SCC File No. 40447

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

BETWEEN:

HIS MAJESTY THE KING

APPLICANT
(Respondent)

AND:

EDWIN TSANG

RESPONDENT
(Appellant)

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

Counsel for the Respondent:
Richard S. Fowler, K.C.
Eric Purtzki
Fowler Blok Law
1200-1111 Melville Street
Vancouver, B.C. V6E 2V6
Telephone: (604) 662-8167
Facsimile: (604) 684-0799
Email: rfowler@fowlerbloklaw.ca

Agent for Counsel for the Respondent:
Michael J. Sobkin
Barrister & Solicitor
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Telephone: (613) 282-1712
Facsimile: (613) 288-2896

Email: msobkin@sympatico.ca

Counsel for the Applicant:
Susanne Elliot
Ministry of Attorney General
Criminal Appeals and Special Prosecutions
600 - 865 Hornby Street, 6th Floor
Vancouver, B.C. V6Z 2G3
Telephone: (604) 660-1126
Facsimile: (604) 669-1133
Email: susanne.elliott@gov.bc.ca

Agent for Counsel for the Applicant:
Matthew Estabrooks
Gowling WLG
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: (613) 786-0211
Facsimile: (613) 788-3573
Email:matthew.estabrooks@gowlingwlg.com

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This application for leave comes down to the applicant's disagreement with how the Court of Appeal for British Columbia applied well established legal principles to the facts of this case. There is no legal uncertainty for this Court to resolve. Leave to appeal should be dismissed.

2. The Court of Appeal found that the trial judge erred in assessing the respondent's evidence that the complainant asked her to be "spanked" while they were engaging in sexual activity in the backseat of a car. The trial judge rejected the respondent's evidence on this point, finding it to be unbelievable, without stating why. The Court of Appeal held, after reviewing the reasons for judgment and the evidence as a whole, that it could not find any basis for the trial judge's rejection of the respondent's evidence on this central point; as such, the rejection could only have been based on the stereotypical assumption that the complainant would not have asked to be spanked.

3. This application for leave is premised on the applicant's belief that this Court needs to resolve the law on the use of stereotypical reasoning, and permissible and impermissible inferences, that can often be made in course of a credibility assessment in any kind of case. But this is in fact a well-established area of the law. This Court, as well as many other appellate courts, have clearly set out the relevant principles. The Court of Appeal for British Columbia cited all the relevant authorities, correctly stated the applicable principles, and carefully applied them, having conducted a complete review of the trial judge's reasons and the evidence at trial.

4. The applicant's disagreement with how the Court of Appeal applied these principles to the established facts does not come close to raising an issue of national importance. The applicant's reliance on *in terrorem* submissions about the 'implications' for complainants in sexual assault cases because of the Court of Appeal's reasons are utterly without foundation or merit.

5. Finally, the applicant seeks leave so this case can be heard together with *R. v. Kruk,* 2022 BCCA 18 (SCC Docket No. 40095), leave granted on July 28, 2022. This case is not similar to *Kruk* and does not raise the same issues upon which leave was sought and granted in that case.

6. The respondent submits that leave to appeal should be dismissed.

B. Statement of facts

7. On December 28, 2018, the respondent met the complainant, and her friend, L.F. at a concert held at BC Place in downtown Vancouver. When the concert ended, the respondent drove the complainant and L.F. to the Commodore Ballroom, also in downtown Vancouver.

8. The three entered the Commodore, and after a short time, L.F. left the club and went home. The complainant testified that she had no interest in the respondent. She testified that she felt safe remaining with the respondent at the Commodore, because she thought that the respondent had seen her "flirting" with a guy named "Josh" at BC Place earlier in the evening.

9. After L.F. left, it was common ground that the respondent and the complainant were drinking and dancing at the Commodore. The respondent testified that they shared a gin and tonic at the Commodore. The respondent testified that the complainant began "grinding" up against him on the dancefloor and that they French kissed each other. The complainant denied "grinding" up against the respondent. She was not asked in cross-examination about whether they had French kissed.

10. The complainant testified that the respondent asked her if she had ever had sex with a stranger. She replied, "no", she hadn't, and the respondent said, "let's go". The two then left the Commodore. The respondent testified that, as they were leaving the Commodore, the complainant asked him if he wanted to have "some fun". He asked her "what kind of fun?" and the complainant said, "I won't F you, but I will give you a blow job". The complainant denied saying that.

11. They got into the respondent's car so he could drive her home. The complainant testified that she directed the respondent to a parking lot near her home.

12. When they arrived at the parking lot, the respondent asked, "How do you want to do this?" and then said: "The back seat looks good". For her part, the complainant agreed she directed the respondent to the parking lot and that she also agreed to "make out" with the respondent. She

testified that when they got to the parking lot, the respondent said: “Okay, let’s just get into the back seat” and she said “Okay” (C.A. Reasons, at para. 57).

13. The complainant testified that she got into the back seat of the car with the respondent, sat on his lap, and straddled him while his penis was exposed. The complainant testified that she kissed the respondent, while he touched her breasts. This occurred in the backseat for approximately 8-10 minutes (C.A. Reasons, at para. 52).

14. Consistent with the complainant’s evidence that she consented to the initial sexual activity in backseat, the trial judge found as a fact that the complainant “got into the back seat with him and consented to engage in some sexual foreplay” (Trial Reasons, at para. 126).

15. The complainant then performed oral sex on the respondent. During the oral sex, the respondent testified that he said to her “Wow, you’re actually really good at giving blow jobs”, and “You’re probably my top five”. The complainant agreed to having such a conversation with the respondent, although she recalled, that after oral sex, she asked him if she gave a good blow job and thought the respondent said something to the effect that she was in his top eight (C.A. Reasons, at para. 59).

16. As he was about to ejaculate, the respondent testified that he asked the complainant “Do you spit or swallow?”, and that she said, “I swallow, spitting is for losers”. In her evidence, the complainant agreed that the appellant asked her, during oral sex, whether she would spit or swallow, and that she had said “swallow” (C.A. Reasons, at para. 54).

17. After the oral sex, it was common ground that the respondent digitally penetrated the complainant’s vagina. While digitally penetrating her, the respondent testified that he asked the complainant if he should “finger” her harder, and that she replied “Yes, finger me hard, daddy”, and “That feels good, daddy”. The complainant testified that she did not say “harder”, but she testified that the respondent made a statement to the effect that she liked it rough (to which she did not respond), and that he described her in demeaning terms (C.A. Reasons, at para. 60).

18. The respondent also testified that the complainant asked him to spank her.

19. The complainant testified that the respondent then forced vaginal sex on her as she was sitting on top of him. She said the sex was painful and that he did not ejaculate. At that point, the encounter ended, and the respondent drove her home. For his part, the respondent denied engaging in any vaginal sex; after the sexual encounter consisting of oral sex and him digitally penetrating her, he dropped the complainant off at her home a short distance away from the parking lot.

Trial judgment

20. The trial judge convicted the respondent of sexually assaulting the complainant. She accepted the complainant's evidence. The trial judge found that the complainant consented to some of the sexual activity in the backseat of the respondent's car (the kissing and the oral sex). However, the trial judge found that the respondent had vaginal intercourse with the complainant and that she did not consent.

21. As for the respondent's evidence, the trial judge found it not credible and rejected it.

22. The trial judge rejected the respondent's evidence that the complainant was "grinding" up against him on the dancefloor at the Commodore. She found that this was not believable because the complainant had been with another man, "Josh", earlier in the evening and was not interested in the respondent (Trial Reasons, at para 121).

23. For the same reason, the trial judge also rejected the respondent's evidence that the complainant willingly engaged in French kissing with the respondent. As the trial judge found: "Mr. Tsang's evidence was that, out of the blue, L.B.V. backed into him and started grinding his groin area and then the two engaged in French kissing. I reject his testimony about what occurred on the dancefloor as unbelievable given L.B.V.'s lack of involvement with Mr. Tsang to this point in the evening and her flirting with Josh" (Trial Reasons, at para. 140).

24. Also, about what occurred at the Commodore, the trial judge rejected the respondent's evidence that they shared a gin and tonic. She found that this seemed "unlikely given that they were still mostly strangers".

25. The trial judge then turned to assessing the respondent's evidence as to the subsequent events in the parking lot. In particular, the trial judge rejected the respondent's evidence that the complainant asked him to spank her while they were in the backseat. She held that, contrary to the respondent's suggestion, the complainant was not "gearing up for rough sex". As the trial judge stated (at para. 126):

> While I accept Mr. Tsang's evidence that L.B.V. got into the back seat with him and consented to engage in some sexual foreplay, it is not believable that L.B.V. would have asked him to spank her. Moreover, given the encounter thus far in the back seat, a belief that L.B.V. was gearing up for rough sex with Mr. Tsang would be a fanciful and unfounded one on his part. The comments he testified to sounded contrived as if he were describing how he thought such an encounter might unfold rather than what really happened in the parking lot that night.

26. The trial judge found that the respondent's evidence as to what occurred in the backseat with the complainant was "fanciful": "Mr. Tsang's evidence this was consensual rings hollow in the opinion of the Court. His testimony about the things he said to L.B.V. and what she said to him seemed lifted from a pornographic script completely at odds with their encounter up to that point" (at para. 148).

<u>On appeal</u>

27. The respondent appealed his conviction. The respondent argued on the appeal that the trial judge erred in rejecting his evidence, in part, because she relied on speculative and unfounded stereotypes.

28. The respondent argued that such impermissible and unsupported findings were demonstrated in four instances where the trial judge had rejected the respondent's evidence that: (1) the complainant was "grinding" against him on the dance floor at the Commodore; (2) they French kissed each other at the Commodore; (3) they shared a gin and tonic at the Commodore; and (4)

later on when they were in the parking lot, the complainant told him to "spank" her in the backseat of the car.

The Court of Appeal's decision

29. In assessing these arguments, the Court of Appeal reviewed the jurisprudence from this Court and from other appellate courts setting out the principles governing impermissible reasoning based on stereotypes, assumptions, or generalizations. Based on these cases, the Court of Appeal stated that credibility findings must be the "product of an evidence-based and context-specific assessment" and not "generalizations about expected human behaviour that are unsupported by the evidence" (C.A. Reasons, at paras 17, 19).

30. Applying these principles, the Court of Appeal disagreed with the respondent that the trial judge resorted to impermissible reasoning on three of four instances argued by the respondent.

31. First, the Court of Appeal held that the trial judge did not err when she rejected the respondent's evidence that the complainant would not have been "grinding" against him on the dancefloor because she had been earlier interested in someone else, "Josh".

32. As Willcock J.A. held, the trial judge's finding on this point was specific to the evidence and circumstances of the case: "the finding here finds support in the complainant's own evidence that she did not expect the appellant to make unwanted advances because he had seen her with Josh earlier. The finding, like that unsuccessfully criticized in *Greif,* may be characterized as a "conclusion that may align with a stereotypical expectation" but in this case is one "drawn from the evidence in the record" (C.A. Reasons, at para. 34).

33. Second, the Court of Appeal did not agree that the trial judge erred in finding that the complainant would not have French kissed the respondent on the dancefloor. Again, the Court of Appeal held that this was a case-specific determination (at para. 39):

> …there was evidence that the complainant would not have engaged in passionate kissing with the appellant on the dance floor at this point in the evening "out of the blue". The finding aligns with the assumption that one would not suddenly engage in passionate kissing with a relative stranger in whom one had expressed no interest,

> but it is a conclusion about what this complainant is likely to have done in these circumstances. (emphasis in original).

34. Third, the Court of Appeal found that the trial judge did not err when she rejected the respondent's evidence that the two shared a gin and tonic as they were "mostly strangers" at that point. Willcock J.A. stated as follows "…that inference falls within the class of inferences relating to behaviour that may fairly be drawn. One might infer that people who have just met may be hesitant to share drinking glasses, such inferences are based on common sense and are not prejudicial" (at para 40).

35. The Court of Appeal, however, reached a different conclusion concerning the trial judge's rejection of the respondent's evidence as to the events in the backseat of his car. The Court of Appeal found that this aspect of the trial judge's analysis of the respondent's evidence was flawed in several respects.

36. As noted above, it was here that the trial judge rejected the respondent's evidence that the complainant said that she wanted to be "spanked", and further, where the trial judge rejected what she characterized as the respondent's evidence that the complainant was "gearing up for rough sex" (Trial Reasons, at para. 128).

37. First, the Court of Appeal held the trial judge provided no support for the conclusion that, contrary to the respondent's evidence, the complainant would not have asked to be spanked. As the Court of Appeal held, this basis for rejecting the respondent's evidence, on its face, appeared to be a "bald statement untethered to any evidence" (C.A. Reasons, at para 48).

38. Second, the Court of Appeal found the trial judge erred in characterizing the respondent's evidence that the complainant was "gearing up for rough sex". The respondent did not testify to this effect, instead, he described a "progression of sexual activity" in the backseat of the car (C.A. Reasons, at para. 51).

39. Third, the Court of Appeal considered whether this basis for rejecting the respondent's evidence could be supported by other findings of fact by looking at the reasons as a whole (C.A.

Reasons, at para. 48). Having done that, the Court of Appeal was unable to find any support for the trial judge's rejection of this aspect of the respondent's evidence.

40. The Court of Appeal found that the events in the respondent's car stood on a different footing than the events at the Commodore. The Court of Appeal held that the complainant's earlier lack of interest in the respondent at the Commodore could not be said to "provide a reliable basis for conclusions with respect to consensual behaviour in the parked car". This was because, based on the trial judge's findings, the complainant had on her own evidence in fact engaged in consensual sexual activity with the respondent: she directed him to the parking lot and engaged in consensual sexual activity with him in the backseat. In other words, the complainant herself testified that her behaviour towards the respondent in the car was different than her behaviour toward the respondent at the Commodore.

41. In these circumstances, based on what the trial judge had found, the Court of Appeal held that the complainant's earlier conduct could not itself serve as a basis for rejecting the respondent's evidence that the complainant told him to "spank" her. In the absence of the trial judge providing any reason for rejecting the respondent's evidence on this point, the trial judge's rejection of the respondent's evidence could only have been based on "an assumption" about what activity the complainant might have willingly engaged in (Reasons, at para. 53), in circumstances in which, by her own admission, her behaviour toward the respondent had changed.

42. The Court of Appeal held that this error was material in the circumstances because it went to the core of the allegation of the non-consensual sexual activity in this case – whether the respondent engaged in non-consensual vaginal intercourse with the complainant. As it could not be said that the result would have been the same had the trial judge not erred on this material issue, the Court of Appeal allowed the appeal and ordered a new trial (C.A. Reasons, at para. 112).

43. Pursuant to the Court of Appeal's decision to order a new trial, on December 15, 2022, the new trial dates were set in Provincial Court of B.C. The trial is scheduled for April 24 to 27, 2023.

PART II - RESPONDENT'S POSITION ON THE LEAVE APPLICATION

44. The respondent submits that this case does not raise any issue of national importance and that leave to appeal should be dismissed.

PART III – STATEMENT OF ARGUMENT

45. The Court of Appeal's decision does not raise any issue of national importance. In allowing the appeal and ordering a new trial, the Court of Appeal applied well-established and incontrovertible legal principles to specific facts of this case. For example, the Court of Appeal was careful to look at problematic parts of the trial judge's reasons in the context of the record as a whole (*R. v. G.F.,* 2021 SCC 20). And the Court of Appeal also applied the requirement that appellate intervention is only warranted where a **material** factual conclusion was based on flawed reasoning (*R. v. J.C.,* 2021 ONCA 131; C.A. Reasons, at paras 11, 25 to 27).

46. As with many legal principles, those governing impermissible, stereotypical reasoning may be difficult to apply to the facts in some cases. This not a function of any confusion or uncertainty in the law itself, but rather a product of the often diametrically opposed facts on important issues that are specific to each case. There is now no confusion or uncertainty in the law for this Court to resolve. The applicant's disagreement with how the Court of Appeal applied these principles in this case does not raise an issue of national importance.

47. The applicant's attempt to augment their application for leave by asking for this case to be heard at the same time as *R. v. Kruk,* 2022 BCCA 18 (SCC Docket No. 40095) is unpersuasive. The two cases are very different. They do not raise the same issues.

48. The application for leave to appeal should be dismissed.

No confusion or uncertainty in the law on stereotypical reasoning

49. There is no dispute about the applicable legal principles. In this case, the Court of Appeal comprehensively set out the jurisprudence from this Court and other appellate courts about permissible inferences, assumptions, and impermissible inferences based on stereotypical or speculative reasoning (C.A. Reasons, at paras. 5-27).

50. All the authorities say the same thing: credibility findings must be grounded in the evidence. Judges are entitled to make common sense conclusions based on the evidence that they accept. The analysis must, of course, be case-specific. It cannot be based on generalizations or stereotypes about how people can be expected to behave.

51. In *R. v. Quartey,* 2018 SCC 59, this Court stated the principle as follows: "the trial judge's statements in this regard were directed to the appellant's *own* evidence and to the believability of *the appellant's* claims about how *he* responded to the specific circumstances of this case, and not to some stereotypical understanding of how *men* in those circumstances would conduct themselves" (at para. 3, emphasis in original, see also: *R. v. A.R.J.D.,* 2018 SCC 6, at para 2).

52. There is no dispute about this principle. Over the past five years, appellate courts across this country have not differed or changed the law governing how permissible inferences must be drawn from the evidence when assessing credibility. Indeed, many of these decisions were cited by the Court of Appeal in this case. And in some of those cases this Court has denied leave on the same issue that the applicant now seeks leave (see: *R. v. R.K.K.*, 2022 BCCA 17 (SCC leave dismissed, docket no. 40085); *R. v. Paulos*, 2018 ABCA 433 (SCC leave dismissed, docket no. 38817); *R. v. Greif*, 2021 BCCA 187 (SCC leave dismissed, docket no. 39689); also: *R. v. Kodwat*, 2017 YKCA 11; *R. v. A.B.A.*, 2019 ONCA 124; *R. v. Cepic*, 2019 ONCA 541*; R. v. Pastro*, 2021 BCCA 149).

53. Very recently, in *R. v. D.R.,* 2022 SCC 50, this Court decided an as-of-right appeal from Newfoundland (2022 NLCA 2) which raised the same issue – whether the trial judge erred in relying on stereotypical reasoning in a sexual assault case. In a brief, unanimous oral judgment, Rowe J. dismissed the appeal, stating: "[w]e agree with the majority of the Court of Appeal that

this inference by the trial judge was rooted in stereotypical reasoning, rather than the entirety of the evidence, and that this constituted an error of law" (at para. 2). This decision reinforces that there is no legal controversy and no issue of national importance raised in this leave application. This is particularly so given that this Court also denied leave less than six months ago in *R. v. R.K.K.* (SCC Docket No. 40085), which raised the same issue.

54. The applicant relies on the Ontario Court of Appeal's decision in *R. v. J.C.,* 2021 ONCA 131 as a recent authority which explains the difference between permissible and impermissible inferences in this context (leave argument, at para. 49). But this decision contains nothing controversial – it merely sets out the well-established principle, consistently set out in the cases, that "judges must avoid speculative reasoning that invokes 'common-sense' assumptions that are not grounded in the evidence or appropriately supported by judicial notice" (*J.C.,* at para. 58).

55. *J.C.* contains nothing different than what was said in the majority judgment of the Court of Appeal for Newfoundland and Labrador (per Hoegg J.A.) in *D.R.*, which this Court upheld without any further analysis.

56. The applicant does not appear to argue that there is any inconsistency between what was said in *J.C.* and the Court of Appeal's decision in this case. And nor could it. The Court of Appeal in this case expressly quoted Paciocco J.A.'s decision in *J.C.* at some length, and correctly concluded that the decision contained a "helpful" summary of the "rules that emerge from the recent jurisprudence" as it relates to the distinction between permissible and impermissible inferences (C.A. Reasons, at para. 25).

57. It is important to appreciate that *J.C.* has been cited with approval by multiple provincial courts of appeal: In *R. c. X*, 2022 QCCA 505[1] the Court of Appeal set aside an acquittal and ordered a new trial because the trial judge had concluded the complainant's story was not credible exclusively relying upon stereotypes about "normal" behaviour and reactions of a victim of sexual offences; in *R. v. Stewart* 2022 CMAC 9, the Court Martial Court of Appeal ordered a new trial because the Military judge erred by refusing to hold an evidentiary hearing into the admissibility

[1] See also: *R. v. Caron,* 2022 QCCA 1550 at para. 30

of evidence of prior sexual conduct because the inferences being sought by the accused, as in *J.C.,* did not rely on prohibited myths or stereotype. The Manitoba Court of Appeal in *R. v. Mazhari-Ravesh* 2022 MBCA 63, endorsed the "Law Regarding Myths and Stereotypes" as set out by Paciocco J.A. in *J.C.* in rejecting a claim that trial counsel had been ineffective in advancing arguments allegedly based on stereotypes or other prohibited reasoning.[2]

58. No useful purpose would be served by granting leave so the parties can debate the precise line between a permissible and an impermissible inference – entirely because, like many areas of the substantive, evidentiary and procedural law, there never can be a bright line. All the Court of Appeal did is apply a well-established body of jurisprudence to the facts of this case. There is nothing unconventional, legally controversial, or *avant-garde* about the Court of Appeal's decision that justifies granting leave to appeal.

59. The applicant's case for leave is really based on a disagreement with how the Court of Appeal applied accepted principles to the facts of this case. Tellingly, the applicant devotes most of its leave argument delving into facts and evidence and argues the inferences which should or should not have been made (see, applicant's leave argument at pp.3-13, 14, 16, 19-20).

60. Because there is no legal issue of national significance in this case, leave should be dismissed.

No error in the application of the principles either

61. Not only did the Court of Appeal correctly state the principles, but it correctly applied those principles to facts and evidence in this case, including to the trial judge's own factual findings. Even if the Court of Appeal erred in the application of the principles – which it did not – this does not raise an issue of national importance.

62. It must be remembered the Court of Appeal found that, in three of the instances raised by the respondent, the trial judge did not err in rejecting the respondent's evidence and did not rely on

[2] See also: *R. v. M.J.* 2022 SKCA 106; *R. v. D.B.* 2022 SKCA 76; *R. v. Lapierre* 2022 NSCA 12; *R. v. Al-Rawi* 2021 NSCA 86; *R. v. Kavanagh* 2022 BCCA 225; and *R. v. Pastro* 2021 BCCA 149.

unfounded or stereotypical assumptions. The Court of Appeal's application of the relevant principles on these respects reinforces that it was well-aware of the boundaries between a speculative inference and a permissible inference and that it properly applied the law to this case.

63. Three of the alleged errors related to whether the trial judge had erred in rejecting the respondent's evidence as implausible: that the complainant was "grinding" up against him, that they French kissed on the dancefloor, and that they shared a gin and tonic at the Commodore. In each of these instances, the trial judge rejected the respondent's evidence finding that the complainant would not have done those things. The Court of Appeal found that the trial judge committed no error on these three points and that the trial judge was entitled to reject the respondent's evidence as she did. In so doing, the Court of Appeal found that each of these determinations was based on a case-specific application of common sense in the circumstances, rather than a stereotypical assumption of what any person would do in the circumstances (C.A. Reasons, at paras. 34, 39, 40).

64. For example, the Court of Appeal found that the trial judge was entitled to find that the complainant would not have been "grinding" up against the respondent or French kissed him because of the complainant's own evidence that she was not interested in him and because she had earlier been flirting with another person. In these instances, the Court of Appeal held, the trial judge was entitled to reach the conclusion she did based on the evidence given.

65. The same goes for the trial judge's rejection of the respondent's evidence that the two shared a gin and tonic. The trial judge's finding was based on the evidence that, up until that point, the two did not know each other well and so it was unlikely, based on common-sense, that they would have shared drinking glasses (C.A. Reasons, at para. 40).

66. What set apart the trial judge's assessment of the respondent's evidence on the fourth instance was that there was no case-specific reason for rejecting the respondent's evidence that the complainant was consenting to sexual activity in the backseat of the car (i.e., calling him "daddy" and asking to be "spanked").

67. As the Court of Appeal rightly held, based on the trial judge's own findings, unlike the complainant's earlier attitude toward the respondent at the Commodore (which was marked by either non-consent, or begrudging consent to the respondent's advances), the complainant's later conduct when she "got into the back seat with him and consented to engage in some sexual foreplay" was consensual. (Trial Reasons, at para. 126). Based on this finding of fact, the complainant's earlier attitude toward the respondent could not itself serve to justify the trial judge's rejection of the respondent's evidence that she was asked to be "spanked" when they were in the car. And, in the absence of a case-specific reason for rejecting the respondent's evidence on this point, the Court of Appeal found that the rejection of the respondent's evidence could only have been based on a generalization of what a person would or would not do.

68. The applicant suggests that the effect of the Court of Appeal's decision is to penalize complainants for engaging in "victim-precipitating" conduct and that the decision effectively undermines female sexual autonomy. Indeed, the applicant goes so far as to say that the Court of Appeal, through this decision, is "practically encouraging an offender to persist in the face of [a complainant's] resistance" (leave argument, at para 62). The Court of Appeal's decision does none of these things. There is no merit to these *in terrorem* arguments.

69. Hyperbole aside, the applicant's argument appears to be that the Court of Appeal's decision is "highly problematic" because it ignored the power dynamic between the parties and that the events in the parking lot were simply a continuation of the power imbalance which the respondent exploited throughout the entire evening (leave argument, at paras. 54-55). But the trial judge made no such finding, either explicitly or implicitly.

70. Moreover, contrary to how the applicant repeatedly characterizes it, the trial judge made no finding that the complainant gave "limited consent" or "reluctant consent" to the sexual activities in the parking lot with the respondent (leave argument, at paras. 7, 54, 65). The trial judge simply found that the complainant consented to some of the sexual activities in the parking lot. The Court of Appeal was required to accept this factual finding for what it was – a finding of consent – and then in those circumstances assess what, if anything, supported the trial judge's decision to reject the respondent's evidence about related issues.

71. In all, the Court of Appeal's decision represents an application of well-established principles concerning the law of appellate jurisdiction in sexual assault cases to the findings of fact made by the trial judge. The applicant's disagreement with how the Court of Appeal applied these principles to the facts of this case is not an issue of national importance.

This case is different than *Kruk* and does not justify granting leave

72. This case gives rise to materially different issues than in *Kruk*. There is thus no basis for granting leave in this case so the two cases can be heard together.

73. The Crown in *Kruk* sought leave to address what it argued was the Court of Appeal's unwarranted intervention in finding that the trial judge speculated when he found that the complainant could not have been mistaken about experiencing the sensation of the accused's penis penetrating her vagina.

74. The Court of Appeal in *Kruk* found that the trial judge speculated when he accepted the complainant's evidence that she remembered being penetrated. It was this passage of the trial judge's reasons which the Court of Appeal found problematic: "[the complainant] said she felt [Mr. Kruk's] 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" (*Kruk,* at para. 30, emphasis added).

75. The Court of Appeal found that this amounted to impermissible speculation because being "mistaken about the feeling of a penis in their vagina is [not] the proper subject of judicial notice or common sense" and the trial judge's finding "was not grounded in the evidence, and engages questions of neurology (the operation of the body's sensory system), physiology (the impact of alcohol on perception, memory and the body's sensory system) and psychiatry (the impact of alcohol and/or trauma on perception and memory)" (*Kruk,* at para. 67).

76. The Crown argued on its leave application in *Kruk* that this represented a significant departure from the law and, indeed created an inconsistency in the law across this Country, on how to apply common sense and judicial notice in sexual assault cases on issues that engaged bodily autonomy (see, Crown leave argument, at para. 32 – arguing that the Court of Appeal's decision in *Kruk* was

directly contrary to the Manitoba Court of Appeal's decision in *R. v. Hunter,* 2016 MBCA 2, at para 3).

77. The law on applying common sense and judicial notice in sexual assault cases had a very specific application in *Kruk* – a woman could not testify about the sensation of a penis being inserted into her own vagina, at least without the Crown leading expert evidence. This has no application in this case. As the Crown argued on its leave application in *Kruk:* "it must be open to a trial judge as a matter of law to accept her to be a reliable historian about what she experienced happening to her own body" (Crown leave argument, at para. 48, emphasis in original). This legal principle has no application in this case. There is no reason why this Court should grant leave so it can be heard at the same time as *Kruk.*

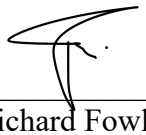
PART IV – SUBMISSIONS OF COSTS

78. The respondent does not seek costs and asks that costs not be awarded against him.

PART V - ORDER SOUGHT

79. That leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Richard Fowler, K.C.
Eric Purtzki
Counsel for the respondent

December 19th, 2022
Vancouver, B.C.

PART VI – LIST OF AUTHORITIES

Paragraph(s)