

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. B.H.*, 2024 NSSC 58

Date: 20240228

Docket: CRH No. 525728

Registry: Halifax

Between:

His Majesty the King

Appellant

v.

B. H.

Respondent

Restriction on Publication: 486.4 and 486.5 CC

Judge: The Honourable Justice Peter P. Rosinski

Heard: February 12, 2024, in Halifax, Nova Scotia

Written Decision: February 28, 2024

Counsel: Paul Niefer and William A. Mathers for the Appellant
Ronald E. Pizzo, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

By the Court:

1. Introduction

[1] BH was acquitted by the Trial Judge of the following charges:

That he did on February 15, 2020:

Without lawful authority and being reckless as to whether [BM] was being harassed, engage in conduct directed at [BM] referred to in section 264(2), thereby causing [BM] to reasonably fear for her safety in all the circumstances, contrary to section 264(1) of the *Criminal Code* [“CC”];

And further that he did at the same time and place aforesaid, communicate with [BM] for the purpose of obtaining sexual services for consideration, contrary to section 286.1(1) of the *Criminal Code*.

[2] The Crown appeals only in relation to the s. 286.1 CC charge, pursuant to s. 813(b)(i) and 822 CC (which makes sections 683 – 689 and particularly s. 686(4), except 683(3) and 686(5), applicable).

[3] The Crown seeks a new trial based on the following grounds:

1. The Trial Judge misapprehended the evidence;
2. The Trial Judge erred in his credibility assessment.

[4] I am satisfied that the Trial Judge misapprehended the substance of the evidence of BM, and failed to give proper effect to the evidence, which played “an essential part in the reasoning process” resulting in the acquittal.

[5] I allow the appeal and order a new trial.

2. Background

[6] BM was in her early 20s and was a part-time employee at BH's business since September 2019.

[7] In the evening of February 15, 2020, there was a Valentine’s Day dinner and dance outdoor event on the expansive rural premises of BH's business.

[8] BM was tasked with driving a van as a shuttle for customers.

[9] Once her duties in that regard were completed, late in the evening after closing time (11 pm), on request, she picked up BH. He was noticeably intoxicated.

[10] It was dark.

[11] Other than she and BH, only one further employee (Nick) remained in the area of the open-air premises. He was in no position to see or hear what took place between BH and BM.

[12] BM and BH were both seated in the front of the van. They were the only persons therein. He had an alcoholic beverage with him.

[13] She drove around the property with him.

[14] They stopped on at least two occasions.

[15] She testified that on the second occasion, he said the words which constitute the two alleged offences.

[16] BM testified that BH made comments to her while they were alone, which amounted to him asking her to perform sexual acts with him, then and at other times in the future, in exchange for him providing her with money, assets and references that might advance her career prospects.

[17] She testified that BH knew she was in precarious financial circumstances.

[18] The Trial Judge concluded that he asked her: "What can I do for you?" (p. 9(15) Decision).

[19] During the ensuing conversation, according to the Trial Judge (at p. 10 Decision), she alleged that BH stated to her: "I want to fuck your ass. I want to fuck you."

[20] She claimed that she was terrified about what he might do, while he was alone with her that night in the van, as a result of what he said.

[21] BH testified and denied saying those or similar words or that he was offering BM financial incentives in exchange for sex with him.

[22] In summary, the Trial Judge concluded that because BM was not sufficiently credible and reliable regarding the specific words she testified BH had spoken to her,

and in light of BH's denials in his testimony, he therefore had a reasonable doubt in relation to both charges.

[23] The Trial Judge stated:

The most significant factual issue is, whether the accused, or the defendant, said these words:

I am a 53-year-old man and there's one thing I want, I want to fuck your ass. I want to fuck you, it's just what I want.

(Emphasis added)

[24] He further stated:

The difficulty in determining precisely what the defendant said, and what his intentions were, is because there was a conflict in the evidence about what he said, and more importantly, what his intentions and motives were. **These are two issues to resolve. What precisely was said, and secondly what was the defendant's motivations or intentions or more accurately, was he harassing the complainant by make – making sexual advances or seeking sex, acting in a way which caused her to be harassed?** I will refine this issue in accordance with the *Criminal Code* provisions later.

I'm not – the defendant denied ever saying the words which I highlighted earlier that begin with 'I'm a 53-year-old man...'. **I'm not convinced that he said this phrase.**

(Emphasis added)

[25] The Trial Judge goes on to explain why he does not believe, even on a balance of probabilities, that BH said the words that BM testified he said to her:

First of all, she prefaced her account in this regard by saying: "**I believe he said to me, I am not sure**". Words of equivocation.

Further, **she was clearly of the view** that the situation she was [in] -when asked to stop the car and turn off the lights with a man over twice her age, her employer, who had been drinking and offering financial help, was not a good situation and **that he had "sex" on his mind.**

She had that idea formulated in her mind, I conclude from the passage that I just read. She said, "this kind of validated everything I was thinking".

In my view, **she heard what she believed the defendant was thinking.** However, the defendant denied he said this. **She is not sure what he said.** This phrase seems out of context as to what the complainant described was happening - the defendant

offering financial assistance. The F word may have been uttered – however I cannot discern precisely what was said.

On balance, I’m not convinced he said these words that I quoted earlier... It is important – this is important because it is the most direct evidence to any kind of desire expressed by the defendant to have sex with the complainant. **I’m not satisfied that it has been shown that he said these words.**

(Emphasis added)

3. The Legal Basis for the Crown’s Appeal

[26] Since the Crown appeal is in relation to the s. 286.1 CC acquittal, only the elements of that offence are relevant.

[27] In this case, the Crown had the burden to prove beyond a reasonable doubt that BH:

1. communicated with BM
2. for the purpose of obtaining, for consideration,
3. the sexual services of BM
4. in exploitive circumstances.¹

[28] In *R. v. Rouse*, 2020 NSCA 8 Justice Beaton considered s. 286.1 CC, and the elements of the offence:

16 Mr. Rouse maintains before this Court that the Crown's view of the facts would endorse an approach that the Crown need only prove (a) the receipt of sex (b) for any type of consideration. Again, I cannot agree. Accepting that s. 286.1 was meant to prohibit exploitive behaviour, on the facts as found by the trial judge, as supported by the evidence, an exploitation occurred. I agree with Mr. Rouse’s argument that Parliament could not have intended that any sexual activity, in any relationship, in exchange for any benefit, would be prohibited by application of s. 286.1. ...

...

18 I agree s. 286.1 was “meant to target exploitive behaviour outside of a mutually friendly, and ongoing, relationship” (para. 35, Appellant’s Factum). That said, it is clear from the trial judge’s decision she did not accept, on the evidence

¹ I bear in mind that BM had earlier that day given her notice that she was quitting her employment with BH’s business. Knowing this, the trial judge still concluded s.286.1 was applicable to the circumstances of this case – p.16(2) Decision.

before her, that the relationship of Mr. Rouse and the victim could be so characterized.

19 The approach to modern statutory interpretation discussed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, that the words in an *Act* are read in their entire context and their grammatical and ordinary sense, cannot lead to the conclusion here that a proper reading of s. 286.1 would necessarily exclude events of exploitation which take place outside of the sex trade worker and john context.

[29] In simple terms, the Crown posited that the key question was whether, in exploitive circumstances, BH communicated to BM that he would give her money, assets, favourable employment references or other consideration, if she would engage in sexual activity with him.

[30] The Crown argues that the Trial Judge misapprehended the relevant evidence of BM, which led to his acquitting BH of both charges.

[31] I bear in mind, as the Court reiterated in *R. v. JA*, 2023 SKCA 119 at paras. 13-14 (See also *R. v. Morin*, [1988] 2 SCR 345 at para. 80): “The Crown’s burden on appeal from acquittal is a heavy one”².

[32] BH argues that Trial Judge was entitled to interpret the language used by BM in her testimony in making his credibility findings, and that there is no reason to interfere with his verdict.

[33] I agree - provided that:

1. The Trial Judge did not materially misapprehend the testimony of BM; and
2. That misapprehension of evidence did not play an essential part in his reasoning process, leading to the acquittal.

[34] I find helpful the reasons of Justice Rothman in *R. v. RC* (1992), 81 CCC (3d) 417 (Que. CA)³:

² In cases where the Crown alleges an “unreasonable acquittal” the following cases are helpful: *R. v. CP*, 2021 SCC 19 at paras. 28-30; *Bensaadi v. R.*, 2020 QCCA 1105 (see also *R. v. Clarke*, 2023 ABCA 62 at para 42).

³ Per Gonthier J. for the majority [1993] 2 S.C.R. 266: “This is an appeal as of right. A majority of us agree with Rothman J.A.’s dissenting reasons in the Court of Appeal... Accordingly, the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the Court of Quebec, Criminal Division, convicting the respondent of the counts charged is upheld, Iacobucci and Major JJ. dissenting.”

In the end, what the trial judge had to decide was whether he was satisfied beyond a reasonable doubt that appellant committed the acts described by the child in her evidence. This was entirely a matter of his appreciation of the evidence and, particularly, the credibility of the two principal witnesses: appellant and the child, whom the trial judge had an opportunity to see and hear.

Credibility is, of course, a question of fact and it cannot be determined by fixed rules. Ultimately, it is a matter that must be left to the common sense of the trier of fact, in this case the trial judge (*White v. The King* [1947] S.C.R. 268). Unless the record reveals an error of law or in principle or a clear and manifest error in the appreciation of the evidence, a court of appeal should not intervene in that determination.

(Emphasis added)

[35] As to what is a “misapprehension of evidence”, Justice Beaton stated in *Rouse, supra*:

Issue No. 2 - Did the trial judge misapprehend the evidence?

25 The standard of review for the second ground of appeal is whether there was a material misapprehension of the evidence that informed the reasoning of the judge, including the reasoning process (*R. v. Delorey*, 2010 NSCA 65 quoting *R. v. Peters*, 2008 BCCA 446). Mr. Rouse’s argument concerning misapprehension of evidence centers around the trial judge’s findings of credibility of the victim, the Crown’s lone witness.

26 Mr. Rouse argues the trial judge misapprehended “pivotal” evidence when making credibility conclusions and those misapprehensions impacted the integrity of the verdict so that a new trial is needed.

27 Mr. Rouse maintains that because the credibility of the victim was central to the trial judge’s reasoning, and the trial judge misunderstood evidence reported to have been provided by the victim at the preliminary inquiry, a miscarriage of justice arises. He relies on this Court’s decision in *R. v. Deviller*, 2005 NSCA 71, wherein Cromwell, J.A. (as he then was) stated as follows:

[10] What is a misapprehension of the evidence? It may consist of “... a failure to consider evidence relevant to a material issue, **a mistake as to the substance of the evidence, or a failure to give proper effect to evidence ...**”: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 218. **A trial judge misapprehends the evidence by failing to give it proper effect if the judge draws an “unsupportable inference” from the evidence or characterizes a witness’s evidence as internally inconsistent when that characterization cannot reasonably be supported on the evidence: *Morrissey* at p. 217; *R. v. C.(J.)* (2000), 145 C.C.C. (3d) 197 (Ont. C.A.) at para. 11. [. . .]**

[11] Not every misapprehension of the evidence by a judge who decides to convict gives rise to a miscarriage of justice. *A conviction is a miscarriage of justice only when the misapprehension of the evidence relates to the substance and not merely the details of the evidence, is material rather than peripheral and plays an essential part in the judge's reasoning leading to the conviction*: see *Morrissey*, *supra* at 221; *R. v. Lohrer*, [2004] 3 S.C.R. 732; S.C.J. No. 76 (Q.L.) at paras. 1-2.

[12] It follows, therefore, that **to succeed on appeal, the appellant must show two things: first, that the trial judge**, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, **was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.**

(Emphasis added)

(My bolding added in paras. 10 and 12)

[36] More recently, in *R. v. Rudder*, 2023 ONCA 864, Justice Paciocco stated:

A. DID THE TRIAL JUDGE MATERIALLY MISAPPREHEND THE EVIDENCE THAT THE BMW WAS A RENTAL VEHICLE RENTED BY MR. BROWN AND/OR MR. RUDDER'S EXPLANATION FOR HIS LIE TO THE POLICE?

[41] "A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence.": *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.), at p. 538. Some misapprehensions of evidence will arise from errors of law. Where misapprehensions of evidence do not give rise to errors of law, which they generally do not, they will not ground a successful appeal unless "those errors play an essential part in the reasoning process resulting in a conviction": *Morrissey*, at p. 541; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at paras. 1, 2. Where a misapprehension of evidence plays an essential part in the reasoning process, the verdict is not true, the trial has been unfair, and a miscarriage of justice will have occurred.

[37] Most recently, in *R. v. Hann*, 2024 NSCA 19, Justice Van den Eynden stated:

[32] **A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence.** The misapprehension must play an essential part in the reasoning process that led to conviction. **This is not to be confused with a different interpretation of the evidence than that adopted**

by the trial judge (see *R. v. Lohrer*, 2004 SCC 8 at paras. 1 and 2 and *Newman* at para. 30).

(Emphasis added)

[38] I conclude that the Trial Judge materially misapprehended BM's testimony, which misapprehension played an essential part in his reasoning process leading to the acquittal.

[39] Let me then examine his reasons, with a view to identifying what the Trial Judge concluded BM stated in her testimony, as contrasted with what she did state in her testimony, and what part his misapprehension played in assessing the credibility of BM.

4. The Trial Judge's Reasons

A. "It was during the second stop **the complainant says** the defendant made certain comments which contained the heart of these allegations. She said he wanted her to turn off the vehicle's lights and she said "No".

This is where Mrs. H radioed. The defendant then asked: "What can I do for you?"

She had told him about her unfortunate family situation. She said at this point, she was "dancing around", meaning she was trying to find a way out of an uncomfortable situation. **The defendant asked, "Would \$1000 in your bank account make you, make her happy?"** Sure he offered to help her, he offered to help her generally. He asked about what she "wanted out of life", to use her words. He said he "knows people".

Again, he asked her to turn off the lights more aggressively this time. He put his drink down and said, "Don't be scared". And she thought "how do I get out of here?" She worried about their respective size differences. She was concerned he would "take advantage of" her, to again use her words.

She testified that at one point, he said "I want to fuck your ass. I want to fuck you". She turned the car on, and she said-he said to turn it off.

Eventually she drove around and back to pick up Nick and they all go back to the Lodge.

There the complainant says the defendant said to her, '**the conversation does not end here**'.

The complainant testified she assumed these offers for help were in exchange for sex." (pp. 9(15)- 20 Decision)

(Emphasis added)

[40] The Trial Judge noted that BH denied saying those or similar words.

B. “The allegation here is that the defendant was making repeated sexual advances towards the complainant, and in particular, during the night in question, and created an uncomfortable atmosphere for the complainant as he advanced his sexual intentions by offering money and other consideration to the complainant while voicing his sexual desire toward her.” (p. 13 Decision)

C. The Trial Judge articulated the issues in the case as:

1. Credibility
2. Did the defendant threaten or engage in threatening conduct directed at the complainant such that he knew or was reckless as to whether she was harassed that caused her to fear for her safety?
3. Did the defendant repeatedly communicate with the complainant knowing that she was harassed or reckless as to whether she was harassed, and caused her reasonably to fear for her safety?
4. Did the defendant communicate with the complainant for the purpose of obtaining sex from her?
5. Finally, the Crown must prove all of the elements of each of the offences beyond a reasonable doubt. (pp. 16-17 Decision)

D. **“The kernel of the case really centres around what was the defendant up to?”**

First of all, findings of individual facts is determined on the balance of probability. It is only when this issue of guilt turns on credibility does proof beyond a reasonable doubt standard need to be employed. Accordingly, if individual findings of fact determined guilt, those facts need to be established beyond a reasonable doubt. In any event, the court must always be always -must always come back to whether the Crown has proven all of the elements of the offence beyond a reasonable doubt after considering all of the evidence. Having said this, I accept the Defendant was earnest and motivated to help the complainant financially and to facilitate her ability to remain employed....

The difficulty in determining precisely what the Defendant said, and what his intentions were, is because there was a conflict in the evidence about what he said, and more importantly, what his intentions and motives were.

These are two issues to resolve. What precisely was said, and secondly, what was the Defendant's motivations or intentions, or more accurately, was he harassing the complainant by make- making sexual advances or seeking sex, acting in a way which caused her to be harassed? I will refine this issue in accordance with the *Criminal Code* provisions later.

The most significant factual issue is whether the accused, or the defendant, said these words:

I'm a 53-year old man and there's one thing I want, I want to fuck your ass. I want to fuck you, it's just what I want.

These are the precise wording that the complainant testified to.... These words however need to be placed in context. At this point, the Defendant had been talking to the complainant about her family situation. He was offering her cash and help with getting a job in the airline industry. He asked her to turn the car off and shut off the lights. She expressed that she was scared. **She was asked in her testimony, 'Why were you scared?' and she responded as follows:**

I was just scared. The big difference between me and [BH], I kept thinking to myself every time he moved, he was going to hit me, or take advantage of me. **I didn't want him to hurt me. I figured why else is he bringing me up here. Why else is he offering me these things?** And then I'm kinda thinking all this to myself. And when I kind of come back to reality, **he said to me, I believe he said to me, I'm not sure.**' (pp. 18-21 Decision)

(Emphasis added)

E. “And then the words that I quoted earlier, “I’m a 53-year old man etc.” Later, or just after that phrase he - she says:

‘I didn't say anything. I didn't have anything to say. It was terrifying. This kind of validated everything, everything I was thinking in my head and my body went into fight or flight mode, and I turn the car on and started to drive. He said: “stop the car, stop, just calm down, I know you're probably terrified, just calm down, don't be scared.’

I'm not - **the Defendant denied ever saying the words which I highlighted earlier that begin with “I'm a 53 year old man...”. I'm not convinced that he said this phrase.**

First of all, she prefaced her account in this regard by saying: **“I believe he said to me, I am not sure.” Words of equivocation.**

Further, she was clearly of the view that the situation she was in, asked to stop the car and turn off the lights with a man over twice her age, her employer, who had been drinking and offering financial help, was not a good situation and **that he had “sex” on his mind.**

She had that certain, that idea formulated in her mind, I conclude from the passage that I just read. She said: “this kind of validated everything I was thinking.”

In my view, **she heard what she believed the defendant was thinking.** However, the defendant denied he said this. **She is not sure what he said.** This phrase seems out of context as to what the, the complainant described was happening, the defendant offering financial assistance. The F-word may have been uttered - but **I cannot discern precisely what was said.**

On balance, I'm not convinced he said these words that I quoted earlier. And, quite frankly I choose not to speculate as to precisely what he said and whether he used the F word and in what context he used it in.

It is important - **this is important because it is the most direct reference to any kind of desire expressed by the defendant to have sex with the complainant. I'm not satisfied that it has been shown that he said these words.** (pp. 21(17) – 23(12) Decision)

(Emphasis added)

[41] It is clear that Trial Judge was not satisfied even on a balance of probabilities, that BH said to her: "I'm a 53-year old man, and there's one thing I want, I want to fuck your ass. I want to fuck you, it's just what I want."

[42] In summary, he concluded this, as reflected by his comments in his Decision, such as:

1. that BM "prefaced" her testimony in that regard "by saying 'I believe he said to me, I am not sure'...";
2. that BM had the idea that BH had sex on his mind, and that just after BM believed he had made the "I'm a 53-year-old man..." reference, she testified that "this kinda validated everything I was thinking"; and
3. "**she heard what she believed the defendant was thinking**".

(Underlining in original decision; my bolding added)

[43] Let me briefly state my position in relation to these matters.

[44] BM testified that:

So after that [Mrs. H finished calling on the walkie-talkie], [BH] **began asking me you know, what can I do for you? ... How can I help you?**

And I was kind of dancing around, answering or giving any specific answers. I was just saying you know "I don't know. I don't know what you mean."

And then he said, you know, would \$1000 in your bank account make you happy? And I said it wouldn't make me sad.

I said: 'what is the catch?' Like why are you saying this? He just laughed.

And then he started offering me more things, and saying, you know, \$1000, what, you need a car? I can get you a car... I was... telling him I would like to be a flight attendant. He was saying, what do you need to get there? I can get you there. I know people in the airline industry, and I was like well, I need to,

you know, have an apartment and seem financially stable. And he's offering me all these things.

And... Never saying "yes" or encouraging the conversation.

It was more so just a lot of him offering and offering.

And then he asked me to turn the lights off again twice and I said "No".... And then Nick again came over again the walkie-talkie and said that he was waiting for us where that number two circle is... in the gold van.

After he radioed the second time, [BH] said "don't answer that", and so I didn't.

And then, he got more angry and told me to turn the lights off on the car in a more of an aggressive tone, and I was very scared at this point, just trying to kind of keep the peace. **And so, I turned the lights off on the vehicle** and he started to get more comfortable.

He was taking his hat off and he had a drink in his hand, and he put **his hat and his drink on the dash and was saying "you know I just want you to feel more comfortable,** that's why I got you to turn the lights off and that's why, look, I'm getting more comfortable, and you look scared. Like don't be scared.

And again, it was more so just him talking. I didn't have anything to say, and I was at this point just assessing my surroundings as - how my going to get out of here? Do I unlock the door, or do I run, do I - like what do I do?

Question - What were you scared of? **Why were you scared,** I should say?

Answer - I was just scared of the big size difference, between me and [BH] and I kept thinking to myself every time he moved, is he going to hit me or is he going to take advantage of me.

And I just didn't want him to hurt me.

And I figured, you know, why else is he bringing me up here? Why else is he offering me these things?

And then, as I'm kind of thinking all this to myself, I believe he was talking when I kind of came back to reality- he says to me, you know I'm not sure what the age he said, but I believe he said- "I am a", like "I am a 52-year-old man, and there's one thing that I want." He said: "I want to fuck your ass." He said: "I want to fuck you. That's just what I want".

And I didn't say anything... I was terrified at that point. It kinda validated everything I was thinking in my head and **my body just kind of went into fight and flight mode and I turned the car on.**

And as I started to drive - he was saying "No, stop the car. Stop the car". He's like "just calm down. I know you're probably terrified, but just calm down, don't be scared".

And I just kept driving and I just kept telling myself - just get to Nick.” ...

Once we got back to the Fort, I parked the van in the back and all three of us [BM, BH and Nick] went into the Lodge... I went to grab the mop bucket. I was trying to get the pieces together, but the two pieces wouldn't fit together... So, [BH] came up and said he would help me with it.

And as he was putting the two pieces of the mop bucket together, he was looking at me just continuously making the offer saying you know \$1000, \$10,000, a car, an apartment in Montréal. 'Like this conversation doesn't have to end here' ...

He just said “you know, what we talked about earlier - that conversation doesn't have to end here. I meant it”, and then he would make any offers.

So, in my mind, I was assuming that all these offers were for sex- yes.⁴

(Emphasis added)

[45] I am very satisfied that - other than BM's not being sure about “what the age he said” - on no reasonable reading of BM's words could one conclude that she was not sure about the words [BH] had said to her:

“there's one thing that I want”. He said: “I want to fuck your ass.” He said: “I want to fuck you. That's just what I want”.

(Emphasis added)

[46] To the extent that the Trial Judge concluded that BM's testimony about those specific words BH had said to her, was prefaced or modified by her having said in relation to the entire statement in issue **“I believe he said to me, I am not sure”** - he materially misapprehended her evidence.

[47] When he gave his oral Decision on **June 26, 2023**, the Trial Judge did not have the benefit of a transcript of the trial evidence.

[48] The Trial Judge cited these misapprehended words at p. 21(2) of the Transcript of his June 26, 2023, Oral Decision, which was certified as “a true and accurate transcript” **on August 26, 2023**, and filed with this Court on January 17, 2024.⁵

[49] BM's evidence was heard on March 13, 2023.

⁴ According to BM, he continued to make similar offers after the “I'm a 52-year-old man...” before they parted that same night – see pp. 46(21) 47(10) 97(16) 102(10) and 105(20) Transcript.

⁵ The transcript of his oral Decision is signed and dated on January 11, 2024, in the original handwriting of Trial Judge on p. 28 of the certified Decision.

[50] On April 6, 2023, BH's evidence was heard. Counsel's submissions were also presented that day.

[51] According to the certified transcript of the proceeding on **April 6, 2023**, during submissions by counsel, at p. 121, the **Trial Judge asked Mr. Pizzo whether he had listened to the testimony of BM since the parties were last in Court.**

[52] The Trial Judge indicated that he had done so, however he did not get the evidence transcribed, but had taken "notes about the, the FUCK phrase, if I can use that". According to his listening of the testimony of BM, the Trial Judge stated that it was BM's testimony that she said:

And then I kind of thinking all this to myself and then I kind of came back to reality. He said to me, **I believe he said to me, I'm not sure**, oh, I'm a 53-year-old man, and there's one thing I want. I want to [fuck] your ass and I want to [fuck] you. It's just what I want.

Like, I left out the expletives. I'm not sure if you want to comment on that or not... I'm going to have these questions for Mr. Mathers, because he said it, that didn't happen. He never, he never said that... **I listened to the tape. I listened to it a number of times...** Because these words are important... **And I'm just telling you what my notes say about... Yeah, well, she said: "I believe he said to me, I'm not sure". Those are the prefix to these, to this phrase.**

[My bolding and underlining added]

[53] However, I also listened to what BM said in Court, and I find the following transcription to be accurate⁶:

And then, as I'm just kind of thinking all this to myself, I believe he was talking when I kind of came back to reality, he says to me, you know, I'm not sure what the age he said, but I believe he said: 'I am'; like: 'I'm a 52-year-old man, and there's one thing that I want.' He said 'I want to fuck your ass.' He said 'I want fuck you. That's just what I want.'

(My underlining added)

[54] On no reasonable reading of BM's words could one conclude that she was not sure about the words BH had said to her: "... there's one thing that I want.' He said 'I want to fuck your ass.' He said 'I want fuck you. That's just what I want'."

⁶ I note that is at page 44 of the transcription of BM's evidence from March 13, 2023, which has been certified as "a true and accurate transcript" by Margaret Graham, dated August 22, 2023.

[55] Moreover, the Trial Judge's misapprehension clearly played an essential part in his reasoning process, that led to BH's acquittal.

Conclusion

[56] Consequently, I allow the appeal.

[57] The verdict of acquittal is overturned and it is appropriate to order a new trial in relation to the s. 286.1 *CC* charge.

Rosinski, J.