NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Al-Rawi*, 2021 NSCA 86

Date: 20211221
Docket: CAC 503005
Registry: Halifax

Between:

Bassam Al-Rawi

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of *Criminal Code*

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: June 11, 2021, in Halifax, Nova Scotia

Subject: Sexual assault; Assessment of credibility; Honest but mistaken belief in communicated consent; Recognition evidence

Summary: Following a nine-day trial before a single judge of the Supreme Court of Nova Scotia, the appellant, Bassam Al-Rawi, was convicted of one count of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46.

At trial, the complainant alleged that after an evening of socializing and drinking with friends, she was picked up in the early morning hours by a cab driver. She testified she was taken to the cab driver's apartment building. After some time in the apartment, she awoke to find herself lying on a bed. She did not recall how she had gotten there.
The complainant said she was afraid and feigned sleep. She said the cab driver removed her clothes and engaged in non-

consensual vaginal intercourse with her. At trial, the complainant was unable to identify Mr. Al-Rawi as the cab driver she had encountered. Further, she had a number of memory gaps relating to other aspects of the evening and early morning hours.

At trial, Mr. Al-Rawi argued a conviction for sexual assault could not be made out on the evidence. He submitted the Crown had not proven he was the cab driver who had interacted with the complainant. Further, he argued the complainant was lacking in credibility, and the trial judge should not accept her description of the events in question. The trial judge did not accept his arguments.

Mr. Al-Rawi seeks to have his conviction set aside and argues the trial judge made a number of mistakes in assessing the evidence and in applying the law.

Issues: (1) Did the trial judge err in his analysis of the evidence relating to the identification of Mr. Al-Rawi?

(2) Did the trial judge err in his assessment of the complainant's credibility?

(3) Did the trial judge err by failing to appropriately consider the *mens rea* element required for a conviction?

Result: Appeal dismissed

The trial judge was satisfied the evidence adduced at trial established beyond a reasonable doubt that Mr. Al-Rawi was the person who interacted with the complainant. Before this Court, Mr. Al-Rawi argues the trial judge failed to properly apply the law relating to identification evidence and, in particular, erred in accepting in-court identification evidence offered by a witness.

The trial judge committed no error in his consideration of the recognition evidence adduced by the Crown. His approach

was in accordance with this Court's decision in *R. v. Downey*, 2018 NSCA 33.

The trial judge, notwithstanding Mr. Al-Rawi's assertions to the contrary, found the complainant to be credible. He believed her. On appeal, Mr. Al-Rawi argues the trial judge's conclusion was flawed because he engaged in impermissible speculation, he improperly enhanced the complainant's credibility and reversed the burden of proof.

After considering the entirety of the record, including the submissions of counsel at trial, Mr. Al-Rawi failed to demonstrate error in the trial judge's credibility analysis.

Finally, Mr. Al-Rawi asserts on appeal the trial judge failed to apply the "actual test" to the required *mens rea* to support a conviction of sexual assault. He says the trial judge confused the necessary mental element to support a conviction with the defence of honest but mistaken belief in consent.

The trial judge did not err in his consideration of the *mens rea* or the honest but mistaken belief in communicated consent. His reasons do not demonstrate error.

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Judges:	Bryson, Bourgeois and Van den Eynden JJ.A.
Appeal Heard:	June 11, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois J.A.; Bryson and Van den Eynden JJ.A. concurring
Counsel:	Ian D. Hutchison, for the appellant Mark A. Scott, Q.C., 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).

Reasons for judgment:

[1] On August 28, 2020, following a nine-day trial before a single judge of the Supreme Court of Nova Scotia, the appellant, Bassam Al-Rawi, was convicted of one count of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge, the Honourable Justice Gerald R.P. Moir, sentenced Mr. Al-Rawi to a custodial sentence of two years and issued ancillary orders.

[2] Mr. Al-Rawi seeks to have his conviction set aside by this Court. He submits the trial judge made a number of errors, specifically in relation to the assessment of the identification evidence, the complainant's credibility and his consideration of the required *mens rea* element.

[3] Having considered the totality of the record and the submissions of counsel, I am satisfied none of Mr. Al-Rawi's complaints give rise to an error of law on the trial judge's part. I would dismiss the appeal and uphold the sexual assault conviction.

Overview of the evidence at trial

[4] Several aspects of the trial evidence will be addressed later in these reasons. For now, a general review of the evidence adduced at trial is helpful to set the stage for the analysis to follow.

[5] The Crown's primary witness was the complainant. She testified that on December 14, 2012, she travelled to Halifax with colleagues and attended a professional luncheon. Afterwards, the complainant, along with her colleagues, met up with some friends for an evening of socializing. Drinks were had at a local pub, and the group later went for dinner. They subsequently attended a hockey game, after which they gathered at another pub, the Split Crow, for further drinks and socializing.

[6] The complainant testified by the time she left the Split Crow later that evening, she was quite intoxicated. It was well past midnight. When describing her actions, the complainant said she had gaps in her memory, although she was able to recall some portions of the evening's events. Evidence given by others who were with her that night supported that everyone, including the complainant, had quite a lot to drink. Although others in the group headed toward another bar upon leaving the Split Crow, the complainant did not follow.

[7] The complainant said her original plan for the evening was to eventually go back to her brother's apartment. When she left her group of friends, she set off on foot to go to the apartment, but she became disoriented. She next remembered speaking to a cab driver and entering the car. The complainant recalled driving in the cab and eventually stopping at her brother's apartment; however, he was not home.

[8] The complainant re-entered the cab, and she testified she could remember driving along a highway. She recalled the cab entering an underground parking lot and parking. She recalled the cab driver getting water out of the trunk of the car. The complainant recalled having a telephone conversation with her brother while driving, but she could not recall what was discussed. She next remembered being in an apartment with the cab driver, chatting and sharing some marijuana. No one else was there. She testified she could recall texting with her brother, and that her cell phone battery was almost dead. She said the cab driver told her to put her phone down.

[9] The complainant said she next remembered lying on a bed. She did not know how she had gotten there. She could hear sounds she believed was the cab driver in a nearby bathroom. The complainant testified she was afraid and anxious about this situation. However, given her level of intoxication, and that she did not know where she was, she felt she could not leave. The complainant testified she decided her best option was to feign sleep to dissuade the cab driver from attempting any sexual contact. She told the court she did not want to engage in sexual activity.

[10] The complainant testified that while keeping her eyes closed, she felt the cab driver tap her face and heard him say he knew she "was in there". He proceeded to pull her shirt and bra up over her head, pull her pants down her legs and vaginally penetrate her with his penis. The complainant testified she continued to pretend to be asleep up until the point when the cab driver attempted to anally penetrate her, at which time she stopped him by obstructing him with her hand and saying "whoa".

[11] The complainant said she was then instructed by the cab driver to get on top of him so the sexual activity could continue. She complied briefly but then flopped to the side. The complainant testified she could recall going to the bathroom to vomit several times. Although she could recall having a conversation with the cab driver, she could not remember what was discussed.

[12] The complainant said when she awoke in the morning, she vomited again, quickly got dressed and left the apartment building. She briefly spoke to the cab driver in response to his inquiry asking what she was doing. She told him she was leaving. The complainant testified she exited the apartment and took stairs down to the street level. She believed the apartment was on the third floor of the building. She recalled walking down a street to a nearby business where she requested a cab be called for her.

[13] Once picked up, the complainant proceeded to a friend's house with whom she had earlier made weekend plans. The complainant testified she vomited again and disclosed to her friends what had occurred the night before. They left Halifax. After being dropped off at home, the complainant attended at the local hospital for a sexual assault examination. Testimony adduced from the complainant's friends supported this evidence, both regarding the complainant's disclosure and her state of well-being.

[14] The complainant recounted she made notes of what she could recall of the evening and her interaction with the cab driver. She contacted the police the next day to report she had been sexually assaulted and provided them with her notes. She prepared what she described as a spreadsheet, attempting to set out her recollections and the events of the evening. She also provided the police with a photograph of herself for the purposes of their investigation. The complainant was contacted several months later and told that the police had interviewed a person by the name of "Bassam", but charges would not be laid.

[15] The complainant testified that several years later she became aware from a news report an individual named Bassam Al-Rawi, a Halifax cab driver, had been acquitted of sexual assault against a female passenger. Believing this was the same person who had assaulted her years earlier, the complainant contacted the police and media. Mr. Al-Rawi was subsequently charged in March 2018 with sexually assaulting the complainant on December 15, 2012.

[16] During the course of the trial, closed-circuit television video ("CCTV") was entered into evidence. It had been seized in the course of the investigation from an apartment building at 40 Bedros Lane in Bedford. The video showed a vehicle with a cab roof light entering the parking garage and parking. Two individuals, a man and a woman, are depicted departing the vehicle, walking through the parkade into the lobby and into an elevator. The quality of the video was such that the faces of the individuals could not be ascertained.

[17] When shown the CCTV, the complainant testified she recognized herself in the footage. She recognized her hairstyle and clothes. The parking garage corresponded with what she remembered. The complainant was unable to identify the other individual in the video, nor was she able to identify Mr. Al-Rawi in court as the person she was with on December 15, 2012.

[18] The Crown called two other witnesses who were asked to review the CCTV. David Veith, the property manager of two apartment buildings located on Bedros Lane, testified he knew Mr. Al-Rawi, whom he identified in the courtroom. However, Mr. Veith testified he knew him as "Adbul" not "Bassam". Mr. Veith testified the person he identified as "Adbul" resided in the apartment building at 40 Bedros, and he was a taxi driver. Mr. Veith recalled an occasion when "Abdul" drove him home from a Christmas party in his taxi. When shown the CCTV, Mr. Veith identified the parking garage as being from the building he supervised, and the man shown was the person he knew as "Abdul". Mr. Veith was familiar with the parking spot used, the car, and the roof light on the vehicle as all being associated with the person he knew as "Abdul", and whom he had identified in the courtroom. Mr. Veith also identified documents pertaining to the rental of the apartment to Mr. Al-Rawi.

[19] The Crown called Mr. Ala Hadad who testified he had been Mr. Al-Rawi's roommate for a period of time. He was shown the CCTV and also identified the male person as being Mr. Al-Rawi. Specifically, he was familiar with the parking spot shown, as well as the car and roof light as those used by Mr. Al-Rawi. Mr. Hadad testified be believed that in December 2012 he was out of the country visiting family.

[20] As noted above, the complainant had attended for a sexual assault examination. The Crown called the sexual assault nurse examiner ("SANE nurse") to confirm the complainant had attended for an examination on the evening of December 15, 2012. The SANE nurse testified as to the nature of the examination undertaken and to her observation the complainant "was reddened and excoriated around the OS"[1], which could be indicative of aggressive penetration. The SANE nurse did not note any further signs of abrasion or bruising on the complainant.

[21] The Crown called an expert toxicologist. The complainant had given a urine sample in the course of the SANE examination. Although testing showed the presence of THC (a metabolite of cannabis) in the sample, there was no reference

[1] The SANE nurse explained in her testimony that the OS is an opening in the cervix, the portion of the uterus that protrudes into the vagina.

to alcohol being present. Asked about the significance of the absence of alcohol, the witness opined, given the timeframe between the complainant having stopped drinking and when the sample was provided, the body would have completely metabolized the alcohol.

[22] The toxicologist was further questioned as to the effects of intoxication on human behaviour and memory. To summarize, he opined the combination of consuming both alcohol and cannabis could enhance the effects of both, and the progressive intoxication from alcohol can result in reduced judgment and problems with balance, co-ordination and memory. The witness testified memory can be impacted in two ways by significant alcohol consumption. First, blackout can occur wherein no memory is formed, which results in the inability to recall events. Second, memory can be fragmented whereby some things can be remembered, and others only recalled when prompted by cues.

[23] Finally, the Crown tendered the videotaped statement Mr. Al-Rawi provided to police in 2013. In the course of the statement, Mr. Al-Rawi indicated he recognized the complainant when shown her photograph. He further stated he lived in the apartment that both Mr. Veith and Mr. Hadad had identified during their evidence. Mr. Al-Rawi said the woman in the picture may have been someone he had sex with at his apartment, although he advised the police interviewer he would never have forced sex on anyone.

Position of the parties at trial

[24] In closing submissions to the trial judge, the Crown argued the identification of Mr. Al-Rawi as the man with whom the complainant had interacted on December 15, 2012 had been proven beyond a reasonable doubt.

[25] The Crown submitted all the required elements to establish a sexual assault contrary to s. 271 of the *Criminal Code* were borne out, beyond a reasonable doubt, in the evidence. The Crown set out why the complainant should be viewed as credible, particularly in relation to the absence of consent.

[26] Mr. Al-Rawi's submissions to the trial judge focused on two alleged flaws in the Crown's case. First, he submitted identity had not been proven beyond a reasonable doubt. He raised a number of concerns respecting the reliability of the evidence in that regard, notably the quality of the CCTV and the evidence of Mr. Veith and Mr. Hadad.

[27] Second, Mr. Al-Rawi strenuously argued the trial judge should find the complainant to be lacking credibility. He argued her memory gaps were not genuine but purposefully selective to lead to a conviction, and that her professed level of intoxication should be viewed with skepticism. In line with her cross-examination, Mr. Al-Rawi argued the complainant's testimony was aimed at securing a finding of guilt motivated by his acquittal in another matter. He urged the trial judge to be hesitant to conclude the complainant was an unwilling participant in the sexual activities that occurred in the cab driver's apartment.

The decision under appeal

[28] The trial judge's oral decision was rendered on August 28, 2020. At the outset, he identified a number of challenges with the Crown's case:

- The complainant recalled some details of the evening in question vividly, but could not recall other aspects;
- The complainant's inability to identify the cab driver with whom she interacted; and
- The length of delay between the complainant contacting the police and the laying of charges, and the events that intervened.

[29] With respect to the length of delay, the trial judge cautioned himself:

> When considering the testimony of [the complainant], I must examine any distortion caused by the frustration or the guilt over the many years between the events and the trial. I must also bear in mind the potential for erosion of witnesses' memories over the several years between the alleged incident and their testimony.

[30] The trial judge then turned to address the live issues at trial, beginning with identification of the cab driver. From his reasons, it is apparent the trial judge considered a number of factors in the evidence including:

- The complainant's recollection of being in an underground parking lot and apartment;
- The CCTV showing a parking lot, a man and woman exiting a car and proceeding into the building;
- The complainant identifying herself as the woman in the CCTV;

- The evidence of Mr. Veith. The trial judge's summary of his evidence included:

In 2012, Mr. Veith managed apartment buildings on Bedros Lane with the assistance of his wife, Susan Veith. One of the buildings was 40 Bedros. He and his wife had apartment 313, three flights up from the parking lot and the lobby. A gentleman he referred to as Abdul lived in 306. Mr. Veith identified Mr. Al-Rawi in court as that tenant, although his first name is Bassam, not Abdul. A lease starting January 1st, 2010, shows Bassam Ab-Duleth (sp?) and Ala Hadad as the tenants for an apartment at 22 Bedros. At sometime, Ab-Duleth was crossed off, Al-Rawi was written in, and the apartment was changed to 306 at 40 Bedros. A termination notice effective February the 1st, 2013, purports to be signed by Bassam Al-Rawi;

- The evidence of Mr. Hadad. The trial judge noted:

Mr. Hadad is a retired taxi driver. He moved from Iran to Canada 30 years ago and drove a cab in Halifax most of that time. He returns to the old country for visits of a month or so, at least once a year. It is likely he was in Iran in December 2012. At that time, he shared a two-bedroom apartment with Mr. Al-Rawi, apartment 306 at 40 Bedros Lane … .

Mr. Hadad identified Mr. Al-Rawi when he testified. Mr. Hadad was shown the surveillance videos. He saw that the taxi had roof light 062. He said that was his number. The number on the roof light in the video is fuzzy at times. It looks like 042 to me, but it could be 062 for someone who saw the roof light many times. Mr. Hadad lent the roof light to Mr. Al-Rawi from time to time.

They had two parking places. One was outside. That was Mr. Hadad's. The other was inside. Mr. Al-Rawi used it. Mr. Hadad said the taxi in the video parked in Mr. Hadad's space looked like Mr. Hadad's car. He saw bottles of oil at the end of Mr. Al-Rawi's space. He said he used those for his vehicle. Mr. Hadad had seen bottles there many times.

When the driver got out of the taxi and walked towards the lobby door and when the video showed him in the lobby, Mr. Hadad identified the driver as Mr. Al-Rawi. In both instances, Mr. Hadad claimed he could identify Mr. Al-Rawi by his height and his white jacket.

- Mr. Al-Rawi's acknowledgement in his police statement he lived in the apartment identified by Mr. Veith and Mr. Hadad, specifically apartment 306, 40 Bedros Lane; and

- Mr. Al-Rawi's further acknowledgement to police that he recognized the complainant when shown her photograph. The trial judge noted,

however, Mr. Al-Rawi went "a step beyond admitting his recognition of her face" when he advised police:

> I remember this girl for one night, and then disappeared. In my knowledge, like, in my eyes and in my mind, next day, that's it. Bye bye.

[31] The trial judge then turned his mind to the complainant's credibility and, in particular, the defence's two-pronged attack launched against it. Specifically, the trial judge turned his mind to whether the complainant was as intoxicated as she portrayed, and whether she was motivated to come forward only after hearing that Mr. Al-Rawi had been acquitted in relation to another allegation of sexual assault. The trial judge was well-aware these concerns, according to Mr. Al-Rawi, raised the spectre that the sexual encounter in question was consensual, and he should not have "confidence" in the complainant's assertions otherwise.

[32] With respect to the level of intoxication, the trial judge was satisfied the complainant "did not exaggerate her drunkenness on the morning of December 15, 2012". In reaching this conclusion, the trial judge noted:

- The evidence was not clear about how much beer had been consumed by the complainant that evening, but he was satisfied it was a lot. Common sense dictated the amount consumed would lead to intoxication;

- The complainant and her friends credibly described the effects on them of their drinking; and

- The complainant's evidence, in conjunction with the expert evidence, made her claim of intoxication ring true. The trial judge said:

> Her testimony presented an unvarnished recollection from the hours in which she became increasingly intoxicated. Her blurry recollections, her gaps in memory, bad judgments and misconceptions conveyed what the expert toxicologist and common sense tell us to expect from recollections of a drunken experience.

[33] The trial judge then turned his mind to the suggestion the complainant's evidence was tainted by a motivation to secure a conviction arising from Mr. Al-Rawi's acquittal in another prosecution. In this regard, the trial judge noted the complainant had been cross-examined on her statements to police, documents she had prepared for their consideration and the transcript of her testimony at the preliminary hearing. He was of the view the cross-examination did not reveal serious contradictions and did not serve to impeach her credibility. The trial judge further noted:

- In the days following the events, the complainant carefully examined what she could recall and what she had to surmise in order to present the police with a "reliable spreadsheet". He was satisfied the complainant undertook this task out of a desire to preserve what she could recall;

- The complainant "had years to imagine sharpened recollections, to imagine filling in for gaps, to find explanations for bad judgments, and to correct the misperceptions. She did none of those things"; and

- Her bad judgments were consistent with intoxication.

[34] In addressing Mr. Al-Rawi's argument it was implausible the complainant could remember details of the alleged assault, yet not remember conversations with her brother or the cab driver (which he said could support a narrative of consent), the trial judge observed her memory "was not perfect at anytime". Further, he said "one expects an intoxicated person who undergoes a violent assault to be more alert when the assault happens".

[35] The trial judge concluded he believed the complainant. He next turned to the law of sexual assault and noted:

> The elements of the *actus reus* are simply, one, touching, two, of a sexual nature, and three, absence of consent. In this case, the evidence establishes beyond doubt the first two elements.

[36] Using the recent decision of *R. v. Percy*, 2020 NSSC 138 as a reference source for the applicable legal principles, the trial judge considered the issue of consent, and concluded:

> [The complainant] testified over and over that she did not want sex with Mr. Al-Rawi. For the reasons given at length in the parts of this decision on [the complainant's] evidence of assault and the credibility of [the complainant], I accept her evidence on consent. The third element of the *actus reus* of sexual assault has been proved beyond a reasonable doubt.

[37] The trial judge then turned his mind to the required *mens rea* and the defence of honest but mistaken belief in communicated consent. Again referencing passages from *Percy*, he said:

> The subject of consent is revived when the trier of fact considers *mens rea* and a defence of honest but mistaken belief. Paragraph 94 and 143 to 152. The accused must have believed honestly, though mistakenly, quote, "that the complainant

actually communicated consent, whether by words or by conduct," end quote. Paragraph 148. This cannot be based on, quote, "silence, passivity or ambiguous conduct." Paragraph 150.

Further, Section 273.2(a)(ii) of the *Criminal Code* precludes the honest but mistaken belief defence where, quote:

> The accused did not take reasonable steps in circumstances known to the accused at the time to ascertain that the complainant was consenting".

End quote. See also paragraph 149 of *Percy*.

[38] The trial judge determined:

> The exculpatory *mens rea* intent and the honest but mistaken belief defence do not arise on the facts of this case. A drunken person who feigns sleep and maintains silence when the feigned sleep does not prevent being stripped and assaulted communicates nothing about consent. Indeed, the feigned sleep is proof that no consent is communicated. Nothing in Mr. Al-Rawi's police statement contradicts [the complainant's] evidence about being intoxicated, not wanting sex and feigning sleep.

[39] In conclusion the trial judge said:

> I find it has been proved beyond reasonable doubt that, on December 15, 2012, at Halifax, Mr. Al-Rawi touched [the complainant] in a sexual way without her having communicated consent. I find the evidence excludes beyond reasonable doubt an honest but mistaken belief in consent. Therefore, I find Mr. Al-Rawi guilty.

Issues

[40] In his factum, Mr. Al-Rawi sets out the following issues for determination:

(a) Did the trial judge err when considering certain evidence relating to the complainant?

(b) Did the trial judge err when considering the identification evidence?

(c) Did the trial judge err by improperly using hearsay evidence?

(d) Did the trial judge err in shifting the burden of proof to him?

(e) Did the trial judge err in determining the *mens rea* for sexual assault was met?

[41] During the course of the hearing, Mr. Al-Rawi abandoned issue (c). After having heard and considered the submissions of the parties, I would re-order and re-state the issues raised on appeal as follows:

(a) Did the trial judge err in his analysis of the evidence relating to the identification of Mr. Al-Rawi?

(b) Did the trial judge err in his assessment of the complainant's credibility?

(c) Did the trial judge err by failing to appropriately consider the *mens rea* element required for a conviction?

Analysis

Did the trial judge err in his analysis of the evidence relating to the identification of Mr. Al-Rawi?

[42] As noted earlier, the identity of the person the complainant was with on the morning of December 15, 2012 was very much in issue at the trial. The trial judge identified it as a primary issue. He was well-aware of the challenges faced by the Crown in establishing, beyond a reasonable doubt, Mr. Al-Rawi was the cab driver the complainant had encountered and accompanied to his apartment.

[43] In his reasons, the trial judge reviewed the evidence presented by the Crown on the issue of identification, including that of Mr. Al-Rawi's former roommate and the building manager. Both men identified Mr. Al-Rawi as a person with whom they were familiar. The trial judge noted in particular both of these witnesses were "not dealing with identification similar to a police line-up". Based on the totality of the evidence, which included the CCTV, the evidence of the witnesses and Mr. Al-Rawi's statement to police, the trial judge was satisfied beyond a reasonable doubt Mr. Al-Rawi was the person who had been with the complainant.

[44] On appeal, Mr. Al-Rawi alleges three errors in relation to the trial judge's conclusion:

1. He erred by "failing to consider and properly apply the law as to identification evidence";

2. He erred by relying upon an in-court dock identification; and

3. He erred when he treated the evidence of the two identification witnesses as circumstantial evidence.

[45] With respect to the first complaint, Mr. Al-Rawi's concern is explained in his factum as follows:

> 52. In his decision, the trial Judge failed to consider the law as to identification evidence. Fundamental principles that an honest witness may be mistaken, or the known fragilities of identification evidence were not addressed. A fail[ure] to do so amounts to an error of law.
>
> 53. The trial Judge commented the identification evidence of both witnesses should not be treated in the same way as "identification similar to a police line-up", see paragraphs 58 and 65 of the trial Judge['s] decision. What this means is unclear. We submit that the evidence of a witness asked to identify [a] person depicted on a video should not be held to a different standard to the evidence provided by a witness who participates in a police line-up. To treat different types of identification evidence is an error.

[46] This argument is unconvincing. In its trial submissions, the Crown argued the trial judge should treat the testimony of the two witnesses as recognition evidence in accordance with the principles outlined by this Court in *R. v. Downey*, 2018 NSCA 33. Although a sub-set of identification evidence, Justice Saunders explained in *Downey* the nature of recognition evidence as follows:

> [51] Before turning to the specific errors which tainted the trial judge's decision making in this case, I will start by explaining the proper legal principles that ought to be applied in an "identification" case such as this. Moreover, it is important to emphasize that the circumstances surrounding this tragic home invasion and attempted murder are more properly characterized as a "recognition" case, which tends to be treated as a separate, sub-set of the broader commentaries seen in the identification jurisprudence. This is an important distinction and one which appears to have been overlooked by the trial judge in his analysis.
>
> [52] Ordinarily, "identification evidence" is used to describe the kind of evidence offered by eyewitnesses who are strangers to an accused but who later testify that the person on trial is the individual they observed at the scene of the crime, and which eyewitness reporting is perhaps later confirmed after pointing out that same individual in a police photo line-up during the course of the investigation.
>
> [53] **That kind of eyewitness identification evidence offered by strangers is to be distinguished from voice or visual identification evidence offered by witnesses who are "familiar" with the accused. Such evidence is properly characterized as "recognition evidence" because the witness is able to verify their identification of the accused from *recognizing* the voice and/or**

> **appearance of the accused based on their familiarity and interaction one with the other.**
>
> [54] A helpful explanation of this distinction can be found in the decision of the British Columbia Court of Appeal in *R. v. Bob*, 2008 BCCA 485 where Neilson, J.A., writing for a unanimous court said:
>
> > [13] … this was a case of recognition, rather than identification. There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. <u>While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence:</u> *R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), aff'd [1996] 2 S.C.R 461, 107 C.C.C. (3d) 194.
>
> (Underlining and italics in original; bolding added)

[47] I am satisfied the trial judge, in stating the two witnesses provided evidence different from that in a police line-up, was cognizant of the principles outlined in *Downey*. It was not an error for him to view the evidence of the two witnesses who had familiarity with Mr. Al-Rawi from their past contacts with him as being different from a stranger identifying a previously unknown suspect from a police line-up.

[48] With respect to Mr. Al-Rawi's second concern, the entirety of his argument is contained in a single paragraph of his factum:

> 54. We also submit that the trial Judge also erred in accepting the dock identification of Mr. Al Rawi by Mr. Veith, see paragraph 49 of the trial Judge['s] decision. Mr. Veith testified that the person in the video was a former tenant by the name of Abdul, not Bassam. Mr. Veith made an in-court dock identification that Abdul was Mr. Al Rawi. As held in **R v. Trochym**, 2007 SCC 6, at paragraph 32, an in-court dock identification is **totally unreliable evidence**. Despite this, the trial Judge relied upon the in-court identification of Mr. Al Rawi to find that Mr. Veith had identified the person in the video as looking "similar" to Mr. Al Rawi. This was an error at law.
>
> (Emphasis added)

[49] As explained earlier, Mr. Veith identified Mr. Al-Rawi as being a former tenant at the apartment complex he supervised. He testified he knew him as "Abdul", not "Bassam", and identified the appellant in the courtroom as the person

he knew from the apartment building. The trial judge noted in his reasons (referred to above and repeated here for ease of reference):

> In 2012, Mr. Veith managed apartment buildings on Bedros Lane with the assistance of his wife, Susan Veith. One of the buildings was 40 Bedros. He and his wife had apartment 313, three flights up from the parking lot and the lobby. A gentleman he referred to as Abdul lived in 306. **Mr. Veith identified Mr. Al-Rawi in court as that tenant, although his first name is Bassam, not Abdul**. A lease starting January 1st, 2010, shows Bassam Ab-Duleth and Ala Hadad as the tenants for an apartment at 22 Bedros. At sometime, Ab-Duleth was crossed off, Al-Rawi was written in, and the apartment was changed to 306 at 40 Bedros. A termination notice effective February the 1st, 2013, purports to be signed by Bassam Al-Rawi.
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> (Emphasis added)

[50] In the context of this case, the trial judge made no error in relying upon Mr. Veith's in-court identification of Mr. Al-Rawi as the former tenant he knew as Abdul. Mr. Al-Rawi asserts *R. v. Trochym*, 2007 SCC 6 stands for the proposition that "an in-court dock identification is totally unreliable evidence". However, I disagree such a definitive statement can be made, or serves to establish legal error on the trial judge's part. I reach that conclusion for three inter-related reasons.

[51] First, in *Trochym*, as opposed to stating such evidence was "totally unreliable", Justice Deschamps noted at para. 32:

> … In *R. v. Hibbert*, [2002] 2 S.C.R. 445, 2002 SCC 39, at para. 50, Arbour J., writing for the majority, stated that despite its long-standing use, dock identification is almost totally unreliable.

The above constituted the entirety of the Court's commentary on the issue of in-court dock identification.

[52] It is helpful to look at the Supreme Court's direction in *R. v. Hibbert*, 2002 SCC 39 regarding in-court dock identification. In that instance, a real estate agent was brutally attacked by an unknown man who attended an open-house at one of her listed properties. She was able to give a physical description of the attacker. She was shown a police line-up and identified the accused as looking familiar, but she did not identify him as the assailant. On the day he was arrested, local television coverage depicted the accused being accompanied by police. The victim recorded the footage of the accused and studied it, including stopping frame by frame to study his appearance. At trial, the victim positively identified the

accused, sitting in court, as the person who attacked her. The accused was convicted.

[53] Although the trial judge in *Hibbert* gave a warning to the jury about the perils of the in-court identification evidence, the Supreme Court determined in those factual circumstances, a stronger warning to the jury was warranted. What is notable, however, is the Court did not prohibit the use of such in-court identification evidence, but that the nature of the warning required a contextual consideration. Justice Arbour noted:

> 50 I am of the view that, in the circumstances of this case, the trial judge should have cautioned the jury more strongly that the identification of the accused in court, by Mrs. McLeod and Mrs. Baker, was highly problematic as direct reliable identification of the perpetrator of the offence. I think it is important to remember that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it. I am not persuaded that the instruction quoted above, to the effect that such identification should be accorded "little weight", goes far enough to displace the danger that the jury could still give it weight that it does not deserve.
>
> …
>
> 53 What will be required to displace the danger that the jury will give an eyewitness identification weight that it does not deserve will vary with the facts of individual cases. Here, at a second trial, and in light of the identification history, I think a stronger warning would have been appropriate.

[54] Contrary to Mr. Al-Rawi's assertion, there is no absolute prohibition against the consideration of in-court identification of an accused. Further, the trial judge was clearly aware of the discrepancy in Mr. Veith's understanding of Mr. Al-Rawi's name. In this context, where Mr. Veith was identifying Mr. Al-Rawi in the courtroom as someone with whom he was familiar, I see no legal error in the trial judge noting and relying upon the building manager's evidence in relation to the issue of identification.

[55] Mr. Al-Rawi's final complaint regarding the trial judge's use of the identification evidence was the manner in which the trial judge chose to reference it. Mr. Al-Rawi specifically complains that in two places in his reasons, the trial judge refers to the evidence of Mr. Veith and Mr. Hadad as "circumstantial evidence". He does not explain how the trial judge's use of this descriptor gives rise to legal error. I see none.

[56] The trial judge was satisfied beyond a reasonable doubt Mr. Al-Rawi was the person depicted in the CCTV with the complainant on December 15, 2012. Having considered the evidentiary record, that was a conclusion the trial judge was entitled to make. Mr. Al-Rawi has not demonstrated legal error justifying appellate intervention.

Did the trial judge err in his assessment of the complainant's credibility?

[57] Mr. Al-Rawi alleges the trial judge made fatal errors in the assessment of the complainant's credibility. Before looking at his specific complaints, I will set out the legal principles that govern an assessment of credibility, both generally and in the context of sexual assault allegations.

[58] Principles relating to the assessment of credibility, particularly in relation to allegations of sexual assault, were recently set out in *R. v. Stanton*, 2021 NSCA 57. Justice Derrick summarized the leading principles at para. [67], notably:

- 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 at 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 at 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 at para. 5; upheld 2020 SCC 39).

- "Credibility findings are the province of the trial judge and attract significant deference on appeal" (*G.F.* at para. 99). Appellate intervention will be rare (*R. v. Dinardo*, 2008 SCC 24 at 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 at paras. 10–11).

- Once the complainant asserts 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 at 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* at 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 at 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 at 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 at para. 14).

[59] In *G.F.*, the Supreme Court re-iterated appellate courts must not unduly parse a trial judge's credibility assessment. Justice Karakatsanis wrote:

> [76] Despite this Court's clear guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate

> court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged.
>
> …
>
> [79] To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review: *Sheppard*, at para. 54. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. **Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error:** *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at pp. 523-25. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated: *Sheppard*, at para. 46. An appeal 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. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity.

(Emphasis added)

[60] Having reviewed the governing principles, I now turn to Mr. Al-Rawi's complaints he says undermine the trial judge's credibility assessment. He submits the trial judge's credibility analysis in relation to the complainant was tainted by legal error because (a) he engaged in impermissible speculation; (b) he improperly enhanced the complainant's credibility; and (c) he reversed the burden of proof. I will explain why, based upon a contextual review of the evidence, the arguments advanced at trial and the trial judge's reasons, I am satisfied there is no demonstrable error justifying appellate intervention.

(a) Impermissible speculation

[61] Mr. Al-Rawi points to the following statement in the trial judge's reasons as demonstrating impermissible speculation:

> It is submitted that [the complainant's] sharp memories from the assault itself, the detail she was able to recall from them, contrasted with her purported failure of memory from before. Firstly, her memory was not perfect at anytime. Secondly,

> **one expects an intoxicated person who undergoes a violent assault to be more alert when the assault happens**. I believe [the complainant].
>
> (Emphasis added)

[62] It bears repeating that Mr. Al-Rawi's argument at trial was the complainant should not be believed. He alleged the sexual encounter on December 15, 2012 with the cab driver was consensual, and the complainant was motivated to come forward with her story of non-consensual sex only after hearing about Mr. Al-Rawi's later acquittal some years later. At trial the defence argued the lapses in her memory were feigned and it was entirely incredible the complainant could vividly describe the alleged sexual assault but could not recall other aspects of the evening. Mr. Al-Rawi argued these purposefully "forgotten" times included events that would have supported the sexual activity was consensual.

[63] In his factum Mr. Al-Rawi describes the judge's error as follows:

> 39. In Mr. Al-Rawi's case, the trial Judge also engaged in impermissible speculation. There was absolutely no evidence presented at trial upon which the trial Judge could find that [an] intoxicated person who undergoes a violent assault will become more alert and have sharper memories of the assault compared to memories of earlier events. In making this finding the trial Judge erred in law.

[64] In support of his argument, Mr. Al-Rawi relies upon *R. v. Roth*, 2020 BCCA 240 where the British Columbia Court of Appeal explored the meaning and consequences of impermissible speculation. He highlights the following passages of the court's reasons:

> [64] The appellant is correct that as a matter of legal principle, it is wrong for a judge to make a negative credibility finding based on a "stereotypical assumption or generalization" that is lacking in an evidentiary foundation: *R. v. Kodwat*, 2017 YKCA 11 at para. 41; *R. v. Thompson*, 2019 BCCA 1 at paras. 52–69; *R. v. Quartey*, 2018 ABCA 12 at paras. 2, 21, aff'd 2018 SCC 59.
>
> [65] Moreover, although judges are entitled to rely on their human experience in assessing the plausibility of a witness's testimony, they must avoid speculative reasoning that invokes "common sense" assumptions not grounded in the evidence: *R. v. Cepic*, 2019 ONCA 541 at paras. 19 –27; *R. v. Perkins*, 2007 ONCA 585 at paras. 30–42.
>
> …
>
> [73] In assessing the credibility of testimony, a trial judge is entitled to draw inferences that "flow logically and reasonably from established facts": *R. v. MacIsaac*, 2015 ONCA 587 at para. 46. When inferences reflect conjecture and

> speculation, based on stereotypical reasoning, a generalization about a particular role or type of individual, unfounded assumptions or otherwise, it amounts to legal error: *MacIsaac* at para. 46, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.) at 530–531; *R. v. Pilkington*, 2019 BCCA 374 at paras. 20–21. In my view, that is what occurred here and it tainted the judge's credibility assessment.

[65] In response, the Crown says the trial judge did not engage in impermissible speculation, nor make an improper generalization. It submits the trial judge was simply responding to the defence assertion regarding the implausibility of the complainant's purported fragmented memory, and he made an entirely reasonable inference grounded in the evidence before him. The Crown points out it is common for trial judges to be called upon to assess credibility notwithstanding the memory of witnesses being impaired or fragmented by intoxication, and typically without expert evidence about the impact of alcohol on memory.

[66] Although the conviction before us is one of sexual assault, I do not understand Mr. Al-Rawi to be asserting the trial judge engaged in impermissible stereotyping or relied on myths relating to the behaviours of sexual assault complainants or perpetrators. The complaint is the trial judge made an ungrounded common sense assumption about the impact of intoxication on memory and, specifically, the impact of experiencing a violent event on the ability to remember.

[67] In considering this matter, in addition to the principles set out in *Roth*, I found the recent comments of Paciocco J.A. in *R. v. J.C.*, 2021 ONCA 131 instructive:

> (1) **The Rule Against Ungrounded Common-Sense Assumptions**
>
> [58] The first such rule is that judges must avoid speculative reasoning that invokes "common-sense" assumptions that are not grounded in the evidence or appropriately supported by judicial notice: *R. v. Roth*, 2020 BCCA 240, at para. 65; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286, at paras. 19-27; *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289, at paras. 35-36. For clarity, I will call this "the rule against ungrounded common-sense assumptions".
>
> [59] **To be clear, there is no bar on relying upon common-sense or human experience to identify inferences that arise from the evidence.** Were that the case, circumstantial evidence would not be admissible since, by definition, the relevance of circumstantial evidence depends upon using human experience as a bridge between the evidence and the inference drawn.
>
> …
>
> [61] Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to

> interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour.
>
> (Emphasis added)

[68] Further, in *R. v. Pastro*, 2021 BCCA 149 the British Columbia Court of Appeal summarized the relevant principles as follows:

> [40] As Justice Paciocco recently cautioned in *R. v. J.C.*, 2021 ONCA 131 at para. 58, "judges must avoid speculative reasoning that invokes 'common-sense' assumptions that are not grounded in the evidence or appropriately supported by judicial notice". The prohibition has found expression in a number of recent cases: see, for example, *R. v. A.R.D.*, 2017 ABCA 237 at paras. 6–9, 28, 43–44, 71, aff'd 2018 SCC 6; *R. v. Paulos*, 2018 ABCA 433 at paras. 26–29, 34, 39, leave to appeal ref'd (2020), [2019] S.C.C.A. No. 336; *R. v. C.M.M.*, 2020 BCCA 56 at paras. 138–139; *R. v. Kodwat*, 2017 YKCA 11 at paras. 27–28, 41.
>
> [41] Judges are entitled, and expected, to rely on their life experience in making credibility findings. This necessarily includes drawing common-sense inferences from established facts. Juries are routinely instructed along the same lines—to come to common-sense conclusions based on the evidence they accept. **Where it is apparent from a review of the reasons as a whole that a credibility assessment is rooted in the evidence, and is the product of a case-specific determination about what the complainant and accused did or did not do, there will be no basis for appellate intervention, absent palpable and overriding error in fact:** see *R. v. Mann*, 2020 BCCA 353 at paras. 72–76; *R. v. Quartey*, 2018 ABCA 12 at paras. 21, 34–35, aff'd 2018 SCC 59. This is consistent with the deferential standard of review that applies to factual findings and with the profound functional and policy justifications that underlie it.
>
> (Emphasis added)

[69] Putting the impugned statement of the trial judge in context, I am not persuaded he engaged in impermissible speculation. In reaching this determination, it is important to remember the trial judge's comment was in response to the defence attack on the complainant's credibility because she could remember the sexual assault but not aspects of the evening that may have assisted the defence. As such, I do not read the trial judge's conclusion as making a generalized statement about the memories of all intoxicated persons. Rather, he was addressing the defence challenge to the plausibility of the complainant's inconsistent memory.

[70] Further, I am satisfied there was ample support in the evidentiary record for the trial judge to conclude the complainant's credibility was not impaired because she could remember the sexual assault and not other events highlighted by Mr. Al-Rawi. The evidence before the trial judge included:

- The complainant's and her friends' testimonies as to their level of intoxication being high;

- The complainant's ability to recall some aspects of the evening, but not others, including those that occurred before her encounter with the cab driver. In other words, it was not just aspects of the evening which allegedly could have been of assistance to the defence that the complainant could not recall, she had difficulty remembering other aspects of the night as well;

- The toxicologist's explanation of how intoxication can result in fragmented memory;

- The complainant's testimony she was fearful when she realized she was lying on a bed in the cab driver's apartment; and

- The complainant's description of her clothing being removed, indicative of rough handling.

[71] Based on the evidence before him, the trial judge was entitled to find the complainant was intoxicated and her memory was fragmented. He was entitled to conclude her memory for more mundane aspects of the evening and early morning had been impacted. Using common sense and human experience, it was open to the trial judge to infer that less mundane events (such as those eliciting fear) may be better remembered. On that basis, he was entitled to reject the defence argument the complainant's ability to recall the alleged sexual assault impaired her credibility.

(b) Improper enhancement of the complainant's credibility

[72] On appeal Mr. Al-Rawi takes issue with the following bolded aspects of the trial judge's reasons:

> [The complainant] was cross-examined on her statements to police, documents she prepared for their consideration, and the transcript of her testimony at preliminary hearing. This was helpful for clarifying and refining evidence on memory gaps and levels of intoxication. But the cross-examination did not reveal

> serious contradictions impeaching credibility. **This gives me confidence in the testimony I heard from [the complainant]**.
>
> First, in the days following the events, [the complainant] carefully examined what she could recall and what she had to surmise in order to present the police with a reliable spreadsheet. I am satisfied she did so out of a desire to preserve what she could recall.
>
> **Secondly, she has had years to imagine sharpened recollections, to imagine filling in for gaps, to find explanations for bad judgments, and to correct the misperceptions. She did none of those things.** As I said, her testimony reflected what one would expect from recollection of a drunken experience unvarnished.

(Emphasis added)

[73] Mr. Al-Rawi relies upon *R. v. Alisaleh*, 2020 ONCA 597 where the Ontario Court of Appeal noted:

> [16] To be clear, it is not an error to simply note that there is an absence of embellishment in the complainant's testimony. This court has held that the presence of embellishment can be a basis to find the complainant incredible, and there is nothing wrong with noting the absence of something that could have diminished credibility. However, it is wrong to reason that because an allegation could have been worse, it is more likely to be true: *R. v. Kiss*, 2018 ONCA 184 at para. 52, citing *R. v. G.(G.)* (1997), 115 C.C.C. (3d) 1, at p. 10 (Ont. C.A.); *R. v. L.L.*, 2014 ONCA 892, at para. 2; *R. v. G. (R.)*, 2008 ONCA 829, 243 O.A.C. 1, at para. 20. Our colleague Paciocco J.A. put it this way in *Kiss* at para. 52:
>
> > On the other hand, in my view, there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. <u>As long as it is not being used as a makeweight in favour of credibility</u>, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible. [Emphasis added.]
>
> [17] In this case, the trial judge was not simply noting that the complainant's evidence did not suffer from a problem of exaggeration or embellishment that diminished its weight in response to a defence argument that the complainant had embellished her allegations. Rather, the lack of embellishment was specifically noted as an "important" factor used to "enhance" the complainant's credibility. Therefore, we agree with the Crown's concession on this error.

[74] Mr. Al-Rawi says the trial judge's finding the complainant did not embellish her testimony led to his "confidence" her evidence was credible. He submits this is the same error of law as identified in *Alisaleh*.

[75] The Crown does not take issue with the legal principles outlined above. It agrees it would constitute an error of law if the trial judge used the complainant's lack of embellishment as a "makeweight in favour of credibility". However, the Crown submits the import of the trial judge's words must be considered within the context of the live issues and arguments advanced before him. When a contextual approach is taken, the Crown says this Court should reject the assertion of error.

[76] I also do not take issue with the principles stated in *Alisaleh*. However, I agree with the Crown that the application of those principles must be done within the specific context of each case. A judge making reference to a lack of embellishment in his credibility assessment does not automatically give rise to legal error. It is essential such references be assessed on appeal in light of the evidence and arguments advanced at trial.

[77] An example of a contextual approach to what may, at first instance, appear to be an improper reference to lack of embellishment is demonstrated in *R. v. Smith*, 2020 ONCA 632. There, Mr. Smith had been convicted of aggravated assault arising from a knife attack. At trial the identity of the attacker was in question. The Crown relied heavily on the testimony of Ms. McKoy, the accused's former girlfriend, who recounted her interaction with the accused on the night of the attack. She testified the accused made a number of statements to her that implicated him in the assault. The defence challenged Ms. McKoy's credibility, arguing she had a motive to lie and had concocted her evidence to buttress her custody claim in regard to the couple's child. The trial judge in that case found Ms. McKoy did not embellish her evidence and to be credible.

[78] On appeal Mr. Smith argued the trial judge's credibility assessment was flawed due to his reliance on Ms. McKoy's lack of embellishment. The court rejected this argument, and explained the importance of context:

> [6] It is well established that the fact that a witness does not embellish her testimony does not enhance her credibility. But it is also well established that the mere mention of the absence of embellishment does not undermine a credibility finding that is otherwise properly supported. These points are made clear in *Alisaleh*, at paras. 16-17, a case in which the Crown conceded that the trial judge had improperly relied on a witness's lack of embellishment as an "important" factor to "enhance" her credibility, a concession this court accepted.

> [7] This is not a case in which a witness's lack of embellishment was relied on or used as a "makeweight" to establish or enhance credibility: see *R. v. Kiss*, 2018 ONCA 184, 145 W.C.B. (2d) 666, at para. 53. **It was not inappropriate for the trial judge to note that McKoy had not embellished her evidence in the context of addressing the appellant's claim that she was merely reiterating press reports or that her testimony was led.**
>
> (Emphasis added)

[79] More recently, the British Columbia Court of Appeal found a trial judge's reference to a lack of embellishment did not undermine his credibility findings. In *R. v. Johnston*, 2021 BCCA 34, the trial judge's impugned words were viewed contextually:

> [113] On a reading of the Trial Reasons as a whole, it is our view that the judge did not use the lack of embellishment as a makeweight in favour of the credibility of Person Y and K.M. There were numerous other factors that she took into account when assessing their credibility. As in *Kiss*, the judge was simply noting that their credibility was not diminished by the existence of embellishment in their testimony. **In the case of K.M., the judge made her comments about lack of embellishment in addressing the argument of defence counsel that K.M. was falsely implicating the accused in order to save her own skin.**
>
> (Emphasis added)

[80] In the present case, I am satisfied the trial judge did not impermissibly use the complainant's lack of embellishment as a source of confidence in her evidence and a bolster to her credibility. In doing so I note:

- On no fewer than ten occasions, defence counsel in his closing arguments asked the trial judge to consider whether he could have "confidence" in the Crown's case. He particularly challenged the trial judge to consider whether he could have "confidence" in the complainant's evidence. The trial judge's use of the word "confidence" in his reasons was simply a response to the arguments made to him by defence counsel. It is not indicative of error on his part; and

- The trial judge's statement the complainant "had years to imagine sharpened recollections, to imagine filling in for gaps, to find explanations for bad judgments, and to correct the misperceptions" was directly in response to the defence allegation she was being untruthful at trial because of Mr. Al-Rawi's acquittal in another matter. In light of this allegation of fabrication, it was not improper for the trial judge to note the complainant

> had not materially changed her evidence at trial from the information she had provided to police in 2012. He was simply addressing the defence allegation of fabrication as he was required to do, and explaining why he found it was without merit.

(c) Reversal of the burden of proof

[81] As a final challenge to the trial judge's credibility analysis, Mr. Al-Rawi focuses on a single sentence in the reasons:

> The main attack on [the complainant's] credibility is an assertion that her recall was selective. She recalled much but ignored memories that contradicted her desire to turn consensual sex into unconsented sex. **Why she formulated such a desire is not explained.**

[82] In his factum, Mr. Al-Rawi summarized his concern as follows:

> 65. With respect we submit that the trial Judge erred in [posing] this question and finding that Mr. Al-Rawi did not explain why [the complainant] fabricated her evidence. This finding imposed an obligation upon Mr. [Al-Rawi] to explain why [the complainant] would fabricate her evidence and runs contrary to the presumption of innocence and reversed the burden of proof.

[83] I agree if the trial judge reversed the burden of proof, such would constitute an error of law and justify appellate intervention. I also agree with the Crown, however, that Mr. Al-Rawi has not demonstrated the trial judge made that error.

[84] The trial judge's comments reflect his recitation of the defence argument he had heard in oral submissions. There is no indication to support Mr. Al-Rawi's assertion the trial judge posed a question to himself, or that he made any finding relative to his ultimate conclusion on credibility. More is required to displace the presumption the trial judge understood the burden of proof rested exclusively with the Crown and Mr. Al-Rawi carried no such obligation. As made clear in *G.F.*, an appellant is obligated to demonstrate error within a judge's assessment of credibility. The possibility of error is insufficient to warrant appellate intervention.

[85] To summarize, Mr. Al-Rawi has failed to demonstrate the trial judge's credibility assessment is flawed. I would dismiss this ground of appeal.

Did the trial judge err by failing to appropriately consider the mens rea element required for a conviction?

[86] Mr. Al-Rawi says the trial judge erred in law in his treatment of the *mens rea* element for sexual assault and the conviction must be set aside. His argument is not complicated.

[87] Mr. Al-Rawi alleges the trial judge confused the concepts of *mens rea* and the defence of honest and mistaken belief in consent. The trial judge is criticized for not considering the "actual test" to establish the required *mens rea*, not applying it and not referencing leading authorities from the Supreme Court of Canada. Instead, says Mr. Al-Rawi, the trial judge inappropriately only focused on the issue of "communicated consent".

[88] The Crown says there is no demonstrable error in how the trial judge applied the facts as he found them to the *mens rea* element. The trial judge was adhering to proper legal principles when he turned his mind to whether there was the required communicated consent to the sexual activity.

[89] I am satisfied the trial judge did not fall into error as alleged. A brief review of the guiding principles relevant to the issues raised in the context of this appeal will assist in explaining why:

- The *actus reus* of sexual assault requires the Crown to prove three things: i) touching; ii) of an objectively sexual nature; iii) to which the complainant did not consent. The first two elements are assessed objectively; however, the third is assessed by virtue of the complainant's subjective state of mind regarding the touching (*Ewanchuk* at para. 25; *G.F* at para. 25);

- At the *mens rea* stage, the Crown must establish (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting or was reckless or wilfully blind as to the absence of consent (*Ewanchuk* at para. 42; *R. v. Barton*, 2019 SCC 33 at para. 87 and *G.F.* at para. 25);

- In *Barton*, the Supreme Court set out the meaning of consent for the purpose of the *mens rea* analysis as follows:

> [90] For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the

complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" (*Ewanchuk*, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (*ibid.*, at para. 47).

- It should be recalled that although referred to as a "defence", an honest but mistaken belief in communicated consent is not a legal defence *per se*, but rather a challenge to the Crown's assertion it has proven the second *mens rea* element beyond a reasonable doubt. As explained in *Ewanchuk*:

> 43 The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):
>
> > Mistake is a defence … where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.
>
> 44 The defence of mistake is simply a denial of *mens rea*. It does not impose any burden of proof upon the accused (see *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

- In *Barton*, the Court cautioned on honest but mistaken belief in communicated consent must rest on a mistake of fact, not a mistake of law. Therefore, an accused who is mistaken as to "what counts as consent" from a legal perspective, will be unsuccessful in challenging the requisite *mens rea* (para. 96);

- Section 273.2 of the *Code* places limits on an accused's ability to raise the defence of honest but mistaken belief in communicated consent. Particularly relevant is s. 273.2(b), which requires an accused to have taken

"reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting";

- The Court in *Barton* has provided guidance on what may and, perhaps more importantly, may not constitute reasonable steps to ascertain consent:

> [106] Keeping in mind that "consent" is defined under s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question", what can constitute reasonable steps to ascertain consent? In my view, the reasonable steps inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words of the statute by supplementing or replacing them with different language.
>
> [107] That said, it is possible to identify certain things that clearly are *not* reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. **As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law** (see *Ewanchuk*, at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see Sheehy, at p. 518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see Sheehy, at p. 537);

(Italics in original; bolding added)

The Court offered the following guidance:

> [109] Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, trial judges and juries should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care — mere lip service will not do.

- An honest but mistaken belief in communicated consent can only be considered if it gives rise to an air of reality. That is, there is evidence upon which a properly instructed jury, acting reasonably, could acquit if it believed the evidence to be true (*R. v. Cinous*, 2002 SCC 29 at para. 65);

- An accused's obligation to take reasonable steps to ascertain consent is directly relevant to whether there is an air of reality. The Court in *Barton* noted:

> [121] An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) **that the accused honestly believed the complainant communicated consent. This Court recently confirmed that where there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (see *R. v. Gagnon*, 2018 SCC 41, [2018] 3 S.C.R. 3).** …
>
> [122] Accordingly, if there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, then the defence of honest but mistaken belief in communicated consent has no air of reality and must not be left with the jury. …

(Emphasis added)

- An accused who denies having had sexual contact with a complainant cannot rely on an honest but mistaken belief in communicated consent. The defence relies upon evidence of an accused's subjective belief and cannot co-exist with an assertion that sexual touching did not occur. This is true even where the accused is found to have engaged in sexual touching (See *R. v. Flaviano*, 2013 ABCA 219 (aff'd 2014 SCC 14); *R. v. A.D.H.*, 2015 ONCA 690).

[90] The trial judge's analysis of the *mens rea* requirement and the honest but mistaken belief in communicated consent was set out earlier. It was brief, but this is not surprising given the thrust of the defence at trial was focused on identification and the complainant's credibility. From his reasons, it is apparent the trial judge was aware, correctly, of the importance of consent being **communicated**. It is also clear the trial judge understood that an accused's challenge to the *mens rea* element must involve an honest but mistaken belief in **communicated** consent.

[91] I see no error in how the trial judge treated the concepts of *mens rea* and honest but mistaken belief in communicated consent. Contrary to Mr. Al-Rawi's assertion, there is no indication the trial judge misunderstood, conflated or

misapplied them. I am further satisfied the trial judge did not err in concluding the defence of honest but mistaken belief in communicated consent did not arise based on the evidentiary record before him.

[92] As a final comment, Mr. Al-Rawi's criticism that the trial judge did not cite the leading case authorities is misplaced. First, trial judges are presumed to know the law. What is critical is whether the proper legal principles are correctly applied, not whether the case authorities are cited in their reasons. Second, the trial judge incorporated by reference to passages from *Percy* the principles contained in the leading authorities. I am satisfied in the present instance the trial judge not only referenced the correct legal principles, he properly applied them.

Disposition

[93] For the reasons outlined above, I would dismiss the appeal.

Bourgeois J.A.

Concurred in:

Bryson J.A.

Van den Eynden J.A.