks prejudicial and unfounded reasoning".[119] Reasoning that is based on "common sense" or generalization as opposed to evidence is not entitled to deference because it does not involve an assessment or evaluation of the evidence by the trial judge. Sense is either common, or its not. Generalization is either the proper subject of judicial notice,[120] or not.

72. The appellant justifies a liberalized approach to 'common sense' reasoning in the case of sexual assault prosecutions by constructing a straw (wo)man of the BCCA's decision.

73. First, it says the BCCA equated the vulnerability of the complainant with "blanket unreliability" that had to be overcome.[121] As explained above in great detail, the trial

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[116] ***R.* v. *S.(R.D.)***, *supra*, at para. 130 [emphasis added]
[117] ***R.* v. *J.M.***, 2021 ONCA 150, at para. 51quoting from ***R.* v. *Potts***, 1982 CanLii 1751 (ON CA)
[118] ***R.* v. *S.(D.)***, *supra*, at para. 131
[119] Dianne L Martin, *R.* v. *White and Côte*, 1997 42:2 McGill Law Journal 459, 1997 CanLiiDocs 61, pp. 464
[120] ***R.* v. *Find***, 2001 SCC 32 at para. 48. A trial judge may only take judicial notice of a fact where it is either: "so notoriously or generally accepted as not to be the subject of debate among reasonable persons; or… capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy". The closer the fact comes to the ultimate issue the stricter these criteria will be. ***R.* v. *Spence***, 2005 SCC 71 at paras. 60-61
[121] *Appellant's Factum*, at paras. 81-82

judge in this case was very concerned about the reliability of the complainant's core assertion. The BCCA did not impute general unreliability to the complainant or treat her evidence as inherently untrustworthy by virtue of her intoxication.

74. Second, the appellant says the BCCA criticized the Crown for not eliciting more detailed evidence from the complainant about her core assertion.[122] Those statements by the BCCA did not amount to a criticism, or to a pronouncement that the Crown is required to lead this type of evidence from any complainant.

75. The BCCA similarly noted defence counsel avoided eliciting these details from the complainant.[123] The Court also agreed with the Crown that there was a "body of evidence on which the judge could convict" despite the trial judge's finding that the complainant's evidence was "devoid of detail".[124] In other words, the BCCA found the Crown does not have to elicit such evidence from a similarly situated complainant in order for a trial judge to accept her allegation .[125]

76. The BCCA was obliged to consider the record before it. The fact that specific evidence did not exist was important context for the purpose of the appeal. Those comments explain why the judge found the complainant's evidence was "devoid of detail", and why he was preoccupied with the reliability of her allegation. The absence of those details also informs the materiality of the trial judge's error. It was important for the BCCA to note what evidence was available to the trial judge in order to explain why the trial judge made an ungrounded assumption not tethered to the evidence that did exist, and why the trial judge erred in light of the record as a whole.

77. The trial judge in this case clearly crossed the line by drawing and relying upon a speculative and ungrounded assumption that was not tethered to the evidence. In effect,

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[122] *Appellant's Factum,* at paras. 81 & 85
[123] A.R. Vol. I – Tab 1C, p. 22 (BCCA Reasons, para. 56)
[124] A.R. Vol. I – Tab 1C, p. 23, para. 61
[125] *Appellant's Factum,* at para. 83

he did exactly what Justice Cory warned against some twenty-five years ago by judging the reliability of the complainant on the basis of a generalization that was not in evidence. That wide sweeping generalization was not the proper subject of judicial notice. The respondent had no opportunity to refute this generalization as no party called upon the trial judge to make that finding. The BCCA carefully reviewed the record and the reasons, and correctly found the trial judge erred in law.

PART IV – SUBMISSIONS ON COSTS

78. The respondent does not seek costs and asks that no costs be awarded against him.

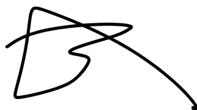
PART V – NATURE OF THE ORDER SOUGHT

79. The respondent submits that this Court should dismiss the appeal.

PART VI – PUBLICATION BAN

80. The respondent agrees with the appellant's submission with respect to the publication ban.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Brent R. Anderson
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Counsel for the Respondent

Dated at Maui, Hawaii, this 17th day of December, 2022

PART VII: TABLE OF AUTHORITIES

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