File No. 41322

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF SASKATCHEWAN)

BETWEEN:

HIS MAJESTY THE KING

APPELLANT (Respondent)

- and -

SOON HYONG KWON **RESPONDENT (Appellant)**

FACTUM OF THE APPELLANT

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

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PART I: OVERVIEW AND FACTS

Overview

1. Sexual assaults usually happen in secret. When the complainant was incapacitated, she can give no direct evidence of the assault or her capacity when it took place. That was the case here. The trial judge accepted the complainant had been drifting in and out of consciousness, had at most hazy impressions of her surroundings, and did not realise anyone had sex with her until later. The judge found beyond a reasonable doubt the complainant lacked capacity to consent.

2. The majority of the Court of appeal said this was unreasonable. For it, the complainant's lack of memory was equally consistent with the inference that she was a conscious and willing participant who by morning had forgotten having sex because she had been drinking. For the majority, this meant that no reasonable trier of fact could convict in these circumstances.

3. The dissenting justice noted the same considerations as the trial judge. He held one could convict on the evidence, if satisfied it was true. In that case, the majority's alternative – alcohol-related forgetfulness – would not be reasonable or leave the trier of fact in doubt.

4. Similar situations are relatively common. Judges frequently determine questions of capacity without direct evidence from the time the alleged assault took place. They must base findings on their view of the weight of circumstantial evidence taken in its totality. There will nearly always be different ways of interpreting such evidence; the trier of fact takes a holistic view and considers whether it is convinced beyond a reasonable doubt. The majority's decision would predetermine many such cases because a complainant's evidence often cannot negative the possibility she woke up, consented, and then forgot.

5. But this determination should usually be left to the trier of fact. The majority justices usurped the role of the trial judge by determining an alternate inference could not be negatived, when, as the dissent noted, a new judge could reasonably reject that inference and make the same factual findings as the trial judge. The appeal should be allowed and a new trial ordered.

Facts

6. The respondent was a bar owner, and the complainant was a patron of the bar to whom the respondent gave a ride home at closing time. The respondent interrupted the journey to have sex with the complainant. The Crown's theory was that the complainant was incapacitated at the time. The respondent was tried and convicted of sexual assault in 2018. The Court of Appeal overturned that conviction in 2020, relying on the Ontario Court of Appeal's decision in *R. v. G.F.*[1]

7. The respondent was retried and convicted by a King's Bench judge sitting alone. The Court of Appeal allowed the appeal, and the majority entered an acquittal. The dissenting justice would have ordered a new trial on the basis of the other errors; he did not agree the verdict was unreasonable.

The Trial

8. AD was an Indigenous 44-year-old woman who lived with her husband TD and their children at Sakimay First Nation. On the day in question, she got home from work around 4 p.m., drank some beer with her husband and the two went to the respondent's bar in town.[2] The trial judge found AD consumed at least 3 to 4 beers before she left home.[3]

9. The couple knew the respondent from having previously gone to his establishment. TD described the respondent as a friend and testified the respondent had driven him home about four times in the past. AD was present on two of those occasions.[4]

10. AD testified she had never been attracted to the respondent and would not have consented to sexual intercourse with him. She said she would not have consented to unprotected sex with

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[1] *R. v. G.F.*, 2019 ONCA 493, reversed in 2021 SCC 20, [2021] 1 S.C.R. 20.

[2] Reasons of the Court of King's Bench for Saskatchewan (CRM 51 of 2017), January 14, 2022, Appeal Record ["AR"], Vol I, Tab 1B, p. 2, ["Trial Decision"], at paras 1 – 2.

[3] Trial Decision at para 77.

[4] Trial Decision at para 38.

anyone other than her husband.[5] On cross-examination, she asserted the respondent was not "her type" because he was not her husband and she was not attracted to non-Indigenous men.[6]

11. At the bar, AD drank one additional beer and was showing signs of intoxication, which led TD to describe her as 'half cut' or 'feeling good.'[7] TD won some money playing at the VLTs, purchased a case of beer with those winnings and returned home, while AD stayed and continued to drink at the bar.[8]

12. AD ran into a friend, JI. The trial judge accepted JI's testimony that AD appeared intoxicated, her hair was disheveled, her speech slurred, and she was using her hand and the table to prop up her upper body.[9] The judge also accepted AD's evidence that she was having difficulty walking.[10] AD was testified she was more intoxicated than was typical for her when she went to the bar.[11] There was no taxi service to Sakimay First Nation so AD was hoping for a ride home but JI was unable to assist.[12] The trial judge found as a fact that AD consumed 7 or 8 beers at the bar or a total of 10 to 12.[13]

13. Just before closing time, AD asked the respondent if he could drive her home, and he agreed. This was around 2 a.m.[14] The trial judge accepted AD's evidence that she required help to

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[5] Trial Decision at para 25.

[6] Trial Decision at para 30; Trial Transcript, AR Vol. II, at pages T96, lines 3 – 22 and T121, lines 1 – 14.

[7] Trial Decision at para 77(1).

[8] Trial Decision at paras 2, 14 – 16.

[9] Trial Decision at para 77(2), Trial Transcript at pages T25, lines 24 – 27, T27, lines 1 – 18, and T29, lines 1 – 5.

[10] Trial Decision at para 77(3); Trial Transcript at pages T87, lines 8 – 18 and T89, lines 8 - 33.

[11] Trial Transcript, at page T88, lines 6 – 19.

[12] Trial Decision at paras 18 and 42.

[13] Trial Decision at para 77(1).

[14] Trial Decision at para 18.

walk a straight line from the front of the bar to the respondent's van and to get into the passenger seat.[15] The respondent had sexual intercourse with AD before taking her home.

14. AD testified she had difficulty remembering things from that night "because I was so drunk." She testified that she was passing out or losing consciousness on the drive because she had had too much to drink.[16]

15. The judge quoted directly from AD's testimony about what she remembered from the drive home. AD remembered going over railroad tracks, over a certain bridge, she remembered hearing the sound of gravel, she remembered "funny music" which she had never heard before, and at one point she had a memory of pain on her chest and seeing the passenger door opened.[17]

16. At this time, she remembered seeing a bush, and that there were no houses or lights. She remembered arriving at her house, hearing the dog bark, seeing a light, and going to sleep on the couch in her clothes.[18] This was unusual for her as she always changed into night clothes. It was also unusual for her to wake up with a hangover, as she did.[19]

17. The trial judge found AD's memory had been affected by the passage of time. In assessing AD's level of consciousness and capacity, the trial judge relied on AD's present memory, but also considered those details she previously remembered but had now forgotten.[20]

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[15] Trial Decision at para 77(4).

[16] Trial Decision at paras. 20 – 21; Trial Transcript, at pages T88, lines 8- 8 and T91, lines 4 – 30.

[17] Trial Decision, at paras. 20 – 22; Trial Transcript, at page T90, line 38 – T91, line 12; see also page

[18] Trial Decision, at para. 30; Trial Transcript, at pages T118, lines 1 – 36 and T121, line 22 – T122, line 33.

[19] Trial Decision, at para. 24; Trial Transcript, T93, line 25 – T94, line 3.

[20] Trial Decision at paras. 29 and 77(5).

18. The trial judge instructed herself that AD's lack of memory meant her evidence could not directly negative the possibility that she consented to sexual activity. AD's testimony that she would not have consented to sex with the respondent was relevant. However, the judge instructed herself to be cautious in approaching AD's evidence about what she would or would not have done, although she found AD to be credible and reliable.[21]

19. The trial judge considered whether the evidence which she accepted established the absence of consent. She accepted AD's evidence that during the drive home, she was drifting in and out of consciousness, her eyes were sometimes closed and her memory intermittent.[22]

20. The judge found that during what must have been vigorous sexual activity, AD's consciousness was reduced to the point that she only felt pain on her chest, saw the passenger door open and picked up some features of the landscape. The trial judge inferred AD was unable to fully understand what was happening to her.[23]

21. As noted, the trial judge accepted it was unusual for AD to have slept on the couch in her clothes and to be hungover. When AD noticed a discharge from her vagina, she 'freaked out.' She asked TD and he confirmed they did not have sexual relations the night before. She felt scared and went to the hospital.[24]

22. The results of a sexual assault examination revealed the presence of the respondent's DNA in the AD's underwear and vagina and established that the respondent sexually touched AD on the night in question.[25]

23. In summarising the evidence, the trial judge recounted other aspects of AD's testimony that featured prominently in the Court of Appeal's decision: AD testified that on a scale of 1 to

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[21] Trial Decision at paras. 72 and 74.

[22] Trial Decision at para. 77(5).

[23] Trial Decision at para 77 (6).

[24] Trial Decision at paras. 24 and 77(7) – (9).

[25] Trial Decision at paras. 5 and 6.

10, her level of intoxication was at around 4 prior to getting a ride home, with 7 being the most drunk she had ever been.[26] As noted, the judge quoted directly from AD's testimony about her memory of the drive home.[27] AD testified she was an alcoholic at the time and part of the problem with alcoholism was making poor decisions.[28]

24. The respondent testified at trial with the aid of a Korean interpreter. He maintained the sexual intercourse was consensual. He testified that AD was acting about the same as when she drank at the bar but not like the few occasions when she had become intoxicated. According to him, AD was not stumbling and walked unaided to the van at the end of the night.[29]

25. Sometime during the drive, AD asked to stop so she could urinate. When she returned, she mentioned the moon and the stars and began "talking very emotional." She did not seem intoxicated. She asked the respondent if he wanted to have sex with her. The respondent asked if she was okay and she answered affirmatively. They each took off their own pants and underwear and engaged in consensual vaginal intercourse for about two minutes. Afterwards, AD asked the respondent not to tell TD.[30]

26. The police interviewed the respondent twice. The respondent testified that in the first interview, he denied sexual activity occurred because of his promise to keep things secret.[31]

27. On the question of consent, the trial judge rejected the respondent's testimony and was not left in reasonable doubt by it. The trial judge offered four reasons for that conclusion. The respondent was inconsistent about whether AD was asleep, [32] at times he was unnecessarily

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[26] Trial Decision at para 17; Trial Transcript at page T87, lines 20 – 31.

[27] Trial Decision at paras. 20 – 21.

[28] Trial Decision at para. 26; Trial Transcript at page T101, lines 10 - 15.

[29] Trial Decision at paras. 48 – 49.

[30] Trial Decision at paras. 50 – 51.

[31] Trial Decision at para. 52.

[32] Trial Decision at para. 67(1).

argumentative including when he resisted admitting he lied in his first statement[33], he did not explain why he thought AD should not drive when he claimed that she seemed normal, [34] and his version of events was implausible. [35]

28. In contrast, the trial judge believed AD's evidence and found that she was neither trying to anticipate questions nor tailor her answers. She was consistent, responsive, restrained and careful. The trial judge found her credible and reliable.[36] The trial judge also found the other Crown witnesses were credible and reliable and accepted their evidence.[37]

29. Based on her factual determinations, the trial judge found AD was intoxicated to the point of not understanding that the respondent had penetrated her vagina and that she had a choice to refuse to participate.[38] Next, the trial judge found the respondent was both reckless and wilfully blind to the fact that AD was not capable of consenting. He failed to take reasonable steps to make sure AD was consenting. The respondent was convicted of sexual assault.[39]

The Court of Appeal Quashed the Conviction

30. The respondent appealed the conviction, alleging the verdict was based on a misapprehension of evidence, that the judge relied on myths and stereotypes not grounded in evidence, that she erred in consideration of reasonable steps, and that the verdict was unreasonable because it was predicated on a misapprehension of evidence, a failure to consider the evidence, or because it was unsupported by the evidence.[40]

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[33] Trial Decision at para. 67(2).

[34] Trial Decision at para. 67(3).

[35] Trial Decision at para. 67(4).

[36] Trial Decision at paras. 68 – 71.

[37] Trial Decision at paras. 75 – 76.

[38] Trial Decision at para. 78.

[39] Trial Decision at paras. 79 – 87.

[40] Reasons for Judgment of the Court of Appeal for Saskatchewan, AR Vol. I, Tab 1D, p. 40-41 ["CA Reasons"], at para 21

The Court Found Various Errors

31. The trial judge had instructed herself to approach "alleged inconsistencies" with caution given the use of interpreters and the fact that different interpreters assisted in the two different trials. In light of this, she found some inconsistencies were innocuous. However, she found the circumstances did not explain other inconsistencies regarding whether the complainant was asleep or how intoxicated she appeared.[41]

32. The Court of Appeal found this reflected error; it held there was no indication the judge grappled with particular difficulties in translation. The Court held that, in its view, the respondent's evidence did not contain inconsistencies.[42]

33. The Court of Appeal held that it was illogical for the judge to conclude AD would not "as a married woman, ask a man she did not know well to have sex, and then proceed to behave in the manner the respondent described. The Court of Appeal held the judge's conclusions in this regard were "generalisations" and "palpable errors, as they were obviously untrue on their face."[43]

34. In its discussion of *R v Kruk*,[44] the Court of Appeal stated the trial judge's reasons fell within the kinds of reversible error this Court identified. It stated that whether this Court's decision in *Kruk* unfairly disadvantages accused persons in sexual assault trials will depend on how willing courts of appeal are to identify "alleged errors of this kind" not just as errors of fact, "but as errors of law – as the analytical framework for appellate review demands."[45]

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[41] Trial Decision at paras. 66 – 67.

[42] CA Reasons at paras. 29 – 42.

[43] CA Reasons at paras. 63 – 65.

[44] *R v Kruk*, 2024 SCC 7.

[45] CA Reasons at paras. 56, 63 – 66.

35. The Court of Appeal also found the judge erred in her consideration of reasonable steps in the context of the respondent's argument that he harboured an honest but mistaken belief in consent. It held the judge failed to consider the respondent's rejected evidence that AD propositioned the respondent and removed her own clothes, erred in considering the respondent's testimony that he asked AD if she was okay, and wrongly characterised the respondent's understanding of capacity.[46]

The Majority Found the Verdict Was Unreasonable, and Acquitted

36. The majority noted the circumstantial nature of critical evidence, including that there was no direct evidence regarding the complainant's capacity at the material time.[47] It stated that a trial judge could not reasonably convict "unless the evidence met the test specified in *Villaroman*."[48] The majority found that the trial judge failed to consider other reasonable alternatives, "failed to undertake this analysis at all, in form or substance", and that this failure constituted an error of law.[49]

37. The majority said that at least one other reasonable inference existed based on the evidence. It held the trial judge was obliged to consider "whether A.D. had the capacity to and did consent to sexual intercourse but could not recall doing so due to her intoxicated state."[50]

38. The majority cited a lengthy list of evidence, including evidence regarding AD's interactions with TD, JI's observations, AD's testimony about how she felt and the physical effects of her intoxication, the things she could remember after asking the respondent to give her a ride, including the impression of pain on her chest and of seeing the passenger door open, and her evidence that she was an alcoholic and this was related to poor decision making.[51]

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[46] CA Reasons at paras. 73 – 76.

[47] CA Reasons at para. 78.

[48] CA Reasons at para. 79.

[49] CA Reasons at para. 81.

[50] CA Reasons at para. 81.

[51] CA Reasons, at para. 83.

39. The majority noted that A.D.'s evidence that she would not have consented to sex with a non-Indigenous man, or one who was not wearing a condom, was circumstantial evidence which had to be treated sceptically given that intoxicated people may make decisions they themselves consider poor or contrary to their moral code.[52]

40. The majority concluded "it is clear that this circumstantial evidence could support another inference" than the trial judge's determination the complainant lacked capacity:

> It would be reasonable to infer that A.D. was not unconscious at any point when she was in the van, but instead, that she had her eyes closed or was drifting in and out of a light sleep from time to time before the sexual encounter. [53]

41. The majority cited evidence which it said was capable of demonstrating the above possibility, including A.D.'s ability to make certain decisions, or ask for a ride while at the bar, the fact she remembered things before the sexual encounter "and, to a limited degree, during the sexual encounter" and her self-assessment of being a 4 out of 10 on the scale of intoxication.[54]

42. The majority said the above considerations were indicative of an operating mind. The "gaps" in A.D.'s memory were relevant circumstances related to her capacity, but they were "nothing more than that" because memory loss due to " 'blacking out', does not demonstrate that a person could not have understood the four things specified in *G.F.*"[55]

43. The majority concluded the trial judge "failed to apply the *Villaroman* principles" and failed to consider the other reasonable possibility available on the evidence- "that A.D. consented but did not remember having done so". It said this error was sufficient to allow the appeal.[56]

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[52] CA Reasons, at paras. 84 - 86.

[53] CA Reasons, at para. 87.

[54] CA Reasons, at para. 87.

[55] CA Reasons, at para. 88.

[56] CA Reasons, at paras. 89 – 90.

44. The majority then said it was required to determine whether a guilty verdict was even reasonably possible based on the evidence. It held that, for the reasons already given, the possibility that A.D. consented to sex and forgot about it was "plausible" and "no more speculative than the inference drawn by the trial judge". [57]

45. It said its inference was based on the evidence or lack there-of and "could not be reasonably excluded by a trier of fact, acting judicially." Finally, the majority said the trial judge's reasons were illogical, but stated it was unnecessary to explain the basis for that conclusion as an acquittal had to be entered.[58]

The Dissenting Justice Said a Judge Could Reasonably Convict

46. The dissenting justice agreed with the majority on all questions except its assessment of the reasonableness of the verdict, the accompanying discussion regarding the trial judge's analysis, and the remedy. He did not endorse anything beyond paragraph 76 of the majority judgment. Specifically, he did not endorse the view that the trial judge misapplied *Villaroman*, and he gave reasons for parting from the majority on the issue of remedy.[59]

47. The dissenting justice reproduced the portion of the trial decision where the judge listed the evidence she identified as relevant to the issue of capacity, and which she said convinced her beyond a reasonable doubt that the complainant lacked capacity to consent. While the dissenting justice agreed these findings of fact were tainted by the errors identified earlier in the majority judgment, he held that "a new trier of fact, based on the same evidence, *could* arrive at the same findings of fact upon which the guilty verdict was rendered in this case."[60]

48. If a new trier of fact were to reach the same factual conclusions as the trial judge, "then there would be no reasonable conclusion….other than that A.D. lacked capacity to consent" to having sex. This was especially apparent from the trial judge's reasonable conclusions that

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[57] CA Reasons, at para. 91.

[58] CA Reasons, at paras. 91 – 92.

[59] CA Reasons, at para. 95.

[60] CA Reasons, at paras. 96 – 97.

AD was "drifting in and out of consciousness", was aware of only a pain on her chest at the time intercourse must have been happening and registered only impressions of her surroundings at that time.[61]

49. The dissenting justice said that "a person in such a state of consciousness would not be capable of understanding the factors described in *R v G.F.*". Accordingly, he would have allowed the appeal on the basis of the other errors he found to exist and ordered a new trial.[62]

PART II: ISSUES

50. The Crown respectfully submits this case raises the following issue:

a. Did the majority of the Saskatchewan Court of Appeal err by entering an acquittal on the grounds the verdict was unreasonable?

51. This question should be answered in the affirmative for two reasons. First, the trial judge properly considered whether other inferences inconsistent with guilt left her with a reasonable doubt. The majority erred in its application of the standard of appellate review.

52. Second, the majority's finding that the trial judge failed to address inferences inconsistent with guilt should not have led it to enter an acquittal. This is because it is still for the trial judge to determine whether alternative inferences are reasonable in the circumstances.

53. By predetermining how that question had to be resolved, the majority usurped the function that properly belonged to the trier of fact conducting the retrial. In this case, the evidence was capable of supporting the conviction.

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[61] CA Reasons, at para. 97.

[62] CA Reasons, at para. 97.

PART III: ARGUMENT

54. This case is about the majority of the Saskatchewan Court of Appeal's approach to the standard of review. It is about the majority's erroneous approach in identifying an alternative inference it would have entertained had it been trying the case.

55. What got lost on the majority is that there was evidence on which a reasonable trier of fact could conclude the complainant was incapacitated at the material time. Because it was established the respondent had sexual relations with her at that time, the evidence was reasonably capable of supporting a conviction.

56. The mere fact the majority justices identified an alternate inference does not mean the trial judge failed to consider it or that a subsequent trial judge would be left with a reasonable doubt by it. The trial judge did not err in her application of the burden and standard of proof, but if she had, the appropriate remedy here would have been a new trial.

1. *R. v. Villaroman*

57. This Court's decision in *Villaroman* was primarily concerned with two things: assisting the trier of fact apply the criminal burden and standard of proof in a case that depends on circumstantial evidence; and cautioning the trier of fact not to "fill in the blanks" to support an inference of guilt, and in so doing, overlook alternate reasonable inferences.[63]

58. It is helpful to explain to the jury that to convict on circumstantial evidence, guilt must be the only reasonable inference that the evidence permits. This addresses both the reasonable doubt standard and the risk of the jury overlooking reasonable alternative inferences.

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[63] *R. v. Villaroman*, 2016 SCC 33, at paras. 25 – 31. Like the case at bar, *R. v. Villaroman* involved a decision by a judge sitting alone. Much of the case's focus, however, relates to assisting a jury with the risks associated with circumstantial evidence.

59. *R. v. Villaroman* did not create a new or more expansive standard of appellate review. Specifically, it did not invite courts of appeal to identify other conceivable inferences and find a verdict unreasonable on the basis that the Crown's case did not exclude them. The Crown's case need not exclude all possible inferences.[64]

60. A verdict is reasonable if it is one a properly instructed jury acting judicially could reasonably have rendered. In circumstantial cases, that necessarily means the jury must be satisfied guilt is the "only reasonable conclusion based on the totality of the evidence."[65] This standard involves asking whether the conclusion was reasonably available, and not whether the reviewing court would itself have reached it.

61. This Court adopted the following statement of principle:

> Circumstantial evidence does not have to totally exclude other conceivable inferences. If the trier of fact infers guilt because the alternatives do not raise a doubt in his or her mind, the verdict is not thereby rendered unreasonable*, ipso jure*. It is still fundamentally for the trier to fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt in the mind[s] of that trier.[66]

62. This Court noted that the line between a "plausible theory" and speculation may not be easy to draw. It held "it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation." It is only when the trier of fact's assessment was not reasonably available to it that an appellate court can intervene on the grounds the verdict was unreasonable.[67]

63. Instead of following that, the majority of the Court of Appeal treated its task as requiring it to undertake a series of inferential steps and determine afresh whether the trial judge's conclusions were open to her as a matter of logic. In short, the majority imported the standard

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[64] *R. v. Villaroman,* 2016 SCC 33, at paras. 55 – 56.

[65] *Ibid*, at para. 55.

[66] *R. v. Dipnarine*, 2014 ABCA 328, at para. 22.

[67] *R. v. Villaroman*, 2016 SCC 33, at paras. 38 and 70-71.

described in *R. v. Beaudry*.[68] Instead of asking whether the verdict was supportable on the totality of the evidence, the majority focused on what it said was an inference which it did not think could logically be excluded.

64. Respectfully, this was in error. Whether the totality of the evidence was capable of establishing incapacity was ultimately a matter of weight, [69] and the trial judge's weighing of the evidence was entitled to deference.[70]

65. The dissenting justice did not endorse any of the majority's views regarding the reasonableness of the verdict. Rather, he rightly held that if the findings of fact were not tainted by the other errors, a new trier of fact could arrive at the same conclusions and the same verdict as the trial judge. The result was not foreclosed as a matter of law or logic, and that is why he disagreed with the remedy the majority granted.[71]

2. The Trial Judge's Findings Were Reasonable in the *Villaroman* Sense

66. In this case, all three justices found the trial judge's findings were tainted by legal errors. The majority went on to find the verdict was not reasonably available on the evidence. It failed to recognise the judge's finding of incapacity was reasonably open to her, and that her factual findings supported the verdict. At the same time, the majority of the Court of Appeal failed to read the reasons generously, in context of the evidence and arguments, and with the presumption of the correct application of the law.

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[68] *R. v. Beaudry*, 2007 SCC 5.

[69] *R. v. C.P.*, 2021 SCC 19, at para. 284; This Court has previously expressed the same view in relation to the mens rea of an offence. The mental element of an offence, much like capacity, is personal to an individual and evidence in that regard may seldom be consistent with only one conclusion. See *The Queen v. Mitchell*, [1964] S.C.R. 471, at pages 479 - 480.

[70] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 113; *R. v. Villaroman*, 2016 SCC 33, at paras. 67, 69 and 71.

[71] CA Reasons, at para. 97.

a. The trial judge knew there was no direct evidence of important facts

67. The trial judge knew there was no direct evidence of what precisely happened. While she did not cite *R. v. Villaroman* or expressly list other possible inferences that could arise from the evidence, her decision shows she grappled with the fact there was no direct evidence of important aspects of the Crown's case – notably consent and capacity – and that she had to consider all the evidence to determine whether she was satisfied incapacity was proven.

68. In the relevant portion of its decision, the majority of the Court of Appeal overlooks that the trial judge assessed the nature of the case in very similar terms to how the majority itself described it. Here is what she said:

> Because Ms. [D] has no memory of engaging in sexual activity with Mr. Kwon, she cannot negative consent other than by saying she would never have consented to sexual intercourse with Mr. Kwon, nor would she have consented to have unprotected sex with anyone other than her husband.[72]

69. The judge went on to note the limited weight she was giving to the complainant's testimony about what she would have done.[73] It is difficult to see how she can be said to have misapprehended the nature of the case, or the task confronting her.

70. The trial judge then considered all the circumstances which led her to conclude incapacity was proven beyond a reasonable doubt. This included evidence of an advanced state of intoxication, evidence from the complainant that she had only indistinct impressions of things she felt, saw, and heard at the time, evidence that she was going in and out of consciousness, and evidence that she did not know she had sex until seeing the discharge the next day.[74]

71. That is to say, the judge considered the totality of the evidence, including evidence which circumstantially supported a finding of incapacity. She concluded she was satisfied beyond a reasonable doubt the complainant lacked capacity.

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[72] Trial Decision, at para. 72.

[73] Trial Decision, at paras. 73 – 74.

[74] Trial Decision, paras. 77 – 78.

72. The judge was responding to an argument raised by defence counsel who identified what he said were inferences inconsistent with guilt in the following argument:

> The first inference that can be drawn, that the complainant had capacity to consent. She consented to the sexual activity, and she does not want to admit her infidelity. … The second reasonable inference that can be drawn from the evidence, if the Court concludes beyond a reasonable doubt that the complaint has not fabricated the story, the second inference is that the complainant had capacity to consent. She consented, and that she doesn't remember doing so.[75]

73. So the trial judge was manifestly aware of the alternative inference on which the majority fixated. She obviously rejected it as unreasonable. She complied with the law.

74. The judge's reasons were not meant to be a jury charge or a replay of her analysis. In rejecting the respondent's evidence, the judge rejected factual inferences similar to those the Court of Appeal said she failed to consider. While she did so in the context of explaining why the respondent's testimony failed to raise a reasonable doubt, it is unfair to suggest the judge failed to consider whether the complainant consented and forgot or was otherwise unreliable.

75. Contrary to the majority opinion[76], *Villaroman* does not prescribe a "form". Even a jury charge does not require particular language. In some cases, the jury may need no instruction on how to approach circumstantial evidence.[77] A trial judge who is presumed to know and correctly apply the law need not go through a "watch-me-think" exercise.[78]

76. When she recognised that a finding of capacity depended on circumstantial evidence, and when she then addressed the circumstances which she concluded proved incapacity beyond a reasonable doubt, the trial judge was doing precisely what she was required to do.

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[75] Trial Transcript at T227/18 – 30. Defence counsel identified a third inference as well: that the respondent believed the complainant consented and took reasonable steps to ascertain consent.

[76] CA Reasons, at para. 81.

[77] *R. v. Villaroman*, 2016 SCC 33, at paras. 18 and 20 – 22, *R. v. Griffin*, 2009 SCC 28, at para. 33.

[78] *R. v. G.F.*, 2021 SCC 20, at para. 74; *R. v. R.E.M.*, 2008 SCC 51, at para. 45.

b. The majority did not apply the Villaroman standard of review

77. So what explains the majority's conclusion that the judge failed to consider other alternatives and accordingly erred in her application of the burden and standard of proof? With respect, the majority justices disagreed with the trial judge's view of the evidence and with the factual conclusions she drew. While the majority acknowledged the limits of appellate review,[79] it treated its factual disagreement as a legal dispute. More than that, it purported to identify errors in the judge's inferential reasoning which had little to do with asking whether the verdict was one a trial judge could reasonably have rendered.

78. To explain its conclusion that the trial judge failed to undertake the appropriate analysis at all, the majority justices referred to a lengthy list of evidence, all of which the trial judge referenced at some point in her decision, and some elements of which in fact described the complainant's mental and physical state at a time hours *before* she became intoxicated.[80]

79. The majority noted, as did the trial judge, that evidence about one's personal code of conduct may not be very probative in situations where a person is intoxicated and more likely to act in a manner contrary to that code.[81] But the majority then stated this:

> It is clear that this circumstantial evidence could support another inference, other than that drawn by the trial judge. It would be reasonable to infer that A.D. was not unconscious at any point… That is demonstrated by the fact that she remembered many things leading up to, following, and, to a limited degree, during the sexual encounter.[82]

80. Overstepping further into factual recasting, the majority noted AD was able to ask for a ride home and mentioned AD's assessment of her own level of intoxication. The Court held all this "is indicative of an operating mind that had the capacity to understand the four things listed in *G.F.*" It held that, while the gaps in AD's memory were relevant, they could not

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[79] CA Reasons, at para. 80.

[80] CA Reasons, at para. 83.

[81] CA Reasons, at paras. 84 – 86, Trial Decision, at para. 74.

[82] CA Reasons, at para. 87.

demonstrate incapacity. The majority said an alcohol-induced "black-out" is not the same thing as incapacity.[83]

81. Throughout, the majority did not ask whether the evidence reasonably supported the trial judge's conclusions but substituted its own view of what that evidence was indicative of. That is to say, the majority justices disagreed with where the trial judge drew the line between reasonable doubt and possible inferences which she considered implausible or unreasonable.

82. Here are some examples of the majority's disagreement with the trial judge's factual findings. The trial judge accepted the complainant's evidence that she was going in and out of consciousness because she had too much to drink. This finding of incapacity was also based on the fleeting and impressionistic nature of the complainant's recollection from that night, and the fact she could recall a feeling of pain but had no idea that she had sex.[84] For the Court of Appeal, these considerations were incapable of proving the complainant was unconscious.

83. The Court of Appeal appeared to place significant emphasis on the complainant's description of her intoxication as being 4 out of 10, with 7 being the most intoxicated she had ever been. While on its own this may sound like someone who is not that intoxicated, the trial judge considered this evidence together with the totality of the record including TD's evidence that AD was a 4 out of 10 before he left the bar (and before she consumed another 7 or so beers)[85], JI's evidence that AD was highly intoxicated[86], and AD's own testimony that she needed help walking[87] and was going in and out of consciousness "because [she] drank too much".[88]

84. While the evidence the majority said went into the mix included testimony about things that happened, and about AD's physical and emotional state, from a time when she had consumed

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[83] CA Reasons, at para. 88.

[84] Trial Transcript, at pages T90 – T93; Trial Decision, at para. 77 (5) – (6)

[85] Trial Decision, at paras. 35 and 77(1).

[86] Trial Decision, at paras. 41 and 77(2).

[87] Trial Decision, at paras. 19 and 77(3)-(4).

[88] Trial Transcript, at page T91, line 30.

only 4 or 5 drinks,[89] it excluded other evidence from its analysis which was important to the trial judge including that it was unusual for AD to have slept on the couch in her clothes, and it was unusual for her to feel hungover, as she did the next day.[90]

85. The majority relied in part on its interpretation that the complainant was "blacking out." This term was primarily used by the lawyers at trial. It was not defined by anyone during examination of the witnesses except for Crown counsel who used it as a synonym for "passed out" when examining JI and TD.[91] Crown counsel's definition was not the one adopted by the Court of Appeal. It referred to the same authorities as defence counsel referenced in his argument which used the term to mean something else.

86. AD did not testify she was "blacking out". In response to this suggestion, she testified there were things she did not remember from the bar, noting the passage of time.[92] The majority used its view of an ill-defined term, which it claimed described AD's condition, to buttress its disagreement with the trial judge's ultimate conclusions.

87. While a trial judge would be entitled to take a similar view of the evidence to that of the majority, this just highlights the problem with the majority opinion. It relied, not on a limited reweighing of the evidence for reasonableness,[93] but on undertaking the role of a trier of fact.

c. The wrong analytical lens

88. The question for the trial judge was whether AD had capacity. This is a determination regarding a person's state of mind or level of consciousness at the time of the sex act. It is typically undertaken with limited direct evidence from the complainant. The trial judge must assess the surrounding information and decide the matter on the weight of the evidence. That

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[89] CA Reasons, at para 83(a) and (b).

[90] Trial Decision, at para. 77(7) and (8).

[91] Trial Transcript, at pages T29, lines 1 – 5 and T57, lines 25 – 27. Defence counsel appeared to use the word in a different sense in his cross-examination of JI.

[92] Trial Transcript, at page T107, lines 37 – 39.

[93] *R. v. Yebes*, [1987] 2 S.C.R. 168, at para. 25

evidence may contain a mix of factors which point in different directions. It is for the trier of fact to decide whether the complainant lacked capacity on the totality of the evidence.

89. The only alternative to a lack of capacity is that the complainant had capacity. When the majority singled out an "inference the trial judge was obliged to consider" it identified nothing more than the negation of the element of the offence and a possible explanation for why the complainant gave no direct evidence (she forgot due to intoxication).[94]

90. The majority's description of this "inference" in the language of *Villaroman* did not promote a safeguard against speculative reasoning; it betrayed an insistence on formalism that the law, including *Villaroman*, abhors.[95] More than that, it invited intrusion by a court of appeal into the trial judge's exclusive province, under the veneer of legally permissible review.

91. When the trial judge determined AD lacked capacity, she made a finding on the only live issue at trial while responding to and rejecting the respondent's arguments (or 'inferences.') The Court of Appeal ought to have read the decision in the context of the trial as a whole, including the submissions of counsel.[96] Instead, it found an error of law in the judge's putative failure to express her decision in the inferential language of *Villaroman*.

92. After finding these errors of law, the majority took matters further and determined the verdict was also unreasonable. A conviction can be reviewed for reasonableness under two headings. First, an unreasonable verdict is one that a properly instructed jury acting judicially could not have reasonably rendered (the *Biniaris / Yebes* standard). A court of appeal cannot substitute its view for that of the trier of fact, but may review, analyse and, within the limits of appellate

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[94] CA Reasons at paras. 81 and 89. See also *R. v. Owston*, 2023 SKCA 101, at paras. 20, 51 – 53 and 56; *R. v. Demong*, 2023 SKCA 109, at paras. 28 – 29; *R. v. Kishayinew*, 2019 SKCA 127, at paras. 25 – 27 and 31 – 32, reversed in 2020 SCC 34.

[95] *R. v. Villaroman,* 2016 SCC 33 at para. 18; *R. v. Griffin*, 2009 SCC 28 at para. 33; *R. v. Mayuran*, 2012 SCC 31 at para. 38.

[96] See *R v G.F.*, 2021 SCC 20 at para 69.

disadvantage, weigh the evidence. The process is the same whether the case is based on circumstantial or direct evidence.[97]

93. In the context of judge-alone trials, an appellate court may also identify a flaw in the trial judge's analysis and evaluation of the evidence. Under this heading, a verdict is unreasonable if it is reached illogically or irrationally (the *Beaudry / Sinclair* standard). This second inquiry is narrowly targeted at flaws in the trial judge's reasoning process.[98]

94. While the majority said it was considering whether the verdict was one the trial judge could reasonably have rendered, the decision was fundamentally concerned with alleged flaws in the trial judge's inferential reasoning (*Beaudry / Sinclair*)[99] rather than whether the weight of evidence supported the verdict (*Biniaris / Yebes*).

95. But as Côté J. pointed out in her dissenting opinion in *R. v. C.P.*, the issue of capacity is a matter of weight, reviewable under the *Biniaris / Yebes* standard:

> C.P.'s second ground of appeal is that the evidence available to the trial judge was capable of supporting neither her finding of incapacity nor, as a result, the verdict of guilty (*R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381). As I mentioned above, if this second ground should succeed, the result will be an acquittal instead of a new trial. Where, as in the instant case, the Crown's case is based on circumstantial evidence, the appeal court must determine "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 55). In contrast with the ground of unreasonableness under *Beaudry* and *Sinclair*, which is concerned with "fundamental flaws in the reasoning process that led to [the trial judge's verdict]" (*Sinclair* , at para. 4, quoting para. 77 (text in brackets in original); see also *Beaudry*), this second ground of appeal is concerned with the weight of the evidence in the record. It "requires the appellate court to re-examine and to some

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[97] *R v Yebes*, [1987] 2 SCR 168 at p 186 *a – e*; *R v Biniaris*, 2000 SCC 15 at paras 36 – 37; *R v C.P.*, 2021 SCC 19 at para 28.

[98] *R v Beaudry*, 2007 SCC 5, and *R v Sinclair*, 2011 SCC 40; *R v C.P.*, 2021 SCC 19 at paras 29 – 30.

[99] See CA Reasons at para 92.

> extent reweigh and consider the effect of the evidence" (*Villaroman*, at para. 55; see also *Biniaris*, at para. 36).[100]

96. The majority did say it considered the verdict was unreasonable in the *Beaudry* sense, but that it was not necessary to detail why that was. Respectfully, this was simply because the majority had already reviewed the decision for *Beaudry* errors under the heading of considering whether the evidence was capable of proving the respondent's guilt.

97. While we address this in more detail when we explain why the evidence was capable of supporting the conviction, we note the majority's recasting of the complainant's hazy memories as being indicators of an operating mind flow from the view it took of the evidence rather than something that was compelled by logical inference.

98. If a judge accepts a woman only remembers feeling pain on her chest from the time she was subjected to vigorous sexual activity the night before, it is reasonable to conclude she was not willingly and knowingly engaging in consensual sex which she promptly forgot, while retaining a memory of the less intimate sensations she experienced elsewhere on her body. Indeed, the fact she recalled pain but not the more intrusive (but presumably less painful) sex act, indicates *reduced* consciousness rather than an "operating mind".

99. If a judge accepts that a woman has impressions of the car door being open, of seeing a bush outside, of the sound of gravel, of unusual music, that judge need not conclude the woman was oriented to her surroundings, capable of understanding the nature of a sex act, and capable of giving consent to it. Indeed, as the dissenting justice pointed out, this evidence is capable of supporting a finding that the woman was in a reduced state of consciousness such that she "would not be capable of understanding the factors described in *R v G.F.*".[101]

100. The majority judgment reconsidered the evidence, not to address whether, taken as a whole, it was capable of supporting the trial judge's inferences, but to conduct its own assessment. This was different from the limited reweighing described ted in *R. v. Villaroman*. It was the

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[100] *R v C.P.*, 2021 SCC 19 at para 284 (*emphasis added*).

[101] CA Reasons, at para. 97.

majority's factual disagreement with the trial judge and its own view of logical inference that underpinned its conclusion the judge did not properly apply the burden and standard of proof.

3. The Majority Erred by Entering an Acquittal

101. It was not a fair or accurate assessment of the trial judgment to hold the judge erred in her application of the burden and standard of proof. But even if that were true, the Court of Appeal ought not to have entered an acquittal.

102. It did so because it identified an alternate inference which it said was impossible to negate. But as the dissenting justice pointed out, the trial judge's factual findings were supported by the evidence and were inconsistent with the majority's inference. A new trier of fact could consider that inference and find it not to be reasonable in light of the evidence it accepted.

103. The evidence was capable of supporting the verdict and it should fall to a new trier of fact to consider whether the majority's inference is a plausible alternative that leaves it with a reasonable doubt or is simply speculative in light of the accepted evidence.

a. The evidence was capable of supporting a finding of incapacity

104. The majority of the Court of Appeal held no reasonable trier of fact could convict on this evidence. As noted, the majority conducted its analysis by identifying another inference which could be sustained only by taking a different view of the evidence. Without having heard or seen the witnesses, it reapportioned the weight the trial judge gave different factors, it gave prominence to some evidence on which the trial judge did not place much weight and failed to consider other evidence which had factored into the trial judge's assessment.

105. While a new trier of fact might well have a doubt about some important aspect or other of the Crown's case, the evidence was capable of supporting the verdict and the majority justices erred by concluding it was not. The majority's error relates to the standard of appellate review, as we have addressed, and to its view of the probative value of the evidence on which the judge relied. It also relates to the majority's understanding of capacity.

106. In *R. v. G.F.*, this Court said that to have capacity to consent to sexual activity one must have an operating mind capable of understanding the physical act, its sexual nature, the identity of the other party, and that one has the choice to refuse.[102]

107. The victim in *G.F.* testified that she had been drinking heavily throughout the evening. She testified she passed out and regained consciousness to find the sexual assault already underway at which point she initially resisted before giving in, feeling she had no choice, and feeling sick and dizzy from intoxication. This Court said it was open to the trial judge to find the victim was incapacitated on the strength of this evidence.[103]

108. There will always be different ways of explaining why a complainant behaved in a certain manner, especially when we do not have direct evidence from her. Trial judges consider the evidence holistically. The reviewing Court's job is not simply to ask whether the trial judge missed an alternative inference that it was able to identify, but to ask whether the view the trial judge took of the evidence was one that was reasonably open to her.[104]

109. Here, the trial judge accepted, that AD at times lost consciousness due to her intoxication. Unlike the victim in *G.F.*, the trial judge accepted that when sexual intercourse was taking place, AD was unaware of the fact and felt only pain on her chest. Her other memories of the drive home were at most sensory flashes of sound, feeling, or images without context.

110. This evidence was at least as consistent with a finding of incapacity at the relevant time as was the victim's in *G.F.* As the dissenting justice said, another trier of fact "could arrive at the same findings of fact upon which the guilty verdict was rendered", in which case:

> there would be no reasonable conclusion – in the way that term is interpreted in *R v Villaroman*….- other than that A.D. lacked capacity to consent to sexual intercourse. This is particularly apparent from the trial judge's determinations that the evidence established that A.D. was "drifting in and out of consciousness" at the time of the sexual intercourse and "during what can only have been vigorous sexual activity, her level of consciousness was

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[102] *R. v. G.F.*, 2021 SCC 20, at paras. 57-58.

[103] *Ibid*, at para. 64.

[104] *R. v. Villaroman*, 2016 SCC 33, at para. 67

> so reduced she registered only a feeling of pain on her chest, perhaps the front passenger door of the van in an open position, a bush to the left, and no houses or lights in the area"…. A person in such a state of consciousness would not be capable of understanding the factors described in *R v G.F.*".[105]

111. The majority broke from the dissent in the view it took of the evidence, and in its understanding of how the evidence related to capacity. Given how it applied the law to the evidence, it also appears it equated incapacity with something near unconsciousness.

112. The dissenting justice anchored his decision in the test for capacity, and in appropriate deference to the role of the trier of fact. He recognised that if on a retrial a judge accepted the facts accepted by this trial judge, she could conclude the complainant was incapacitated and that the alternate "inference" that she had capacity would not be reasonable. This was legally correct, and this Court should endorse the dissenting justice's opinion.

b. It is for the trial judge to determine whether alternate inferences are reasonable

113. It is for the trier of fact to determine whether evidence or an evidentiary inference leaves it with a reasonable doubt. The existence of a possible alternate inference does not predetermine the outcome of a trial. A verdict is not rendered unreasonable simply because some alternate inference has not been excluded entirely.[106]

114. The fact a judge weighs evidence differently from how the Court of Appeal would have weighed it does not support the conclusion the judge failed to consider evidence or evidentiary inferences. But if the record establishes the trial judge failed to consider critical evidence or a critical inference, it does not follow that the Court of Appeal may simply substitute its view of the evidence or draw its own inferences.[107] The remedy will most often be a retrial. In that case, it falls to the subsequent trier of fact, who will have the benefit of

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[105] CA Reasons, at para. 97.

[106] *R. v. Dipnarine*, 2014 ABCA 328, at paras. 22 and 24 – 26; *R. v. Villaroman*, 2016 SCC 33, at para. 56.

[107] *R. v. Morin*, [1992] 3 S.C.R. 286, at pages 295 – 297.

receiving evidence first-hand, to determine whether an alternate inference leaves it with a reasonable doubt on consideration of all the evidence.

115. This was not a case where the circumstantial evidence was incapable of supporting the verdict. The acquittal entered on appeal deprived a trier of fact of its essential function. It disturbed the division of judicial labour that lies at the heart of the appellate process.

116. Not all triers of fact would reach the same conclusion as the trial judge. But the standard of proof does not require unanimity among all potential judges or juries. Nor does *Villaroman* generally contemplate appellate courts coming up with theoretical possibilities and declaring them reasonable without the benefit of having conducted the trial and heard and assessed the actual evidence. In fact, that was the situation this Court addressed in *Villaroman*.

117. The Court of Appeal's role is to determine whether it was reasonably open to the trier of fact to draw the line between alternative inferences where it did, and find guilt proven. The majority did not adhere to its role. It stepped into the domain of the trier of fact and stated where the line *had* to be drawn. In supplanting the role of the trial judge, it overstepped the bounds of appellate review and committed a reversible error of law.

4. The Issue Is Bigger Than This Case

118. In cases involving allegedly incapacitated victims, there is frequently no direct evidence regarding the complainant's capacity. Many cases involve intoxicated complainants whose evidence about the lead-up to the sexual encounter is characterised by fragmentation, as was the case for AD. Few complainants can give direct evidence to negative the suggestion they had capacity but were forgetful.

119. Incapacity cases, like this one, typically turn on a trial judge's conclusions regarding the weight of all the circumstantial evidence relevant to capacity and consent.[108] This case is not readily distinguishable from many – or most – cases involving an incapacitated complainant.

[108] *R. v. C.P.*, 2021 SCC 19, at para. 284, as per Justice Côté in dissent, but not on this point.

120. If convictions where trial judges have found the circumstantial evidence proves incapacity beyond a reasonable doubt can be overturned simply because, in the Court of Appeal's view, the evidence does not rule out the possibility the complainant forgot she consented due to intoxication, reasonable convictions will be liable to reversal on appeal. More importantly, a vulnerable segment of society will lose a level of protection currently afforded by the law. Women from already vulnerable groups will be most affected by this loss of protection.

PART IV: COSTS

121. The Attorney General makes no submissions on the issue of costs.

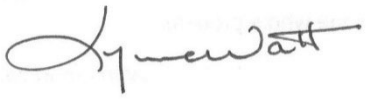
PART V: ORDER SOUGHT

122. The Attorney General respectfully asks this Court to allow the appeal and order a new trial.

PART VI: CONFIDENTIALITY ORDER

123. There is a publication ban covering the complainant's name and information that might identify her.

ALL OF WHICH is respectfully submitted, DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of November, 2024.



for:

Andrew Stuart Davis

Agent of the Attorney General for the Province of Saskatchewan, Counsel for the Appellant, His Majesty the King

PART VII: TABLE OF AUTHORITIES AND LEGISLATION

Cases	Cited at Para
Law Society of Saskatchewan v. Abrametz, 2022 SCC 29	64
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