

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Stanton*, 2021 NSCA 57

**Date:** 20210720

**Docket:** CAC 497814

**Registry:** Halifax

**Between:**

James Stanton

Appellant

v.

Her Majesty the Queen

Respondent

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**Restriction on Publication: Section 486.4 of the *Criminal Code***

**Judge:** The Honourable Justice Anne S. Derrick

**Appeal Heard:** June 9, 2021, in Halifax, Nova Scotia

**Subject:** Criminal law. Sexual assault. Standard of review for the Summary Conviction Appeal Court. Deference to trial judge's credibility findings. Assessing credibility and reliability in the context of the totality of the evidence.

**Summary:** The Appellant was convicted of sexual assault contrary to s. 271 of the *Criminal Code* following a trial in Provincial Court. His appeal against conviction was dismissed by the Summary Conviction Appeal Court. The Appellant did not testify at trial. His counsel argued the sexual intercourse with the complainant was consensual and that she claimed it was not only after the Appellant texted her to say there would be no further sexual intimacy between them. The Appellant argued on appeal to this Court that both the SCAC judge and the trial judge committed errors of law. He said the presumption of innocence was sidelined by the trial judge who assumed the complainant's credibility and failed to consider the whole of the evidence in assessing the ultimate issue of reasonable doubt. He said the SCAC judge exclusively applied the palpable and overriding error standard

of review to the trial judge's credibility findings when he should have examined the reasons for legal error.

**Issues:**

- (1) Should leave to appeal be granted?
- (2) Did the SCAC judge err in law in how he dealt with the trial judge's assessment of the complainant's credibility and reliability?
- (3) Did the trial judge err in assuming the credibility of the complainant's evidence rather than presuming the Appellant's innocence, and fail to consider the whole of the evidence in assessing the ultimate issue of reasonable doubt?

**Result:**

The application for leave to appeal is granted but the appeal is dismissed. The SCAC judge's analysis of the trial judge's approach to the Crown's case was overwhelmingly characterized by an assessment of whether there had been palpable and overriding error. His examination of the question of legal error – had the trial judge assumed the complainant's credibility and examined the individual items of evidence in a piecemeal fashion, as argued by the Appellant – was cursory and inadequate. He erred in law by not affording the Appellant the appeal to which he was entitled.

This Court was well-equipped to step into the shoes of the SCAC and address the Appellant's allegations of error against the trial judge. The trial judge had to be correct in his approach to assessing whether the Crown had discharged its burden of proving beyond a reasonable doubt that the complainant did not consent to sexual intercourse with the Appellant. Substantial deference is owed to the trial judge's assessment of credibility absent error of law. The trial judge's analysis of whether the complainant's evidence of non-consent considered the evidence in its totality, including evidence the Appellant argued was damaging to the complainant's credibility and raised a reasonable doubt. The trial judge committed no error in finding the complainant credible and determining, on the whole of the evidence, he had no reasonable doubt about the Appellant's guilt.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 32 pages.*

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**Judges:** Wood, C.J.N.S., Bourgeois and Derrick, JJ.A.

**Appeal Heard:** June 9, 2021, in Halifax, Nova Scotia

**Held:** Leave to appeal granted; appeal dismissed, per reasons for judgment of Derrick, J.A.; Wood, C.J.N.S., and Bourgeois, J.A. concurring.

**Counsel:** Philip Campbell, for the appellant  
Glenn A. Hubbard, for the respondent

## **Order restricting publication – sexual offences**

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

## **Limitation**

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

## **Reasons for judgment:**

### **Introduction**

[1] On May 6, 2019, James Stanton was convicted in the Provincial Court of Nova Scotia of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge, Judge Richard MacKinnon, imposed a ten-month conditional sentence with two years' probation and ten years' mandatory registration under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10. Mr. Stanton's appeal against conviction to the Summary Conviction Appeal Court ("SCAC") was heard on December 16, 2019. On February 27, 2020, Justice N. Scaravelli dismissed the appeal (2020 NSSC 74). Mr. Stanton then filed a Notice of Appeal and application for leave to appeal.

[2] Mr. Stanton did not testify at his trial. His counsel argued the sexual intercourse with the complainant, A.R., on November 10-11, 2017, was consensual and her allegation that it was not only emerged once Mr. Stanton told her there would be no further intimacy between them.

[3] Mr. Stanton says the SCAC judge and the Provincial Court judge each committed errors of law. He argues the trial judge failed to foreground the presumption of innocence, assumed A.R.'s credibility, and neglected to consider the whole of the evidence in assessing the ultimate issue of reasonable doubt. He says the SCAC judge exclusively applied the lens of palpable and overriding error to the judge's credibility findings when he should have examined the reasons for legal error. Mr. Stanton is seeking a new trial.

[4] For the reasons that follow, I am satisfied leave should be granted on the basis of legal error by the SCAC judge. Mr. Stanton has questioned many aspects of the trial judge's reasoning. None, in my view, warrant appellate intervention. I would dismiss the appeal.

### **Overview of the Trial Evidence**

[5] The Appellant and A.R. were first year students at St. Francis Xavier University in Antigonish. The Appellant was 19 years old. A.R. was 18. They lived in an on-campus student residence that was divided into a male section – MacNeil – where the Appellant lived, and a female section – Chillis – where A.R. lived. They each had roommates. Patrick MacDonald was the Appellant's roommate.

A.R.'s roommate was E.D.; they had been friends in high school. Their close friendship had cooled somewhat although they continued to socialize and spend time together.

[6] The Appellant and A.R. met during their first week at the university in September 2017. Their contact at weekend parties evolved into a series of sexual encounters that involved mutual oral sex but no intercourse.

[7] A.R. testified to having pursued a relationship with the Appellant. Her interest and enthusiasm was not reciprocated. She described the relationship as one of "acquaintances". She was considerably more emotionally invested. Although she did not remember doing so, A.R. acknowledged when cross-examined that she had told the police investigator about an occasion approximately a month before the incident when she had "made out" with one of the MacNeil residents to try to make the Appellant jealous.

[8] A.R. testified that a couple of weeks before November 10-11, the Appellant had wanted to "go further" than oral sex but she said no. The Appellant did not press the issue and no intercourse occurred.

[9] On November 10, A.R. and E.D. attended a party at MacNeil. A.R. was drinking alcohol and described herself as drunk. As the party was winding down, she connected with the Appellant. They started kissing. Eventually they were alone in the room. The Appellant asked A.R. if she had a condom. She replied that she did. She testified she brushed off the comment, not thinking much about it. There had been a previous sexual encounter where she and the Appellant had discussed getting a condom. She had subsequently obtained one from the student office in her residence.

[10] The location of the condom was a focus of defence questioning of A.R. and E.D.. It ended up on a shelf above A.R.'s bed having previously been kept in her desk drawer. It was within easy reach of the bed.

[11] The Appellant and A.R. left MacNeil and ended up in A.R.'s room. They had first gone to the Appellant's room, but Mr. MacDonald was there. A.R. suggested going to her room as E.D. had left the party earlier and gone out to a pub.

[12] A.R. testified the kissing and mutual oral sex that occurred when they got to her room was consensual. She and the Appellant were naked, and she was content

with the nature of their sexual intimacy. She said what happened next was unexpected and unwanted. The Appellant put the condom on and penetrated her. She testified she tried in various ways to get him to stop, including verbally. She was unsuccessful. She testified the Appellant placed his hands around her throat, choking her, and perpetrated three separate acts of sexual intercourse, none of which she consented to.

[13] The first act of intercourse ended when the Appellant stopped, telling A.R. he had to go to the washroom. A.R. said when he returned she was looking for her phone on the desk to call E.D.. A.R. testified the Appellant proceeded to have sexual intercourse with her on the desk and again on the bed. She tried to distract him and told him to stop, with no effect.

[14] The Appellant then pulled the blanket over both of them, put his arm around A.R. and went to sleep. She testified she lay there “trying to figure out what I was going to do, and how I was going to get out of the situation”.

[15] The aftermath of the sexual intercourse was described in testimony from A.R. and E.D. who returned to the room to find the door locked. A.R. did not respond to E.D. pounding on the door and calling out to her. Once E.D. gained entry she made observations about A.R. and the Appellant in bed that caused her to infer they had been engaged in consensual sex. She was very angry at the messy state of the room including a discarded condom on the floor.

[16] After directing A.R. to clean up the clothing and other mess, E.D. left the room to let off steam by calling her boyfriend. When she returned fifteen minutes later, A.R. and the Appellant were in bed. A.R. had tidied the room up and texted E.D. that she had done so. E.D. got into her bed, and she and A.R. texted back and forth. A.R. said nothing to E.D. about being sexually assaulted.

[17] The Appellant left in the morning before E.D. woke up. A.R. got a text from him at 9:32 a.m. The text read: “Okay, I’m not real sure what happened last night, but I hope it won’t happen again” followed by “This is not happening again”. A.R. did not immediately respond. She testified the text made her angry and upset because the Appellant was denying what happened.

[18] When A.R. responded at 11:28 a.m. to the Appellant’s text, she said: “You’re right. It won’t happen again. I didn’t want last night to happen in the first place”.

[19] A.R. testified that once E.D. awoke in the late morning, she told her she had been sexually assaulted. E.D.'s evidence described A.R. looking distraught and starting to cry. She put her covers over her head. E.D. did not quite hear what A.R. said and testified it was "something along the lines of...I didn't want to do it" or "I wish I didn't do it" or something along those lines". It was E.D.'s impression A.R. was expressing regret for losing her virginity to drunk sex. E.D. said she tried to console A.R. by hugging her, telling her not to worry about it and reassuring her that the first experience of intercourse never measures up to expectations. E.D. testified that after her intervention A.R. seemed better.

[20] A.R. and E.D. then went to meal hall. The Appellant came in with other MacNeil residents and they sat in their usual spot next to the Chillis table. A.R. testified the Appellant was telling his friends how drunk he had been the night before and how he didn't really remember what had happened.

[21] After meal hall, A.R. told a Community Advisor in the residence building she had been sexually assaulted. This led to her being directed to the hospital for an examination by a SANE (Sexual Assault Nurse Examiner) nurse. She subsequently gave a statement to police.

### **The Trial Judge's Decision**

[22] The trial judge rendered a lengthy unreported decision totalling 158 paragraphs. He began by properly instructing himself on the presumption of innocence and the onus on the Crown to prove all the elements of an offence beyond a reasonable doubt. He reviewed the principles espoused in *R. v. Lifchus*, [1997] 3 S.C.R. 320:

- The standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- The burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- A reasonable doubt is not a doubt based on sympathy or prejudice;
- Rather, it is based upon reason and common sense;
- It is logically connected to the evidence or [the] absence of evidence;
- It does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and

- More is required than proof that the accused is probably guilty – a jury which concludes only that the accused is probably guilty must acquit.

[23] The judge noted who had testified: A.R., E.D., and the SANE nurse, Amanda Horne, for the Crown. The defence witnesses were the Appellant's roommate, Patrick MacDonald, and Ethan Mastin, another St. F.X. student from the 2017-2018 school year. The judge signaled his intention to review some but not all of the evidence from the trial:

I am going to refer to some of the evidence during the course of giving this decision, but I am not going to refer to all of the evidence, but I have considered all of the evidence in arriving at a decision. It will be noted during the evidence of [A.R.] that she was cross-examined by defence counsel, Thomas Singleton, about prior sexual conduct with respect to James Stanton. She was also cross-examined about making a statement about sexual conduct with respect to Mr. Stanton. Ethan Mastin gave testimony about [A.R.] making a statement about sexual conduct with respect to Mr. Stanton. All three of these subjects were the subject of an application by defence counsel to introduce this evidence. I allowed this evidence after hearing an application pursuant to Section 276 of the *Criminal Code* so that Mr. Stanton would be enabled to have a full answer and defence.

[24] The judge set out the witnesses' testimony sequentially over 121 paragraphs of his reasons. His analysis followed. It began with his self-instruction on determining credibility:

In every criminal trial the Court is required to make findings with respect to the credibility and reliability of witnesses. A Court can accept all of a witness's testimony, none of a witness's testimony or some of a witness's testimony. Some of the factors that the Court can take into account in determining credibility and reliability are whether or not a witness's evidence is consistent within itself. Also, whether or not a witness's evidence is consistent with known facts or the evidence of other witnesses. Also, the Court can take into account whether or not a witness appears to be exaggerating or embellishing as compared to truthfully relating what they observed. The Court can also take into account whether or not a witness's evidence appears to make sense.

[25] The judge followed with a recital of paragraphs 10, 11 and 12 of the much-cited decision of *Faryna v. Chorny*, [1951] B.C.J. No. 152, on the credibility and reliability of witnesses. The *Faryna* paragraphs include this statement about assessing the credibility of witnesses where there is conflict in the evidence: "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and

informed person would readily recognize as reasonable in that place and in those conditions”.

[26] The defence theory for A.R.’s allegations of sexual assault was that she made them up after the Appellant’s dismissive text on November 11. The judge described defence counsel’s characterization of what occurred: A.R. was “dumped” by the Appellant. He noted the Crown viewed the arguments of defence counsel as relying on stereotyping and prohibited reasoning about sexual assault complainants.

[27] The judge approached the task of assessing the Crown’s case against the Appellant by addressing evidence the defence had argued adversely affected A.R.’s credibility and otherwise constituted circumstantial evidence raising a reasonable doubt. He specifically considered:

- A.R. describing her relationship with the Appellant as one of “acquaintances” when they had spent time together at parties and previously had engaged in mutual oral sex. (This was in response to the Crown asking her in direct examination whether she would describe her relationship with the Appellant as “positive”. On cross-examination she said she never saw them as friends. “We couldn’t talk outside of being out together after parties”. A.R. testified that in October she had been pursuing the Appellant and wanted to establish a relationship with him. She never denied or obscured the fact they had engaged in consensual mutual oral sex previously. The judge said that “in everyday parlance when somebody is not a friend they are usually an acquaintance”.)
- A.R.’s reaction to overhearing the Appellant describe her on an earlier occasion as annoying. She could not recall being upset when she overheard the comment. E.D. had testified to being concerned about A.R. and that A.R. was located by campus security “wandering around campus”. (A.R. testified she had been drinking a lot on “that night in particular” and recalled being outside and seeing her friends come looking for her. She did not recall being found by campus security. She said she would have told E.D. that she overheard the Appellant say she was “annoying”.)

The trial judge appears to have accepted E.D.’s evidence that A.R. reacted to the “annoying” comment, finding it to be “understandable” given her

feelings toward the Appellant. He did not find that reaction damaged her credibility.

- Ethan Mastin’s evidence that A.R. had said in his presence “What do I have to do to get Griffy<sup>1</sup> to fuck me?” (A.R. testified she never said this. The trial judge accepted A.R. had made the statement and concluded she had failed to admit to making the statement. He said this did not affect his assessment of her credibility in relation to her evidence about what happened on November 10 and 11.)
- A.R.’s evidence about moving the condom to the shelf by her bed. (According to A.R. she had moved it the previous week. E.D. said she noticed it had been moved on November 10. E.D. did not testify she saw A.R. move the condom on November 10, only that she noticed on November 10 it had been moved.)
- E.D.’s assumption that A.R. had consensual sex with the Appellant. (E.D. testified that on the morning of November 11, A.R. had put her bedcovers over her head and made a statement E.D. didn’t quite hear, evidence the judge reviewed:

...at this point [E.D.]said:

I didn’t quite hear exactly what she said, but she said something along the lines of, like...like, I didn’t want to do it or I wish I didn’t do it or something along those lines.

[E.D.], in my view, then jumped to the conclusion that she had said, I wish I didn’t do it, and remember [A.R.’s] testimony about [E.D.] being judgmental and making [A.R.] feel bad. [E.D.] made, in my view, feeble attempts to console her and her assumption that [A.R.] had moved the condom on November 10<sup>th</sup>, 2017, fits in very well with her assumption that [A.R.] had consensual sex with Mr. Stanton. For that reason, I do not conclude that [E.D.] is reliable in her assumption that [A.R.] moved the condom on November 10<sup>th</sup>. I do not conclude that [E.D.]’s evidence on this point adversely affects the credibility of [A.R.].

- The exchange the Appellant and A.R. had about whether A.R. had a condom and the fact that A.R. did have a condom. (The judge found the fact A.R. “had a condom and had obtained a condom several weeks before

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<sup>1</sup> “Griffy” was the Appellant’s residence nickname.

and the fact that she moved a condom, and even if she did move it on November 10<sup>th</sup>, does not mean that she consented to have sexual intercourse with Mr. Stanton”.)

- The evidence of what A.R. did and didn't do when the Appellant left the bedroom for five to seven minutes after the first incident of sexual intercourse. (The trial judge, referencing A.R.'s police statement that she adopted on cross-examination, found she was “both shocked and confused about what had happened...I have to take into account the fact that she had consented to some things, but did not consent to other things”.)
- The differences in the evidence of A.R. and E.D. about how A.R. and the Appellant were configured in A.R.'s bed when E.D. returned to the room and whether A.R. was asleep, evidence the defence said supported an inference of consent.
- The reliability of E.D.'s evidence. (The judge doubted the accuracy of E.D.'s observations, saying they were “from the point of view of someone who thought [A.R.] had engaged in consensual sex with Mr. Stanton and was therefore not an objective, unbiased and impartial witness”. He also took into account as a factor in assessing the reliability of E.D.'s evidence the fact that when she made her observations upon entering the dorm room she was “very angry” as the door had been locked and she had had to get a key to enter.)
- The evidence of E.D. in relation to the door to their dorm room being locked and that A.R. had later texted her to say she only did what E.D. had done previously when her boyfriend had visited. (A.R. testified E.D. had brought her boyfriend over to the dorm and locked her out of the room without telling her. The trial judge, in his recital of the trial evidence noted A.R. had testified she did not lock the door. He said the locked door may have been an indication A.R. consented to being with the Appellant in bed naked and participating in oral sex, “however, in my view, it does not suggest that she consented to everything that took place”.)
- The evidence of the SANE nurse that A.R. had mentioned only one incident of sexual intercourse versus the three incidents A.R. testified to and that A.R. had said there was no oral sex. (A.R. was never asked about what she had told the SANE nurse about oral sex. As for the sexual

intercourse, she testified she had understood the SANE nurse was not the person she needed to give a complete statement to. "...but she wouldn't be the one that would make a case about it. And at that point, I wasn't really sure I wanted to pursue it".) The judge found "what [A.R.] did, how she acted, what she said to other people about what had occurred is not as significant or as determinative about what actually happened as her evidence describing what actually happened. I do not conclude that she was an untruthful witness because of what she told the SANE nurse".)

- E.D.'s evidence indicating the Appellant had previously sent A.R. texts that what had happened between them the night before would not happen again. The judge described this evidence as "noteworthy".

[28] In assessing A.R.'s credibility, the judge noted A.R.'s consistency, with respect to her interest in having a relationship with the Appellant and the nature of the sexual activity they engaged in. He said: "It was probably not very pleasant for her being asked about these things in a public courtroom, nevertheless, in my view, she truthfully related the history of her attempts at having a relationship with Mr. Stanton". The judge also commented favourably on A.R.'s consistency in describing the events of November 10-11. He went on to conclude:

With respect to those things I find that [A.R.] was a truthful witness. I make that finding notwithstanding the fact that she told Mr. Stanton that she had a condom, notwithstanding the fact that she had moved the condom to the shelf above her bed, notwithstanding the fact that there are some differences between her description of events after [E.D.] arrived back in the room and [E.D.]'s description of those events, notwithstanding the fact that she did not admit that she said to Ethan Mastin, what does someone have to do in order to get Mr. Stanton to fuck you, notwithstanding what she told the SANE nurse when they were conducting a sexual assault examination.

[29] Referring to a statement A.R. gave to a police investigator "a couple of days after November 11, 2017", the judge found A.R. had been "both shocked and confused about what had happened". This was understandable in his view because of her relationship with the Appellant:

...Mr. Stanton was somebody that she wanted to have a relationship with and he was somebody that she wanted to and did engage in some sexual activity with, but he was also the person that had sexual intercourse with her without her consent. A great deal of defence counsel's arguments are to the effect of what [A.R.] did prior to this incident and what [A.R.] did subsequent to this incident. I have to

take into account the fact that she had consented to some things, but did not consent to other things. In those circumstances, it would not be unusual for observers to get mixed messages from [A.R.] about what happened.

[30] The judge concluded the Appellant had taken “unfair advantage” of A.R. who had a “crush” on him and wanted a relationship to develop. He noted the Appellant was only interested in A.R. when he was intoxicated at the end of the parties they attended. They would become intimate to the extent of mutual oral sex and then he would send a text the next morning to say such activities would not happen again. This, the judge found, was what happened on November 10 except this time the consensual oral sex was followed by non-consensual sexual intercourse. The next morning the Appellant sent his customary not-happening-again text.

[31] The judge rejected the defence theory about A.R.’s allegations:

I do not conclude that [A.R.] made up the allegation of Mr. Stanton having sexual intercourse with her without her consent because Mr. Stanton dumped her. This is not a case where [A.R.] made up an untruthful allegation to get back at Mr. Stanton because he took her virginity. I accept the evidence of [A.R.] when she described that Mr. Stanton had sexual intercourse with her without her consent.

### **The Summary Conviction Appeal Court Proceedings**

[32] In his written submissions to SCAC the Appellant identified A.R.’s credibility as the “paramount issue” at trial. He appealed on the basis the trial judge had erred in law: (1) in his application of legal principles when assessing the credibility of witnesses; (2) in failing to consider the totality of the evidence in concluding the Crown had proven the Appellant was guilty beyond a reasonable doubt; and (3) by failing to provide sufficient reasons.

[33] The Appellant addressed the standard of review for the SCAC appeal by referring to paragraphs 5 and 6 from *R. v. Nickerson*, 1999 NSCA 168, in which *R. v. Miller*, 1999 NSCA 51, is cited. He said:

What appears to be required is more than a “mere review of the facts” or a determination that there exists some evidence to support the trial judge’s conclusions, but rather a re-examination and re-weighing of the whole of the evidence at trial to determine of [*sic*] whether the same is reasonably capable of supporting the Trial Judge’s conclusions.

[34] He noted that questions of law are reviewed for correctness and factual findings for palpable and overriding error.

[35] In his critique of the trial judge's approach to the credibility assessments, the Appellant acknowledged such assessments are not formulaic and can be difficult to explain. However, in his submission, the trial judge's approach was deeply flawed. The Appellant told the SCAC judge the trial judge had failed to assess A.R.'s credibility in light of the evidence as a whole. He said the trial judge determined A.R. was credible and then examined the evidence of the other witnesses in relation to this finding. He piecemealed the evidence and failed to consider evidence the Appellant argued was incompatible with non-consensual sexual intercourse.

[36] The Appellant said the trial judge had uncritically accepted A.R.'s evidence "despite the many internal inconsistencies in her testimony, the inconsistencies between her evidence and that of other witnesses, and a clear evasiveness in her answers which would directly support the defence theory presented of a motive to fabricate." He argued the trial judge should have found reasonable doubt on the issue of consent in the "inconsistencies and evasiveness" of what A.R. described having happened before and after the incidents of sexual intercourse. He said the evidence revealed A.R. "minimizing, [being] evasive, and [having] a selective memory when it came to describing her relationship with James Stanton". He attacked what he described as the trial judge's basis for believing A.R. to be truthful: the fact that she testified for several hours on both direct and cross-examination, was consistent in her evidence about wanting a relationship with the Appellant, and was consistent in describing the incidents of sexual intercourse.

[37] Counsel for the Appellant concluded his written submissions to the SCAC judge with the following:

While not all of the above inconsistencies are problematic on their own, the cumulative effect of them, viewed in light of all of the other evidence, and the complainant's minimizing and evasiveness in relation to her description of her relationship with James Stanton should have left the Learned Trial Judge with not only questions about [A.R.'s] credibility and motive but also raised a reasonable doubt as to the guilt of James Stanton.

[38] In oral submissions at the SCAC appeal, the Appellant's counsel urged the judge to keep in mind the cardinal principles described by this Court in *R. v. D.D.S.*, 2006 NSCA 34: "A fundamental requirement of a fair trial is the

recognition and application of correct legal principles in assessing issues of credibility, as well as a proper understanding and application of the burden of proof” (para. 34).

[39] The Crown’s written submissions to the SCAC judge addressed the highly deferential standard of review to be applied in appeals involving credibility findings. They did not explicitly tell the SCAC judge that a standard of correctness had to be applied to the issue raised by the Appellant of the trial judge not assessing the Crown’s burden in the context of the totality of the evidence. The trial judge had to assess the Crown’s burden correctly; he had to have considered, on the whole of the evidence, whether the Crown had proven beyond a reasonable doubt that A.R. had not consented to sexual intercourse with the Appellant. The SCAC judge had to determine if the judge had committed an error of law in his assessment of this question.

### **The Reasons of the SCAC Judge**

[40] The SCAC judge released his written decision on February 27, 2020 (2020 NSSC 74). He identified the Appellant’s grounds of appeal which he said alleged errors that “principally go to the trial judge’s assessment of reliability and credibility of witnesses, and more broadly, to his evaluation of evidence” (para. 18). Referring to *Nickerson*, he noted that a Summary Conviction Appeal Court may address questions of both fact and law. He instructed himself on appellate deference to findings of fact by trial judges and the standard of review of palpable and overriding error. He acknowledged in a single sentence that questions of law are reviewed for correctness.

[41] The SCAC judge’s reasons do not make it entirely clear he recognized he was to assess alleged errors of law. He said the Appellant was asserting “witness credibility is a question of law” and pointed out that credibility is a factual finding. The Appellant’s grounds of appeal alleged the trial judge had made errors of law:

- (1) “by failing to properly direct himself, or apply proper legal principles when assessing the reliability and credibility of witnesses”; and
- (2) “by using improper reasoning in his application of the Crown’s burden of proof, particularly in relation to the evaluation of evidence to support the finding of the guilt [*sic*] beyond a reasonable doubt...”

[42] The SCAC judge dismissed the Appellant's appeal. He concluded the trial judge had not erred in assessing credibility or applying the burden of proof:

[91] I find the trial judge's reasons (and the record) do not support the appellant's argument that the trial judge first decided that A.R. was credible, and then considered the other evidence in light of that conclusion. The trial judge opened his decision by reviewing the evidence of each witness at great length. He then focused heavily on defence counsel's attacks on A.R.'s credibility. Defence counsel does not clearly indicate what procedure would have been preferable. The crucial issue at trial was A.R.'s credibility. Moreover, A.R. was the only witness to the alleged offence. In short, I find that the appellant has not shown that the trial judge committed palpable and overriding error by his approach to assessing the evidence. In my view, the specific points defence counsel point to in arguing that the trial judge erred taken individually are in most cases explained by the trial judge's reasons or can be explained based on the record.

[43] This same paragraph appears earlier in the SCAC judge's reasons, at paragraph 36, with a concluding sentence: "As the Crown submits, the Appellant's case is essentially requesting this Court of Appeal to conduct a close re-examination of the evidence to reach a different result".

[44] In the "Analysis" section of his reasons that followed, the SCAC judge addressed the attacks the Appellant had made on A.R.'s credibility. He assessed the evidence and found the trial judge had made no palpable and overriding errors in reaching his conclusions. He considered each of the arguments made by the Appellant that I reviewed earlier, with the exception that he did not address the trial judge's treatment of Ethan Mastin's evidence about A.R.'s comment, and A.R.'s denial.

[45] After reviewing the evidence the Appellant said the trial judge should have found adversely impacted A.R.'s credibility, the SCAC judge moved on to consider whether the trial judge erred by finding guilt beyond a reasonable doubt without considering the evidence in its totality.

[46] The SCAC judge dismissed the argument that the trial judge erred in his approach to the Crown's case:

[90] The Appellant's position is essentially that the trial judge should not have found that the Crown had met the burden of proof on the strength of the complainant's evidence about the assault alone. The law does not suggest that there is a different standard applicable to a sexual assault trial where A.R. is the only witness to the alleged assault. This ground is difficult to distinguish from the

appellant's main argument that the trial judge did not properly assess credibility. Both of these arguments, as they have been argued, essentially ask the Summary Conviction Appeal Court to re-weigh the evidence and apply the burden of proof so as to make the decision the trial judge should have made. I do not believe the appellant has shown that the trial judge erred on the relevant standard in assessing credibility or applying the burden of proof.

## Standard of Review

[47] This Court in *R. v. Pottie*, 2013 NSCA 68 identified the two standards of review in play in summary conviction matters: the standard of review to be applied by the SCAC judge reviewing the trial decision, and the standard of review to be applied to the review by this Court of the SCAC judge's decision. *Pottie* describes these standards of review:

[16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This Court must determine whether the SCAC judge erred in law in the statement or application of the principles governing its review (*cites omitted*). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

[48] The Appellant is alleging the SCAC judge made errors of law. In accordance with *Pottie*, the standard of review this Court must apply is correctness.

## The Issues

[49] The Appellant has set out the issues in his factum as follows:

1. Whether the SCAC judge erred in law in applying the standard of “palpable and overriding error” to issues of law.
2. Whether the SCAC judge erred in law in failing to apply relevant legal principles to the grounds of appeal raised and in particular:

- (a) Whether the trial judge erred in failing to assess the reliability and credibility of the complainant's evidence in light of the cumulative effect of the evidence, rather than piecemeal and in isolation;
- (b) Whether the trial judge erred in assessing the credibility of the complainant's evidence by assuming its truthfulness rather than presuming the innocence of the appellant.

[50] A threshold issue is whether leave should be granted to the Appellant to bring this appeal. As *Pottie* explains, leave is to be granted sparingly:

[20] The rationale for selectively granting leave to appeal in order to limit access to provincial appellate courts is understandable. When a summary conviction matter is granted a second appeal to a provincial appellate court, it becomes the third court involved in the proceedings. If leave to the provincial appellate courts is not granted selectively, summary matters would essentially have more appeal rights than some of the most serious criminal cases at the Supreme Court of Canada (*cites omitted*).

[51] This Court held in *R. v. R.E.M.*, 2011 NSCA 8 that leave is determined on an examination of whether “the questions of law raised transcend the borders of the specific case and are significant to the general administration of justice...” (para. 47).

[52] Leave may also be granted in appeals from the Summary Conviction Appeals Court if the SCAC judge is found to have committed a clear error of law (*R. v. Sypher*, 2021 NSCA 21; *R. v. Hweld*, 2020 NSCA 36; *R. v. Anand*, 2020 NSCA 12; *R.E.M.*, para. 47 ).

### **The Arguments of the Appellant**

[53] The Appellant argues the SCAC judge failed to address the legal errors in the trial judge's reasons and instead focused, by way of a piecemeal approach, on the question of whether his factual findings reflected “palpable and overriding error”. What he should have done was examine whether the trial judge committed legal error in his approach to determining the Crown had proven beyond a reasonable doubt that A.R. had not consented to sexual intercourse.

[54] The Appellant says the SCAC judge should have found the trial judge erred by failing to assess the complainant's credibility on the issue of consent against the

whole of the evidence. He argued before us the same evidence that the trial and SCAC judges were urged to view as fatal to A.R.'s credibility. In the Appellant's submission, the trial judge's assessment should have taken into account all the circumstantial evidence that suggested consent and the evidence that challenged her account. He says in his factum that the trial judge was required:

...to weigh the credibility of the complainant's account against the entire body of circumstantial evidence suggesting consensual conduct and with regard to the *cumulative* effect of the many challenges to her testimony. He was also required to view the evidence through the lens of the presumption of innocence: reasoning that depended for its cogency on *assuming* the truth of the complainant's evidence would be necessarily faulty.

[55] Instead, the Appellant says the trial judge assumed A.R.'s credibility and viewed the evidence through that lens rather than the lens of his presumed innocence.

[56] The Appellant says the trial judge's legally flawed approach tested individual pieces of evidence against A.R.'s presumed truthfulness. The presumption that A.R. was credible prevailed. The SCAC judge should have recognized these legal errors and granted the appeal.

### **The Arguments of the Crown**

[57] The Crown argues the SCAC judge did what was requested of him: he addressed the factual findings of the trial judge that the Appellant argued should have undermined A.R.'s credibility. The SCAC judge was asked to consider the evidence that had been relied on to raise a reasonable doubt. He found the trial judge made no palpable and overriding errors or unreasonable and unsupported findings in determining the facts and concluding they did not disclose reasonable doubt.

[58] The Crown says the SCAC judge clearly understood that he was being asked to assess the trial judge's reasons for legal error and error of mixed fact (assessing credibility) and law (shifting the burden of proof). The SCAC judge identified the obligation of a trial judge to consider the evidence as a whole when determining if the Crown has proven guilt beyond a reasonable doubt. The Crown says the SCAC judge's grasp of the relevant legal principles was apparent from his reference to *R. v. D.A.*, 2012 ONCA 200, at paragraph 33 of his reasons, and the principle it

establishes that: “the credibility and reliability of all witnesses must be assessed after all of the evidence is presented as a whole”.

## **Analysis**

### Leave to Appeal

[59] As the Appellant points out, the SCAC judge focused his attention primarily on what he saw as the central issue on appeal – the trial judge’s assessment of the credibility and reliability of the witnesses. This shaped his emphasis on “palpable and overriding error” as the standard of review with a passing reference to questions of law being reviewable for correctness.

[60] It is true, in part, that the SCAC judge did what the Appellant asked of him. He conducted a detailed review of the specific items of evidence he was told should have raised a reasonable doubt about A.R.’s claim she had not consented to sexual intercourse. The SCAC judge accurately reviewed the trial judge’s approach and findings, the arguments of the Appellant and the Crown on appeal and the deference to be shown by a summary conviction appeal court to trial findings of credibility. Before embarking on his examination of the evidence the Appellant said should have adversely affected A.R.’s credibility, he concluded the trial judge had not decided A.R.’s credibility first and then considered the other evidence through that lens.

[61] However, the SCAC judge’s analysis of the trial judge’s approach to the Crown’s case was overwhelmingly characterized by an assessment of whether there had been palpable and overriding error. His examination of the question of legal error – had the trial judge assumed A.R.’s credibility and examined the individual items of evidence in an atomized fashion, as the Appellant argues he did – was cursory and inadequate. By not affording the Appellant the appeal he was entitled to, he erred in law in how he conducted the proceedings. Consequently, I would grant leave to appeal.

[62] Where a SCAC errs in how it discharges its function, as this Court pointed out in *Sypher*, there are two options:

[55] ...remit the appeal back to the Summary Conviction Appeal Court for another judge of that Court to address the appellant's grounds of appeal; or, this Court, now armed with the trial judge's oral decision, can carry out the function of the SCAC and determine if the trial judge committed legal error, misapprehended

the evidence or arrived at an unreasonable verdict or one that was unsupported by the evidence.

[63] The latter option is the appropriate course in this case. We are well equipped to step into the shoes of the SCAC and address the Appellant's grounds of appeal. We have the transcript of the trial evidence and submissions and the trial judge's reasons. Like the SCAC, we can review the record and determine whether legal error was committed in the assessment of A.R.'s credibility and the ultimate issue of reasonable doubt.

### Applicable Legal Principles

[64] I have indicated the central themes of the Appellant's appeal of the trial judge's decision. He says the trial judge should have viewed the various pieces of evidence not in silos but in relation to each other as cumulatively they raise a reasonable doubt about A.R.'s claim that she did not consent to sexual intercourse. He says his presumed innocence was sidelined in favour of a pre-emptive assumption of A.R.'s credibility. In his submission, the evidence in its totality supports the existence of consent and his innocence. He says the flashpoint occurred at 9:32 a.m. on November 11 when he sent the dismissive text to A.R., triggering the false allegation of sexual assault. Everything before then indicates what happened in the dorm room between him and A.R. was what she had wanted.

[65] The Appellant raises a question of law that must be assessed according to a standard of correctness. The trial judge had to be correct in his approach to assessing if the Crown had discharged its burden of proving beyond a reasonable doubt that A.R. did not consent to sexual intercourse with the Appellant.

[66] A trial judge will have erred in law if their decision, read as a whole, discloses a "chain of reasoning from credibility to guilt without recognition that the ultimate issue is not credibility but reasonable doubt" (*R. v. Mah*, 2002 NSCA 99, para. 46). A judge's approach to the evidence must be correct in law "so as to ensure that the final step in the process, the weighing of the evidence, is not flawed" (*R. v. B.(G.)*, [1990] 2 S.C.R. 57, para. 38). That final step is the weighing of the evidence in its totality to determine whether there is reasonable doubt.

[67] Before embarking on an assessment of the trial judge's reasons to determine whether he committed legal error, I set out below the legal principles relevant to appeals where credibility is pivotal:

- The focus in appellate review “must always be on whether there is reversible error in the trial judge’s credibility findings”. Error can be framed as “insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict” (*R. v. G.F.*, 2021 SCC 20, para. 100).
- Where the Crown’s case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant’s evidence be tested in the context of all the rest of the evidence (*R. v. R.W.B.*, [1993] B.C.J. No. 758, para. 28 (C.A.)).
- Assessments of credibility are questions of fact requiring an appellate court to re-examine and to some extent reweigh and consider the effects of the evidence. An appellate court cannot interfere with an assessment of credibility unless it is established that it cannot be supported on any reasonable review of the evidence (*R. v. Delmas*, 2020 ABCA 152, para. 5; upheld 2020 SCC 39).
- “Credibility findings are the province of the trial judge and attract significant deference on appeal” (*G.F.*, para. 99). Appellate intervention will be rare (*R. v. Dinardo*, 2008 SCC 24, para. 26).
- Credibility is a factual determination. A trial judge’s findings on credibility are entitled to deference unless palpable and overriding error can be shown (*R. v. Gagnon*, 2006 SCC 17, paras. 10-11).
- Once the complainant asserts that she did not consent to the sexual activity, the question becomes one of credibility. In assessing whether the complainant consented, a trial judge “must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant...” (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 61).
- “Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...” (*Gagnon*, para. 20).
- The exercise of articulating the reasons “for believing a witness and disbelieving another in general or on a particular point... may not be

purely intellectual and may involve factors that are difficult to verbalize...In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization” (*R. v. R.E.M.*, 2008 SCC 51, para. 49).

- A trial judge does not need to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence (*R.E.M.*, at para. 56).
- “A trial judge is not required to comment specifically on every inconsistency during his or her analysis”. It is enough for the trial judge to consider the inconsistencies and determine if they “affected reliability in any substantial way” (*R. v. Kishayinew*, 2019 SKCA 127, at para. 76, Tholl, J.A. in dissent; upheld 2020 SCC 34, para. 1).
- A trial judge should address and explain how they have resolved major inconsistencies in the evidence of material witnesses (*R. v. A.M.*, 2014 ONCA 769, para. 14)

[68] In *G.F.*, the Supreme Court of Canada has recently warned against the parsing of a trial judge’s reasons, particularly as they relate to the assessment of credibility. An appellant must be able to show actual error or, due to insufficient reasons, the frustration of appellate review. The appellate court “must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated” (para. 79).

[69] The Court in *G.F.* acknowledged the particular challenges faced by judges assessing credibility in sexual assault trials:

**[81]** As *Slatter* [*R. v. Slatter*, 2020 SCC 36] demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful

of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt.

### A Broad Overview of the Trial Judge's Reasoning

[70] I previously outlined the trial judge's reasons at paragraphs 22 to 31. He began by instructing himself on the framework within which he was required to operate: the presumption of innocence and the Crown's burden of proof. He reviewed the principles from *Lifchus*. While such recitals are not a guarantee these principles have been applied, they demonstrate the judge was alive to them and their overarching role in his analysis of the evidence. The trial judge is also presumed to understand "the basic principles of criminal law at issue in the trial". Appellate courts are to conduct "[a] 'functional and contextual reading' of a trial judge's reasons while keeping this presumption in mind (*G.F.*, para. 74).

[71] The trial judge knew to apply, and did apply, the principles he articulated at the start of his reasons. In the process of analyzing the evidence he had so comprehensively reviewed, he said:

The submission of the defence is that [A.R.] engaged in consensual sexual intercourse with Mr. Stanton and then the morning after when she received a message from Mr. Stanton telling her that that was not going to happen again she decided to make a false complaint against Mr. Stanton to the effect that she did not consent to sexual intercourse because he had taken away her virginity. The defence argument is that this factor and all of the other arguments about the credibility and reliability of [A.R.] must lead the Court to conclude that there is a reasonable doubt about Mr. Stanton's guilt and he should be found not guilty of the offence.

[72] The Crown's case against the Appellant rested on A.R.'s credibility. The judge was asked by the Appellant to examine A.R.'s allegation that she did not consent to sexual intercourse in relation to evidence that suggested otherwise, evidence from E.D., the SANE nurse, Patrick MacDonald, and Ethan Mastin. And he was asked to assess A.R.'s evidence critically, taking into account her eagerness for a relationship with the Appellant and her conduct before and after November 10 and 11.

[73] The judge understood this evidence was relevant, that it was open to the Appellant to claim that A.R.'s "words and actions, before and during the incident,

raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place” (*Ewanchuk*, para. 29).

[74] The trial judge has been accused of “piecemealing” the evidence. As a majority of this Court held in *R. v. Muise*, 2016 NSCA 34, a trial judge’s job is to turn “a critical eye to the evidence” and not deal with it on a piecemeal basis. The judge is to weigh it and comment on its strength and reliability, and not subject individual bits of it to the standard of proof beyond a reasonable doubt or fail to consider it in its totality in determining whether the accused has been proven guilty beyond a reasonable doubt or not (*Muise*, para. 51).

[75] However, while a trial judge must consider all the evidence in relation to the ultimate issue of reasonable doubt, “unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect” (*R. v. Morin*, [1992] 3 S.C.R. 286, at para. 20, per Sopinka J.).

[76] The trial judge looked at the evidence identified by the Appellant as critical to assessing A.R.’s credibility. He did not make the legal error associated with “piecemealing” evidence. His understanding of the full canvas of A.R.’s evidence and the evidence of the other witnesses was not obscured. He did not deal with items of evidence in isolation nor did he subject each piece of evidence to the criminal standard of proof beyond a reasonable doubt. In assessing the credibility of A.R. he considered her evidence in relation to other evidence and determined the impact on her credibility. He ultimately weighed all the evidence and concluded it did not cause him to disbelieve her assertion that she had not consented to sexual intercourse. He considered the whole of the evidence in deciding the Crown had proven the Appellant’s guilt beyond a reasonable doubt.

[77] The trial judge had only A.R.’s evidence about what happened in the dorm room with the Appellant. He had to evaluate whether that evidence was credible. His reasons indicate he did not assume it was. He undertook a painstaking examination of all the arguments advanced by the defence that it was not. And how else could that examination have been conducted other than by addressing the items of evidence and assessing their significance and whether they dealt a blow to A.R.’s narrative of non-consent? Cumulatively they may have done so or one item of evidence may have been enough to fatally undermine her credibility. The trial judge found neither to be the case.

[78] A trial judge's reasons do not have to be perfect (*G.F.*, para. 102). As the principles I recited earlier establish, judges' reasons are not to be assessed on appeal using rigid, formulaic criteria. The trial judge's reasons here were bookended by his recognition of the ultimate issue he was to decide: reasonable doubt. As he worked his way toward the conclusion of his reasons he said:

I have considered the arguments of defence counsel with respect to the credibility and reliability of [A.R.]. I have also considered the arguments of defence counsel to the effect that the evidence of A.R. does not prove beyond a reasonable doubt that Mr. Stanton committed an offence and Mr. Stanton is entitled to the benefit of any doubt and should not be found guilty...

[79] Contrary to the Appellant's argument, the trial judge's reasons focused "almost entirely on the ability of the complainant to hold the same story throughout her testimony", he took account of the whole of the evidence in his determination of whether there was reasonable doubt. I repeat here for ease of reference:

With respect to those things I find that [A.R.] was a truthful witness. I make that finding notwithstanding the fact that she told Mr. Stanton that she had a condom, notwithstanding the fact that she had moved the condom to the shelf above her bed, notwithstanding the fact that there are some differences between her description of events after [E.D.] arrived back in the room and [E.D.]'s description of those events, notwithstanding the fact that she did not admit that she said to Ethan Mastin, what does someone have to do in order to get Mr. Stanton to fuck you, notwithstanding what she told the SANE nurse when they were conducting a sexual assault examination.

[80] While I agree the trial judge's reliance on A.R.'s "consistency" is of limited value in a credibility assessment, these references followed his analysis of the evidence that was said to torpedo her credibility. In that analysis he found no reasonable doubt about the issue of consent.

[81] The trial judge found no reasonable doubt having reviewed the evidence in its totality. That is what he was required to do – examine the whole of the evidence for reasonable doubt – and he did it.

#### Considering the Whole of the Evidence in Assessing Credibility and Reasonable Doubt

[82] It is instructive to consider what the Supreme Court of Canada said about the approach taken by the trial judge in *Gagnon*, in which it found no fault:

[17] The trial judge's reasons began with a fairly detailed review of the evidence from the child's grandmother, her mother, the investigating police officer, an acquaintance of the accused, a cousin of the accused's wife, the accused's wife Ms. L., and Mr. Gagnon. She also reviewed the video of the child's conversation with the police. After setting out the relevant law, the trial judge explained her conclusions on credibility, setting out her reasons for finding the declarations of the child to be reliable, and for finding the evidence of the grandmother and mother to be credible... Her reasons aptly demonstrate the rationale behind her conclusions on credibility and reasonable doubt.

[83] This is what the trial judge did in this case: his reasons began with a statement of the law he would be applying, followed by a very detailed review of all the evidence, an explanation of his conclusions on credibility and why, having taken into account some deficiencies in her testimony, he accepted A.R.'s credibility about what happened on November 10 and 11. His reasons "aptly demonstrate" the rationale that underpinned his conclusions on credibility and reasonable doubt.

[84] Not only did the trial judge subject A.R.'s credibility to a critical analysis in his assessment of the ultimate issue, reasonable doubt, he did so avoiding the legal error of relying on stereotypical assumptions. Reliance on a stereotype in assessment of credibility is impermissible and an error of law (*R. v. A.R.J.D.*, 2017 ABCA 237, para. 9; *R. v. Steele*, 2021 ONCA 186, para. 17).

[85] The defence had invited the trial judge to find A.R. made a false claim of sexual assault in reaction to the Appellant's dismissive text on the morning of November 11. There was no evidence to support what amounted in this case to nothing more than a stereotype, the familiar trope of the scorned, vindictive woman. The judge expressly rejected it.

[86] The judge also did not infer A.R.'s consent from the evidence of her infatuation with the Appellant, the movement of the condom, the mutual oral sex, or A.R.'s conduct after the sexual intercourse. He did not treat this evidence as irrelevant and considered the defence submissions on how it should be viewed. He concluded none of it undermined A.R.'s assertion that she had not consented to sexual intercourse with the Appellant. It was open to him to determine A.R.'s credibility was adversely affected by this evidence and it was open to him to determine, as he did, that it had not been.

[87] A.R.'s conduct prior to the sexual intercourse on November 11 included the "what do I have to do to get Griffy to fuck me" comment, which the trial judge

accepted had been made. There were two purposes for the defence advancing this evidence, one of which involved impermissible reasoning: that she had eagerly and explicitly signaled her readiness to have sexual intercourse. *Ipsa facto*, when it did occur, it was with her consent.

[88] The other purpose for the evidence – its use on cross-examination to attack A.R.’s credibility – was properly dealt with by the trial judge. It was for the trial judge to weigh the significance of the conflict between Mr. Mastin’s testimony and A.R.’s. He accepted Mr. Mastin’s evidence that the remark was made. He did not accept A.R.’s denial. He ultimately concluded A.R.’s lack of forthrightness about this particular statement did not cause him to disbelieve her evidence that she did not consent to sexual intercourse. His determination of how this evidence factored into his overall assessment of A.R.’s credibility on the issue of consent is entitled to deference on appeal.

[89] As for A.R.’s conduct after the sexual intercourse, including when she said to E.D. she had been sexually assaulted, the trial judge considered whether, as argued by the defence, that indicated she was lying about her lack of consent and concluded it did not. The judge understood it was an error for him to ground an adverse credibility finding in stereotypes or “common sense” assumptions about how a sexual assault complainant is expected to act, “including that they would immediately disclose the fact of an assault or seek assistance” (*R. v. Roth*, 2020 BCCA 240, paras. 129-130).

[90] The trial judge’s reasons indicate he clearly understood evidence that carried the potential for impermissible reasoning may also have a permissible role to play as “one circumstance to consider in the factual mosaic of a particular case” (*R. v. D.(D.)*, 2000 SCC 43, at para. 65; *Roth*, para. 130).

[91] As I noted earlier in these reasons, the trial judge considered A.R.’s conduct before and after the alleged sexual assault. He took into account her description to police of being in a state of shock and confusion after the sexual intercourse and factored that into his assessment of whether how she behaved raised a reasonable doubt. His determination it did not is entitled to deference on appeal.

[92] Likewise, evidence of A.R. actively pursuing intimacy with the Appellant was not ignored by the trial judge. It was relevant for him to consider, which he did, although it “certainly does not lead to an inference of consent...” (*R. v. Cepic*, 2019 ONCA 541, para. 26). It also did not lead the judge to conclude A.R. had

minimized the nature of the relationship with the Appellant, as argued by the defence.

[93] The judge was entitled to find A.R. gave a credible account of her relationship with the Appellant. She did so in a candid description of her interest in developing a relationship with him, her feelings toward him, and the mutual oral sex that had been the high water mark of their intimacy. The relationship, such as it was, had never amounted to much. A.R. acknowledged it had fallen short of her hopes for it.

[94] The Appellant argues there was circumstantial evidence A.R. had “a long-standing plan to have consensual intercourse with him and that what took place in that room was simply the culmination of that plan”. Pursuit, whatever its objective was in this case, is not consent.

[95] A.R. may have entertained at some point the idea of sexual intercourse in the context of her interest in the Appellant, however what was relevant was whether there was “conscious agreement” by her “to engage in every sexual act in a particular encounter” (*G.F.*, para. 29), that is agreement to sexual intercourse with the Appellant on November 11.

[96] A.R. may have thought at various times she wanted a full sexual experience with the Appellant. However, there is also evidence she was ambivalent about going beyond mutual oral sex. She testified that a couple of weeks earlier he had wanted “to go further”, she said no and he complied. That was an opportunity for consummating the plan the Appellant says A.R. had, an opportunity she did not take up.

[97] The trial judge’s reasons were not flawless. He appears to have missed the defence argument concerning why the evidence about A.R.’s reaction to the Appellant saying she was “annoying” was relevant to her credibility. The SCAC judge grasped what the trial judge had not: that the defence was implying A.R. had been disingenuous in her description of what she had been doing that evening, a further example of how she minimized the relationship with the Appellant.

[98] I find the trial judge’s error in how he dealt with this defence argument was inconsequential. The evidence supported the judge’s finding that A.R. had a “crush” on the Appellant and gave an unambiguous description of her interest in developing a relationship with him, an interest that was not reciprocated. A.R.’s

testimony that she did not remember exactly what happened that night accords with the fact that she had been drinking to the point of being drunk.

[99] The Appellant argued on appeal to us that A.R. had a “highly emotional reaction” to the Appellant’s “annoying” comment making it “much more credible” she would “react in an extreme manner” when he texted her on November 11 there would be no more intimacy between them. In the absence of evidence A.R. was bent on revenge, the trial judge was correct to have flatly rejected the suggestion she invented the sexual assault allegation out of spite as “payback”. And, as he noted, A.R. had received not-happening-again texts from the Appellant before.

[100] The Appellant takes issue with three other significant determinations by the trial judge: his finding A.R. was credible in spite of a finding she had not been candid in her testimony about the comment to Ethan Mastin, his determination that E.D. lacked impartiality, and his willingness to believe A.R. notwithstanding her giving incomplete details to the SANE nurse.

[101] The trial judge was entitled to believe all, some or none of a witness’ evidence. His determination that A.R.’s credibility was not undermined by her denial of the comment to Mr. Mastin is entitled to deference on appeal.

[102] The Appellant has argued it was essential to consider if A.R. “would lie about that indicator of consent”, might she not also have lied about other evidence that was, in his submission, indicative of consent, such as the moving of the condom, the locked dorm door, and staying in bed with him, ultimately inventing a false allegation of sexual assault. I repeat: the statement to Mr. Mastin cannot be viewed as an “indicator of consent”. At its highest it may have been an indicator of interest at the time it was made. The trial judge was entitled to decide how A.R.’s denial of the statement factored into his credibility analysis.

[103] As for E.D., considerable deference is afforded to trial judges because they see and hear the witnesses whose credibility and reliability they have to assess. In finding E.D.’s observations were filtered through her assumption there had been consensual sex, the trial judge had evidence that E.D. was judgmental of A.R., they had grown apart since starting university, and she was very angry with A.R. when she found herself locked out of their dorm room. This was all evidence the judge expressly took into account. It factored into his calculus of E.D.’s reliability. He was not bound to accept E.D.’s view that consensual sexual intercourse had occurred. He understood he had to determine beyond a reasonable doubt whether

the Crown had proven it had not. Deciding whether he could rely on E.D.'s evidence in his analysis was his prerogative.

[104] The Appellant has attacked how the trial judge expressed his assessment of E.D.'s observations on entering the dorm room, saying that he began with an assumption the sex was non-consensual, effectively dispensing with the presumption of innocence. The specific passage from the judge's reasons stated:

...All of [E.D.]'s observations are from the point of view of someone who thought that [A.R.] had engaged in consensual sex with Mr. Stanton and was therefore not an objective, unbiased and impartial witness”.

[105] The trial judge had to draw his own inferences from the evidence. He decided he believed A.R. that the sexual intercourse occurred without her consent. He cannot be held to a standard of perfection in how he organized his reasons. He was entitled to not accept the inferences drawn by A.R.'s furious, judgmental roommate. Doing so was not a reversal of the presumption of innocence which remained intact as he sifted through the evidence.

[106] The trial judge said little about the evidence of the SANE nurse and where it conflicted with A.R.'s, notably that A.R. had said there was one incident of sexual assault, not three, and no prior oral sex. He had heard A.R.'s evidence about the SANE examination which occurred on the afternoon of November 11. A.R.'s testimony on cross-examination indicated she understood the difference between giving a statement to the SANE nurse (“...I was under the impression that she wasn't the person that I needed to give a statement to”) and giving one to the police (“...but she wouldn't be the one that would make a case about it”). A.R. said at the time she spoke to the SANE nurse she was not sure if she wanted to pursue the matter. She testified she was “...nothing but truthful...as I said, I wasn't trying to give her the statement that I felt was necessary at the time”.

[107] Defence counsel put it to A.R. that her disclosure to the SANE nurse of a sexual assault had been fueled by intense anger at the Appellant for his dismissive text and then gossiping with others about having had sex with her. Trial counsel described this as A.R. deciding it was “payback time”. A.R. responded she “would never make something up of that magnitude”. She also said it had been hard for her to disclose first to the community advisor for her residence, then the Residence Life Co-ordinator, and finally at the hospital where she was examined and questioned for four hours.

[108] I am satisfied the trial judge made no palpable or overriding error in the credibility and reliability determinations he made, including his finding that A.R. was credible on this issue of consent.

[109] There was some evidence the trial judge did not refer to in his reasons. I find he committed no error in finding A.R. credible despite not explicitly addressing:

- A.R.’s initial denial of an attempt to make the Appellant jealous. A.R. said on cross-examination when shown her police statement that if she had told the police she had done so, then she had, as she would not have lied to the police.
- Patrick MacDonald’s evidence that on the night of November 10, the Appellant arrived at their dorm room ahead of A.R. whereas A.R. had testified they had gone back to the room “together”. Mr. MacDonald had said A.R. appeared only thirty seconds to one minute later than the Appellant. The difference in these descriptions is inconsequential.
- A.R.’s evidence that she was awake when E.D. first entered their room even though she had not answered her phone which E.D. said she could hear ringing. A.R. testified she could hear E.D. yelling her name and banging on the door. The Appellant argues it makes “much more sense” that whether A.R. was awake or asleep, she was in bed with the Appellant and not responding to E.D. because she was where she wanted to be, an indicator the sexual intercourse had been consensual.

A.R.’s evidence, accepted by the trial judge, was that she was in a state of disorientation, confusion and shock after the sexual assault. She was an 18 year old virgin. She testified that, “I wasn’t given instructions on how to handle a situation like that, so I was just doing whatever I thought in the moment was what I was supposed to do”. When E.D. left the room to ventilate her aggravations in a call to her boyfriend, A.R. stayed put because “I was contemplating what I should do...I couldn’t really do anything...I didn’t really have anywhere else to go, and I didn’t want to wake him up”. She didn’t say anything to E.D. in texts they exchanged when E.D. returned to the room because, “I knew that [E.D.] was upset, so she wouldn’t have listened to me had I even brought it up”. She got back into bed with the Appellant after cleaning the room up because “I didn’t know what else that I was supposed to do”.

- A.R.'s evidence that she did not lock the door to the room and E.D.'s testimony that A.R. sent her a text indicating she had just done what E.D. did on a previous weekend. A.R. was never asked on cross-examination about sending E.D. the purported text. I also note the last person who came through the door before E.D. returned was the Appellant when he returned from using the washroom.
- A.R.'s inconsistent evidence about when she put a shirt on. This inconsistency can only be described as of negligible relevance and not probative of A.R.'s credibility.
- A.R.'s testimony, as characterized by the defence, that she would not necessarily tell the truth if she believed someone would be judgmental of it. This was a distortion of what A.R. actually said. A.R. testified she would not necessarily tell the truth to E.D. who she viewed as judgmental and critical. Her evidence went no further than that. It was specific to E.D. and not a general statement about A.R.'s truthfulness.

[110] The Appellant argued the trial judge had before him “a body of circumstantial evidence that supported a positive inference of consent and provided a motive to fabricate an allegation”. He says it had to be considered in its totality and, but for the trial judge’s legal errors, should have raised a reasonable doubt.

[111] In making these submissions, the Appellant glides over the substantial deference owed to the trial judge’s assessment of credibility. He has not persuaded me the trial judge found A.R. to be credible and examined the evidence through that lens, disregarding the presumption of innocence. I find the judge in his analysis of whether it had been proven beyond a reasonable doubt that A.R. did not consent to sexual intercourse considered the evidence in its totality. I am satisfied he committed no error in his application of the relevant legal principles and how he assessed credibility and reasonable doubt.

### **Disposition**

[112] I would grant leave to appeal and dismiss the appeal against conviction.

Derrick, J.A.

Concurred in:

Wood, C.J.N.S.

Bourgeois, J.A.