

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Stanton*, 2020 NSSC 74

Date: 20200227

Docket: CRAT No. 489538

Registry: Antigonish

Between:

JAMES STANTON

Appellant

v.

HER MAJESTY THE QUEEN

Respondent

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

DECISION

Judge: The Honourable Justice N.M. Scaravelli

Heard: December 16, 2019, in Antigonish, Nova Scotia

Written Decision: February 27, 2020

Counsel: Thomas Singleton, for the Appellant
Courtney MacNeil, for the Respondent

Restriction on Publication

By court order made under subsection 486.4(1) of the Criminal Code, information that may identify the person described in this decision as the complainant [and/or witness] may not be published, broadcasted or transmitted in any manner. This decision complies with this restriction so that it can be published.

By the Court:

[1] James Stanton appeals his conviction in Provincial Court of Sexual Assault contrary to Section 271 of the *Criminal Code*. He and the complainant, A.R., were students at St. Francis Xavier University at the time of the alleged assault.

[2] For the reasons below, I would dismiss the appeal.

Overview of Evidence at Trial

[3] The evidence presented by the Crown consisted of the testimony of A.R., the nurse who examined A.R. the day after the alleged assault, A.R.'s roommate at the time, and the RCMP constable who took photographs of A.R..

[4] The defence led evidence of two fellow students of both A.R. and the accused, each of whom testified about certain aspects of surrounding circumstances.

[5] The Appellant did not testify at trial. The only evidence of the actual alleged assault was that of A.R..

[6] The Appellant and A.R. lived in the same residence at St. Francis Xavier University, MacKinnon Hall. They met in September of 2017 during the first week of school and interacted only during weekend parties, where they engaged in

multiple sexual encounters but not sexual intercourse. A.R. was interested in pursuing a relationship with the Appellant. The Appellant did not reciprocate her desire to be in a relationship.

[7] A.R. lived in a dormitory called MacNeil Hall which was part of the larger MacKinnon Hall residence. A.R. shared a dorm room with E.D.. On November 10, 2017, A.R. and her roommate spent the day together and went out together that evening. They first attended a pre-party where they played drinking games with friends before attending a residence party at MacNeil Hall. As the night progressed, the two separated as E.D. left the party to go to a pub.

[8] The Appellant was also attending the party at MacNeil Hall. Both the Appellant and A.R. consumed alcohol before and during the party and were both intoxicated.

[9] A.R. testified that she consumed one Blackfly vodka cooler and a pre-mixed drink containing vodka. She testified that she finished this alcohol around 11:30 p.m., that she felt more intoxicated than usual and that she became more sober as the night progressed.

[10] Towards the end of the party, A.R. and the Appellant were kissing and were alone in the room. At around 12 a.m., they left the party to go to the Appellant's

dorm room. When they arrived, the Appellant's roommate, P.M., was present. A.R. suggested that they go to her dorm room instead because she knew her roommate would not be there.

[11] At trial, A.R. testified that she left the Appellant alone in her room for a brief period shortly after they arrived. When she returned, the Appellant was undressed. A.R. and the Appellant engaged in consensual sexual activity in her room, which consisted of kissing, touching and oral sex.

[12] At a certain point, A.R. noticed that the Appellant had taken a condom that she placed on her shelf and put it on his penis. A.R. testified that the condom was on the shelf above her bed in plain sight. The Appellant then inserted his penis into A.R.'s vagina which caused her to experience a sharp pain. The Appellant then had sexual intercourse with A.R. without her consent. A.R. testified that she told the accused to stop and to wait to try to push herself away or distract him.

[13] After the first incident of non-consensual intercourse, the Appellant left A.R.'s room for a brief period of time. During this time, A.R. was searching for her cell phone to call her roommate but was unable to do so before the Appellant re-entered the room. Upon re-entering the room, the Appellant pushed A.R. onto her desk and continued to have sexual intercourse with her without her consent.

This was followed by another instance of non-consensual intercourse on A.R.'s bed. At some point during the assault, A.R. noticed that the condom had come off and that the Appellant had thrown it away. The Appellant remained in the same bed as A.R. until morning.

[14] In the early morning, E.D., A.R.'s roommate, returned to the room to find the door locked. After getting a key from residence security to open the door, she became upset with A.R. due to the state of the room and finding a used condom on the floor.

[15] Later in the morning, on November 11, 2017, the Appellant left. Sometime later, he sent a text message to A.R. saying that he did not want "to do that again". Later that day, A.R. disclosed to her roommate and a community advisor that she had been sexually assaulted. She then went to the hospital and was attended by a sexual assault nurse examiner named Allison Horne. She reported to the RCMP a few days later on November 15, 2017. Both the RCMP and Ms. Horne took photographs of numerous bruises on A.R.'s body as well as an area of tenderness near A.R.'s neck.

[16] In his decision, Provincial Court Judge Richard MacKinnon accepted A.R.'s account of what had happened in the room and convicted the Appellant of sexual assault.

Grounds of Appeal

[17] The Appellant has appealed his conviction. In his Notice of Appeal, he pleads that the trial judge:

- (1) erred in law by failing to properly direct himself, or apply proper legal principles when assessing the reliability and credibility of witnesses;
- (2) erred in law 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 guilt beyond a reasonable doubt; and
- (3) erred in law in not providing sufficient reasoning.

[18] The errs alleged principally go to the trial judge's assessment of reliability and credibility of witnesses, and more broadly, to his evaluation of evidence.

Standard of Review

[19] In **R. v. Clark**, 2005 SCC 2, the Supreme Court of Canada said:

[9] ...Appellate courts may not interfere with the finding of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result "Palpable and overriding error" is a resonant and compendious expression of this well-established norm.

[20] The Federal Court of Appeal interpreted a “palpable and overriding error” as follows in **Millennium Pharmaceuticals Inc. v. Teva Canada Limited**, 2019 FCA 273:

[6] Palpable and overriding error is a difficult standard to meet. In one case, this Court explained the standard as one where “[t]he entire tree [must] fall”; “it is not enough to pull at leaves and branches and leave the tree standing”: *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46, approved in *Benheim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38. In another case, this Court explained the standard as follows:

“Palpable” means an error that is obvious. Many things can qualify as “palpable.” Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

...

“Overriding” means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not “overriding.” The judgment of the first-instance court remains in place.

There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

[21] **R. v. Nickerson**, 1999 NSCA 168, establishes that a Summary Conviction Appeal Court may address questions of both fact and law. Justice Cromwell said in that case that absent an error of law or a miscarriage of justice, the test to be

applied in assessing a trial judge's findings of fact is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence:

[6] ...Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.) at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[22] In his grounds of appeal, the Appellant asserts witness credibility is a question of law. However, **R. v. R.P.**, 2012 SCC 22, establishes that credibility is strictly factual, not a question of mixed fact and law. In that case, the Court said:

[10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474 (S.C.C.), at para. 7.).

[23] **R. v. Boone**, 2011 NSSC 465, establishes that questions of law are reviewed for correctness.

Trial Judge's Decision

[24] The trial judge provided a lengthy decision. He reviewed in detail A.R.'s direct and cross-examination. He then went on to review in similar detail the evidence of the other Crown witnesses as well as the evidence of the two witnesses testifying on behalf of the defence.

[25] Having reviewed the evidence, the trial judge identified the central issue as credibility. He summarized the law on credibility, referring in particular to the frequently-cited decision in **Faryna v. Chorny** (1951), [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (BCCA). He then considered A.R.'s credibility, addressing numerous alleged inconsistencies and untruths raised by the defence (which will be considered in more detail below). In the course of finding her to be a credible witness, he expressly considered the evidence of other witnesses on the same points, which related to the background of the relationship between A.R. and the appellant, as well as that between A.R. and her roommate, E.D., or to various events before and after the alleged sexual assault. He said:

[147] In her evidence, A.R. was consistent throughout that she was interested in having a relationship with Mr. Stanton. She readily admitted that they had been engaged in some sexual activities including oral sex. 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.

[148] A.R. was also, in my view, consistent in describing what happened on November 10th and November 11th, 2017. She testified that they got naked, were in bed and that they engaged in oral sex. She testified that then Mr.

Stanton put her condom on his penis and he had sexual intercourse with her and when he did so she said stop, she said wait, she tried to push him away and he would not be pushed away and she tried to talk about other things that would distract him from what he was doing.

[149] A.R. was consistent in describing the way that Mr. Stanton had sexual intercourse with her. He pushed her knees up on her chest and was holding onto her legs and in that position she was not able to push Mr. Stanton away. She was consistent in describing that after she got up out of bed Mr. Stanton had sexual intercourse with her when she was on the desk in her residence room. She was consistent in saying that when that occurred she said stop, she said wait, and she tried to push Mr. Stanton away, but he would not be pushed away. She was consistent in describing that when they got back in bed Mr. Stanton tried to have sexual intercourse with her on top of him and she was able to push herself away, but then Mr. Stanton rolled her over and, again, had sexual intercourse with her and she did not consent to him having sexual intercourse with her.

[150] 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 those events, notwithstanding the fact that she did not admit that she said to E.M., 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.

[26] The trial judge acknowledged the defence theory that A.R. had engaged in consensual intercourse with the appellant and decided to make a false complaint of sexual assault when he informed her the next morning that it would not happen again.

[27] The trial judge summarized his conclusions as follows:

[154] ...A.R. had a crush on Mr. Stanton. Mr. Stanton was not interested in having a relationship with A.R.. Mr. Stanton's roommate, P.M., told A.R. to go away when she went to their residence room. Mr. Stanton was only interested in having contact with A.R. when he was intoxicated at the end of parties, when he

was making out with her and when they were engaged in sexual activities, being oral sex. He would send her a message the next morning saying that these things would not happen again.

[155] On November 10th, 2017, the same pattern was followed. Mr. Stanton was intoxicated. A.R. was under the influence of alcohol, and at the end of the evening and into November the 11th, 2017, at the end of a residence party they were making out and they went to A.R.'s room where they got naked in bed and where they engaged in consensual sexual activity, being oral sex. After the consensual sexual activity, Mr. Stanton used A.R.'s condom, put it on, and had sexual intercourse with A.R. while she told him to stop, to wait, tried to push him off, tried to change the subject. He had sexual intercourse with her without her consent in bed, on her desk and, again, in bed. The next morning he left and A.R. received another message saying that that was not going to happen again.

[28] The trial judge noted the definition of “consent” in s. 273.1(1) of the *Criminal Code* – “the voluntary agreement of the complainant to engage in the sexual activity in question” – as well as the circumstances where no consent is obtained, including where “the complainant expresses, by words or conduct, a lack of agreement to engage in the activity” (s. 273.1(2)(d)). He continued:

[156] ...In my view, A.R. expressed by words and conduct a lack of agreement to engage in the sexual activity, being sexual intercourse.

[157] 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 Trial Judge’s Assessment of the Reliability and Credibility of Witnesses

[29] The Appellant says that the trial judge erred in his application of legal principles when assessing the credibility of witnesses. The Appellant also argues

that the trial judge erred in assessing the credibility of A.R. and the reliability of A.R.'s testimony first and then in rejecting the accused's contradictory evidence under that light. Instead, the credibility and reliability of all witnesses must be assessed after all evidence is presented as a whole. To do otherwise reductively shifts the onus of proof to the accused, the Appellant submits.

[30] The Crown says that the trial judge made no palpable and overriding errors, or errors in law, in his assessment of witness credibility. The Crown also says that the trial judge did not fail to consider all of the evidence as a whole in determining whether the Crown had proved the Appellant's guilt, and that it is the Appellant that advocates an improper piecemeal assessment of the evidence.

[31] As stated by the Supreme Court in **R. v. Gagnon**, 2006 SCC 17, in the absence of palpable and overriding error by the trial judge, his or her perception should be respected because of the difficulty in assessing witnesses.

[32] Our Supreme Court of Appeal in **R. v. D.D.S.**, 2006 NSCA 34, confirmed that a summary conviction appeal court does not have the authority to substitute its view about credibility of witnesses for that of the trial judge. It further stated:

[41] While considerable deference is owed to a trial judge's findings of credibility, that level of deference is forfeited if it is apparent that the trial judge in the course of his or her decision, has misapprehended the evidence,

overlooked or misunderstood the importance of material evidence; or otherwise erred in law by using improper reasoning when deciding the guilt of the accused.

[33] **R. v. D.A.**, 2012 ONCA 200, establishes that the credibility and reliability of all witnesses must be assessed after all of the evidence is presented as a whole.

[11] ...While a trial judge is not obligated to refer to all of the evidence or to exhaustively explain his reasoning process, the combination of unacknowledged evidence supporting the defence position and an almost complete paucity of analysis compel the conclusion that the trial judge failed to consider the whole of the evidence in deciding the case.

[34] The Appellant alleges that the trial judge accepted the evidence of A.R. despite the many internal inconsistencies in her testimony and the inconsistencies between her evidence and other witnesses in addition to an evasiveness in her answers which would directly support the defence theory of a motive to fabricate.

[35] The Crown argues that any inconsistencies in evidence were considered by the trial judge, were not misapprehended on material points and not meaningfully contradicted in many cases.

[36] 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 in great length. He then focused heavily on the 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. The trial judge considered her evidence in light of the evidence of other witnesses about the surrounding circumstances. In short, I find that the Appellant has not shown that the trial judge committed palpable and overriding error by his approach to assessing credibility. I find that the specific points defence counsel point to in arguing 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. 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.

Analysis

[37] The Appellant raises the trial judge's finding that A.R. was consistent in describing her relationship with the Appellant, concluding that A.R. consistently testified to wanting a relationship with the Appellant. The Appellant says to the contrary, A.R. was minimizing, evasive, and had a selective memory when describing her relationship with him.

[38] The Appellant raises the evidence of E.D. which supports the theory that A.R. wanted a relationship with him: according to E.D., A.R. was “always excited to see” the Appellant and had a “crush” on him. E.D. testified that “she [A.R.] always had her eye on him”, “that she would get jealous and angry if he talked to another girl”, and that she “always knew where he was”. E.D. testified to A.R.’s fantasies of double dating with her and the Appellant, as well as her saying “like tonight she was going to like get with him and make out with him and dance with him”. Furthermore, E.D. testified that A.R. texted her saying that she “hated herself”, worrying E.D. to such an extent that she contacted campus security, who found A.R. wandering around. A.R. then told her that she was upset because she overheard the Appellant telling another girl that “A.R. was being super annoying that night”. Additionally, the Appellant argues that the affidavit of E.M. supports the theory that A.R. was pursuing a relationship. E.M.’s affidavit says he observed A.R. saying, “what do I have to do to have Griffy [the Appellant] fuck me?”.

[39] Contrary to her aspirations in this evidence, the Appellant alleges numerous examples of A.R. minimizing her relationship with him. On direct examination, she referred to their relationship as “acquaintances”. On cross-examination, she said that she could not recall being upset when she overheard the Appellant say she was annoying, contradicting E.D.’s testimony which depicted her as so distraught

she was wandering around campus. A.R. initially denied kissing another boy to make the Appellant jealous, but later admitted during cross-examination that she said this to the police.

[40] With regards to A.R.'s description of her relationship with the Appellant as "acquaintances", when asked in cross-examination if she and the Appellant were something more than acquaintances, A.R. replied, "yes". When asked to elaborate, A.R. said, "I don't see us as friends. I never did see us as friends. We couldn't talk outside of being out together after parties. So, we wouldn't be anything more than acquaintances, in my opinion". On cross-examination A.R. said that she was "pursuing" the Appellant. In re-direct examination she testified that she wanted to be more than friends with him. The Crown says A.R. was not evasive in her answers to questions surrounding her relationship with the Appellant. Rather, her answers were truthful despite how difficult it would have been to admit her interest in the Appellant during trial. In this vein, her description of her relationship with the Appellant as "acquaintances" was reasonable and accurate. Despite A.R.'s admitted pursuit of him, the Appellant did not reciprocate her feelings towards him. A.R. and the Appellant were never in a relationship, and the evidence of E.D. and P.M. is consistent with how they only saw one another at weekend parties. The

Crown says the trial judge was correct in finding that her credibility is undamaged by her use of the word “acquaintances”.

[41] I do not believe the trial judge made a palpable and overriding error when finding A.R. credible despite these inconsistencies. For instance, her use of the word “acquaintances” does not raise enough doubt of her credibility. She initially said this during direct examination as a reflection of her feelings towards the Appellant before November 11th:

Q: And before November 11th, 2017, was your relationship with Mr. Stanton a positive relationship?

A: I wouldn't describe it as positive or negative.

Q: Okay. How would you describe the relationship?

A: Acquaintances.

[42] Her answer aligns with the background of this case. A.R. and the Appellant only interacted at parties. Despite their sexual activity before their encounter on November 10, 2017, and despite her desire to be in a relationship with him, A.R. and the Appellant were not friends. Considering this background, it is hard to imagine that she would describe their relationship as either “positive” or “negative”.

[43] It is noteworthy that A.R. contradicted this statement later in her testimony, during cross-examination:

Q: So, prior to the incident which you claim happened on the 11th of November, you guys were something more than mere acquaintances. Right?

A: Yes.

[44] This was a response to a leading question: it would have been strange if she answered, “no”, because in this context A.R. was only acknowledging that she and the Appellant were not purely platonic acquaintances. In other words, this was not a correction of her prior use of the word “acquaintances”, which she later defended as follows:

Well, “acquaintances” would be how I would describe our relationship. I don’t see us as friends. I never did see us as friends. We wouldn’t talk outside of being out together after parties. So, we wouldn’t be anything more than acquaintances, in my opinion.

[45] There was evidence from A.R., E.D., and E.M. that A.R. had romantic feelings for the Appellant. A.R. acknowledged that she was “pursuing” him and wanted to be more than friends with him. Her use of the word “acquaintances” does not meaningfully contradict the evidence of her romantic pursuit of the Appellant.

[46] For these reasons, I do not believe the trial judge made a palpable and overriding error in finding that A.R.'s use of the word "acquaintances" does not adversely affect her credibility.

[47] The Appellant's argument that A.R. could not recall being upset when she overheard the Appellant say she was annoying stems from her testimony on cross-examination:

Q: Now, was there an occasion – and this is before November the 11th of 2017 – was there an occasion when you were at a party where James was at the party and you overheard James saying to some people that he found you annoying?

A: I don't recall if that happened or not.

Q: Do you recall an incident where security at StFX had to go looking for you at two or three o'clock in the morning?

A: Yes.

Q: What happened then?

A: I don't remember exactly what happened that night.

Q: You don't remember. How come you don't remember?

A: That was a long time ago.

[48] In his decision, the trial judge found that because A.R. was intoxicated at the time of this incident, her reaction was understandable given the way she felt about the Appellant. It appears that the trial judge misses the Appellant's argument here: the Appellant is implying that A.R. is disingenuous and evasive of her relationship

with him by pretending to forget this event, not that her reaction alone put her credibility into question. The trial judge does not comment on this argument or connect her lack of memory of the incident to her intoxication. However, I do not believe this error was palpable and overriding.

[49] The Crown acknowledges that A.R. initially denied kissing another boy to make the Appellant jealous. However, when the transcript of her statement to the police was read to her, she could not recall saying this to them, but nevertheless agreed that it was the truth. The Crown argues that her casual acknowledgment of this fact demonstrates that her initial denial is insignificant, and that it was nothing more than a memory lapse.

[50] During cross-examination, A.R. testified as follows:

Q: And do you – was there a time when, at a party when James was there, you started making out with somebody else to make him jealous?

A: No.

Q: Is that something maybe that you told Cst. Drake?

A: I don't remember if I would have told him that or not.

Q: Well, I'm going to read you something. This is page 29 of the statement dated November 15, 2017. And it's you who's talking at line 4:

“And then, the weekend October, like, 14th to 15th, what happened was, like – so, there was a different guy that I made out with, but that was really just to make him jealous. It was a stupid idea.”

Does that refresh your memory on maybe having told Cst. Drake that?

A: Yeah, I must have told him that if it's in the record. I don't recall telling him about that particular incident.

Q: But you wouldn't have told him a lie.

A: No. That's why I say, then if it's there, then that's what I said.

[51] The trial judge does not comment on this exchange in his decision. However, I do not believe he made a palpable and overriding error in finding A.R. credible in spite of it.

[52] The Appellant raises P.M.'s testimony, which alleges that the Appellant returned to his room by himself on the night of the alleged assault and collapsed onto his bed. He testified that A.R. appeared a little later. The Appellant argues that this contradicts A.R.'s testimony that both she and the Appellant returned to his room together and contends that the trial judge did not address his assessment of P.M.'s evidence in his decision. The Crown argues that there is no contradiction: A.R. stated that she and the Appellant left the party room together and proceeded to the Appellant's room; she did not state that they returned to his room together. The Crown argues that any inconsistency is immaterial because P.M.'s evidence states that she arrived at his room only thirty seconds to one minute after the Appellant.

[53] The Appellant is correct that the trial judge did not comment on P.M.'s evidence in his decision. On direct examination A.R. testified as follows:

Q: Okay. And what happened when you realized that the room had emptied out?

A: I think we just started, or we just continued kissing each other, and then, I don't remember if one of us said that we should leave, or not, but we decided to leave the party, so, we left the room together.

Q: Do you know what time you would have left the room, approximately?

A: Probably around 12:15. I don't – somewhere around there.

Q: Okay.

A: It was a little bit after 12:00.

Q: Okay. And what happened after you left the room that the party was in?

A: We went to his room, and we weren't there for very long, and his roommate was there with a couple other people. I don't remember who was there.

[54] The alleged contradiction occurred during P.M.'s direct examination:

Q: And after the party was shutting down, where did you go?

A: My room. Or our room.

Q: Yeah. Did you notice if James came back to the room?

A: Yes, he did.

Q: Can you tell us about that?

A: James came back just like any other night. Just came back alone, flopped down on the bed. Around roughly 30 seconds to a minute later, A.R. showed up at the door.

[55] It is plausible that these testimonies were not necessarily contradictory. A.R. appeared only thirty seconds to one minute after the Appellant. This is a short enough period for A.R. to describe their arrival as “we went to his room”. Therefore, I do not believe the trial judge made a palpable and overriding error in not acknowledging this evidence.

[56] According to A.R.’s testimony, she moved the condom to the shelf above her bed during the week before the alleged assault. Meanwhile, E.D. testified she noticed the condom was moved to the shelf above A.R.’s desk on November 10, 2017. I believe the Appellant is implying that this gesture indicates consent due to a willingness and anticipation that she would have sex with the Appellant that evening. Additionally, A.R. testified that she did not tell the Appellant where the condom was and that he found it somehow on his own. The Appellant says this testimony does not make sense and was used by A.R. to reinforce the idea that there was no consent.

[57] The trial judge did not find E.D. reliable in her assumption that A.R. moved the condom on November 10th. This is because he concluded that she assumed that A.R. had consensual sex with the Appellant based on her conversation with her the following morning, which E.D. described as follows:

A: So, she [A.R.] looked – she looked apologetic at the beginning. Like, that was all. And then after we'd talked for about ten minutes like I started to get ready to go to breakfast. And then she started – and then she started to look more distraught. She started crying. And she put her covers over her head. And she said – I don't – I didn't quite hear exactly what she said, but she said something along the lines of like "I –like, I didn't want to do it" or "I wish I didn't do it" or something along those lines.

[58] The trial judge found that E.D. was unreliable because she jumped to the conclusion that A.R. said, "I wish I didn't do it", and that A.R. and the Appellant had consensual sex. E.D. never testified to seeing A.R. move the condom. As E.D. said during cross-examination, she only noticed that the condom had been moved:

A: And then I noticed the day of the party that she had moved it out of the drawer, like closer to her bed. So, it was like a reach away, instead of like having to search for it.

[59] It is therefore not a foregone conclusion that A.R. intended to have sex with the Appellant that evening. Even if it was, advance consent is prohibited, as mentioned by Justice Rosinski in **R. v. Brown**, 2019 NSSC 177:

[93] ...American scholar Michelle Anderson puts it this way: "prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. These negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question" (M. J. Anderson, "Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armour" (2004), 19:2 *Crim. Just.* 14, at p. 19, cited in Hill, Tanovich and Strezos, at s.16:20.50.30). These "negotiations" would not, however, include an agreement involving broad advance consent to any and all manner of sexual activity. As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.

[60] The trial judge did not err in finding that consent cannot be inferred from A.R.'s decision to move her condom.

[61] The Appellant raises E.D.'s testimony, which confers that A.R. told her in text that "we used the condom I got from the CLT hub" when describing the sexual intercourse. The Appellant argues that this language suggests that the sexual intercourse was consensual. The trial judge reasoned that since there were two people involved in the sexual assault and the condom belonged to A.R., the use of the word "we" in this sentence is reasonable and does not convey that the sexual intercourse was consensual.

[62] The trial judge found that the use of the word "we" is appropriate and not indicative of consent because "a sexual assault necessarily involves two people". In the context of the evidence I believe this was a reasonable conclusion. I do not believe he made a palpable and overriding error on this issue.

[63] The Appellant raises A.R.'s testimony in which she claims to have been looking for her phone to call E.D. while the Appellant was out of the room for five to seven minutes. The Appellant finds it odd that she could not find her phone in a room where the light was on and the phone was in clear view on the desk next to her bed. The Appellant finds this especially questionable given her later testimony

that she found her phone by grabbing for it blindly. The Appellant implies that A.R. fabricated this detail in order to give credence to the notion that she was sexually assaulted.

[64] The trial judge did not comment directly on A.R.'s inability to find her phone, but he did make the following findings which are relevant to this issue because they describe A.R.'s disorientation explaining her actions subsequent to this incident:

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.

In my view, this confirms her shock and confusion and, again, that is understandable because of the fact that she consented to some sexual activity, but did not consent to sexual intercourse. The person who had sexual intercourse with her without her consent was the person that she had a crush on, a person that she wanted to have a relationship with, a person with whom she pursued having a relationship and then that person, in my view, took unfair advantage of A.R. and had sexual intercourse with her without her consent.

[65] I do not believe the trial judge made a palpable and overriding error in finding A.R. credible despite her evidence of her inability to find her phone. As the trial judge said, it is reasonable to infer that A.R. was disoriented after the assault.

[66] The Appellant raises A.R.'s testimony that she did not disclose the sexual assault to E.D. right away. E.D. was mad at her, leading A.R. to think she would not believe her. She also testified that E.D. is a judgmental person. The Appellant argues that A.R.'s testimony of a strained relationship with E.D. is not corroborated by evidence. A.R. testified that they were best friends, going out together that evening, texting each other throughout the night, playing drinking games, and sharing clothes. She also testified that her first instinct after being sexually assaulted was to contact E.D.. The Appellant also raises E.D.'s testimony which described how A.R. told her that she was "such a good friend" and that A.R. expressed how much she loved her that evening.

[67] A.R. did not disclose the sexual assault to E.D. until later in the morning on November 11, 2017. This was after they were texting throughout the evening and speaking in the early morning. The appellant argues that the most likely explanation for this delayed disclosure is that she consented to the sexual intercourse, and that she only changed her mind after receiving a text from the Appellant later in the morning.

[68] The relevance of the status of A.R.'s relationship with E.D. is questionable. The Appellant is essentially arguing, "if A.R. and E.D. were still good friends, it does not make sense that she would not disclose the assault right away". There are

numerous reasons why one who was just assaulted would wait to divulge the assault. In **R. v. D.D.**, 2000 SCC 43, in which the Supreme Court of Canada found that the promptness of a sexual assault allegation has no bearing on the veracity of the complainant, the Court stated:

[65] A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

[69] I do not believe the trial judge made a palpable and overriding error in finding A.R. credible despite her slight delay in reporting the incident and her unclear relationship with E.D..

[70] The Appellant argues that A.R.'s testimony contradicts itself. She testified that she did not open the door for E.D. when she was knocking because she did not want to wake the Appellant; on cross-examination she testified that when E.D. was in the room, she was no longer afraid of waking the Appellant.

[71] It would be reasonable for A.R. to no longer have been afraid once E.D. initially returned to the room because even though E.D. left the room again, A.R. knew she would return since this was her room and she had nowhere else to sleep.

I therefore do not believe the trial judge made a palpable and overriding error in finding A.R. credible despite this alleged inconsistency.

[72] Contrary to her testimony, the Appellant argues that A.R. must have been asleep when E.D. first entered the room. This is because E.D. testified to clearly hearing A.R.'s phone ring from the other side of the door, while A.R. never testified to hearing the phone ring even though it was right next to her. The Crown alleges that E.D.'s testimony is consistent with A.R. being awake because A.R. testified to hearing E.D. screaming her name and banging on the door. The trial judge did not comment on this issue, but I do not believe it is a sufficient ground to claim the trial judge made a palpable and overriding error with regards to A.R.'s credibility.

[73] The Appellant raises an inconsistency between A.R.'s and E.D.'s testimonies. A.R. testified that she did not lock the door. However, E.D. testified that A.R. told her that she locked the door because on a previous occasion E.D. locked the door when she had her boyfriend in the room. The Crown indicates that A.R.'s text message, which the Appellant relies on for this submission, read "I only did what I thought you would have done when the door was locked". The Crown argues that this is not a clear indication from A.R. that she herself locked the door.

[74] A.R. said the following comments during cross-examination:

Q: So, you're back in bed, and eventually E.D. comes and she's banging on the door.

A: Yes.

Q: The door is locked.

A: Yes.

Q: Did you lock the door?

A: No.

[75] Meanwhile, E.D. said the following comments during cross-examination:

Q: Okay. Because you talked about that with Constable Drake also. And again, this is page 54 of your statement:

“And then the next text she was like – and then ‘I only did...’ she was like ‘I would have closed it, but I only did what I thought you would have done when the door was locked.’”

Does that sound like what you remember telling Constable Drake?

A: Yes, it does.

[76] While the trial judge did not comment on this issue directly, there is not enough evidence here for the Appellant to suggest that it would be a palpable and overriding error to trust A.R.'s testimony. There is no overriding reason to believe A.R. was lying when she said she did not lock the door, especially considering how A.R.'s text message is inconclusive on this issue.

[77] The Appellant raises testimonial inconsistencies between A.R. and E.D.'s accounts of A.R.'s position on the bed when E.D. returned to the room twice. A.R. testified that when E.D. entered the room the first time, she was lying awake facing the Appellant and that he placed his arms around her. However, E.D. testified that when she entered the room, she observed A.R. cuddling with the Appellant with her head resting on his chest and their legs intermingled. A.R. testified that when E.D. returned to the room a second time (after her Skype call with her boyfriend), she was lying on the bed no longer facing the Appellant and keeping her distance from him. Meanwhile, E.D. testified that A.R. and the Appellant were still facing each other.

[78] The trial judge found that E.D.'s testimony was less credible than A.R.'s because she was under the assumption that the Appellant and A.R. had consensual sex. As he wrote in his decision, "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". I do not believe the trial judge made any palpable and overriding errors in his reasoning on this point.

[79] A.R. testified that after E.D. left the room the first time, she got up, cleaned the mess, and then, not knowing what else to do, got back into bed with the

Appellant. Her rationale for this was that she did not want to wake him, did not know where else to go, and was no longer afraid because E.D. was back. The Appellant indicates that the trial judge ignored how A.R. also turned out the light while E.D. was out of the room and had no idea how long she would be gone. The Appellant seems to suggest that these actions indicated consensual sexual intercourse.

[80] A.R. testified during cross-examination that before she got back into bed with the Appellant, she put a shirt on. However, during her initial testimony, she stated she put a shirt on after the Appellant left in the morning. While the Appellant identifies this inconsistency, the Crown argues that this is an ambiguous point that is not probative of the issue of consent and minimally probative of A.R.'s credibility. Moreover, A.R. was never given the opportunity to explain this discrepancy.

[81] In her testimony, A.R. described oral sex that she and the Appellant performed on each other, as well as three acts of intercourse. When asked by Ms. Horne that same day if there was oral sex her answer was "no" and she reported to Ms. Horne only one act of intercourse. While the Appellant raises these inconsistencies, the trial judge concluded that they do not weaken A.R.'s credibility.

[82] Regarding this issue, the trial judge made the following remarks:

Defence counsel also argues that A.R. is not believable because she told the SANE nurse that there was only one incident of sexual intercourse and that there was no oral sex. Whether one refers to what A.R. described in her testimony as being one incident of sexual intercourse or three incidents of sexual intercourse I do not think is significant in terms of characterizing whether or not the person who says that there was one incident of sexual intercourse is untruthful. The fact that A.R. said there was no oral sex is not completely accurate and I do not know why she said that to the SANE nurse, however, in my view, 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.

[83] I believe the trial judge made reasonable findings on this issue and that he did not commit any palpable or overriding errors.

[84] A.R. testified that she would not necessarily tell the truth if she believed that someone would be judgmental of it. The Appellant believes this to be problematic and presumably indicative that she is not a credible witness.

[85] A.R. made the disputed statement during cross-examination:

Q: So when you'd talk to E.D., you were best friends, you were roommates.
Right?

A: Yes.

Q: And you'd be telling her the truth. Right?

A: Not necessarily.

[86] The Appellant makes two overly broad assumptions in his argument: that A.R. is saying she would lie to people other than E.D., and that her reason for not telling the truth is because people would be judgmental of it. Neither of these insights are apparent from what A.R. actually said. All she said is that she would not necessarily always tell the truth to E.D..

[87] While the trial judge does not comment on this issue directly, I do not believe he made a palpable and overriding error when finding A.R. credible in spite of it.

The Trial Judge's Evaluation of Evidence and Sufficiency of Reasons

[88] The Appellant says the trial judge failed to consider the evidence in its totality in reaching a conclusion of guilt beyond a reasonable doubt.

[89] Citing **R. v. Nyznik**, 2017 ONSC 4392, the Appellant argues that meeting the standard of proof is especially important in the context of sexual assault, and that it is not enough to be satisfied that the event probably happened. At para 43 of his factum, the Appellant alleges that the only direct evidence of an assault having occurred is A.R.'s testimony. In such cases, **Nyznik** infers that such testimonies need to be especially scrutinized because proving the guilt of an accused beyond a

reasonable doubt is a heavy burden that is difficult to determine based on the word of one person. The rationale for this principle is that the presumption of innocence is a necessary instrument to avoid wrongful convictions. The Appellant seems to be arguing that the Trial judge did not scrutinize A.R.'s testimony to a sufficient standard.

[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.

[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.

Conclusion

[92] Appeal Dismissed.

Scaravelli, J.