In the Court of Appeal of the Northwest Territories

Citation: R v Roberts, 2017 NWTCA 9

Date: 2018 01 02
Docket: A-I-AP-2017-000003
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

Richard Stanley Roberts

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Decision by
The Honourable Madam Justice S.H. Smallwood
Dated on the 5th day of January, 2017
(2017 NWTSC 17, Docket: S-1-CR-2015 000026)

Memorandum of Judgment

I. Overview

[1] The appellant appeals his convictions for sexual assault and two counts of uttering threats following a three-day judge-alone trial in the Supreme Court of the Northwest Territories. The sexual activity was admitted and the sole issue at trial was consent.

[2] Both the appellant and the complainant had consumed alcohol on the night of the events. The testimony given by each was entirely irreconcilable. The complainant maintained that she had gone to bed and was awoken to the appellant having sexual intercourse with her; when she tried to push him off, she was punched by the appellant in the face and rendered unconscious only to wake up sometime later and find the appellant still on top of her, following which he threatened her not to tell anyone. In contrast, the appellant testified that he had gone over to the complainant's residence to have a beer with her husband, but found the complainant alone and thereafter she initiated multiple sexual encounters with him which were consensual.

[3] On appeal, the appellant argues that the trial judge erred in law by relying on stereotypes and unproven inferences about the complainant's unlikelihood to initiate sexual contact in order to reject the evidence of the appellant. He further argues that the trial judge failed to give sufficient reasons to allow for meaningful appellate review of the findings of credibility.

[4] Despite the able arguments on behalf of the appellant, the appeal must be dismissed.

II. Relevant Background

[5] The appellant was initially charged with break and enter to commit sexual assault contrary to section 348(1)(b) of the *Criminal Code*, as well as two counts of uttering threats to cause death and burn property.

[6] At the outset of trial, an Agreed Statement of Facts was filed that provided that at approximately 10:30 am on September 6, 2014, the complainant attended the Stanton Hospital with the RCMP. She was "upset and sobbing" and observed by a doctor to have a "bruise on her right check". A further examination by a nurse which took place two hours later, noted the complainant to have two dark purple bruises on her right cheek, and the right side of her face and back of her head were tender to the touch; bruises were also noted on both of the complainant's legs. There were no injuries to the complainant's vaginal or genital area, but a swab taken from inside the complainant's vagina was ultimately tested by the RCMP and revealed to contain the appellant's sperm.

A. Evidence at Trial

(i) The Complainant

[7] The complainant testified that since 2008 she and her common-law spouse, DE, and their children, have resided in Yellowknife. The appellant was described as an acquaintance who lived nearby, and would stop by their residence and smoke cigarettes outside with DE.

[8] On September 5, 2015, the complainant was drinking beer with DE when they got into an argument and the police were called. A friend, MS, drove over and picked up DE and the children, to take them away for the night. The complainant testified that she was "sad" her family left, and was "kind of upset" and "mad" about the argument with DE. At some point, Constable "Tina" attended at the residence and told her to go to bed. The complainant then went upstairs to "pass out" in her bedroom. She stated that while she knew what she was doing, in terms of sobriety she was about a 7 out of 10, with 10 being black out drunk.

[9] The complainant testified that the next thing she remembered was waking up to the appellant on top of her with his penis "inside" her. She told him to get off, but when she tried pushing him off, the appellant hit her in the face with his fists five or six times, and she lost consciousness. When she came to, the appellant was still on top of her, "having sex - - sexually assaulting me". She tried to push the appellant off again, and he eventually got up and left but not before telling her that if she told the police, he would "burn me and the house down".

[10] After the appellant left, the complainant stated that she lay in bed "crying, scared." She eventually got up and went downstairs, noting that the TVs were missing from her son's room and living room, and that the balcony door was wide open.

[11] During examination-in-chief, the Crown asked the complainant if she would have let the appellant into her house after DE left had the appellant come to the door. Defence counsel objected on the basis that the question was speculative. Crown counsel argued that it was an appropriate question in anticipation of the defence arguing that the complainant had consensual sex with the appellant but had no memory because she was intoxicated, and further that she also sought to ask the complainant whether she would have had sex with the appellant that night. In the first instance, the trial judge refused to allow these questions.

[12] During the complainant's cross-examination, she was pressed about her memory and her level of intoxication, leading to the following exchange:

> Q: What you remember about that night, you remember things different things today than you did in the preliminary inquiry, don't you?

A: I remember everything.

Q: What you remember has changed since you talked to Constable Um and Constable Bennett, hasn't it? It's changed; it's different?

A: Why is that? You guys should just get over with what he did. He sexually assaulted me and threatened me.

Q: You can't be sure of your memory of what happened can you…?

A: I'm telling you I remember.

Q: But you can't be sure, can you? You can't be sure, can you?

A: I guess.

[13] Following cross-examination, the Crown renewed its request to ask the same questions it had previously sought to ask relying on ***R v Esau***, [1997] 2 SCR 777 wherein the complainant was intoxicated, awoke to realize she had sexual intercourse with the accused but had no memory of it and gave evidence that she would not have consented because the accused was her second cousin. Crown counsel contended that where the complainant has no memory, "this sort of evidence is commonly evidence that the Courts permit to be elicited because it does go to the question of consent". Defence counsel maintained his objection on the basis that it invited speculative evidence and impermissible reasoning about what a sexual assault complainant would likely have done.

[14] While acknowledging during argument that the complainant's evidence was "pretty clear" that she did remember waking up to the sexual act with the appellant, the trial judge allowed the Crown's request stating: "... this evidence does arise in cases particularly where the complainant has no memory of what occurred - - it is not uncommon for one to be asked why. And there is a reason where they're related, as in Esau, or there is another reason why the person would not have consented... So I think that it does have some value. . . ".

[15] The following exchange (the "Redirect") then took place between Crown counsel and the complainant:

Q: ... if [the appellant] had come to your door that night after [DE] left with the kids – or, excuse me, if [the appellant] were in your house that night after

> [DE] left with the kids and wanted to have sex with you, would you have had sex with him?
>
> A: No
>
> Q: Why not?
>
> A: Because I just don't go have sex with people I don't know.

(ii) The Complainant's Spouse: DE

[16] During his testimony, DE acknowledged that his memory of events was "kind of vague". He recalled that he had arrived home sometime around 3:00 pm on September 5, 2014, to find the complainant drinking a mickey with her friends; she was "getting drunk". DE then began consuming alcohol himself, about 4 or 5 beers, and had an argument with the complainant sometime around 8:00 or 8:30 pm. Around 8:30 or 9:30 pm, he called his friend MS to come and pick up him and the children.

[17] As DE was leaving the house with the children, the appellant approached asking him if he wanted to buy some flats of beer. DE told him "no, get out of here. Cops are coming, social services. I'm getting out of here for the night." MS then pulled up, and DE and the children got into her car and left. DE described the appellant as an acquaintance who lived two units over from his home, and would occasionally come over and "bum cigarettes".

[18] DE testified that about 20 to 30 minutes after leaving the house, they returned to his house because DE had forgotten diapers for his youngest son. He gave MS the key and she went into the house to get the diapers.

(iii) Friend: MS

[19] MS testified that on September 5, 2014, she received a phone call from DE asking her to come and pick up him and the children so they could go to a hotel for the night. When she arrived, she saw the appellant on the sidewalk near the complainant and DE's house. DE and the children got into MS' van, and they went to get snacks.

[20] About 30 minutes later, MS drove back to the house because DE had forgotten diapers. MS went into the house to get the diapers and spoke with the complainant inside for about 10 to 15 minutes. MS recalled that the complainant had been drinking, was "crying" and "talking about her son that had just passed away"; and was also "upset" and "mad" that her children had left the house.

(iv) Constables Bennett and Um

[21] Constables Bennett and Um responded to a complaint of sexual assault on the morning of September 6, 2014, and attended at the complainant's home. Constable Bennett observed the complainant to be "calm" but "intoxicated" with "red, bloodshot eyes and slurred speech... unsteady on her balance." Constable Um also described the complainant as "calm" with "subtle signs" of intoxication.

[22] After taking the complainant to the hospital, the police officers located the appellant and arrested him. Constable Bennett stated that the appellant "appeared intoxicated" with red, bloodshot eyes, slurred speech, emitted an odour of stale alcohol, and seemed unsteady on his feet.

[23] Constable Um observed that the appellant had poor balance, and was slow to respond to commands; however, both police officers agreed that the appellant may have been unsteady because he was in handcuffs.

(v) The Appellant

[24] The appellant testified that in the evening of September 5, 2014, he bought a 15 pack of beer. He came home and drank four or five beers before going to visit a friend who lived nearby. He returned home again and drank a few more beers. Around 10:30 or 11:00 pm, he left the house with four beers in his hand, and walked to the complainant and DE's house to see if DE wanted to have a beer.

[25] The appellant stated that the complainant answered the door, and told him that DE was out with the children. He then asked the complainant if she wanted to have a beer with him, and she said "[y]es, sure. Come in." He described the complainant as a "a bit giggly", "happy", "happy-go-lucky" and a "little bit buzzed", but that she did not seem intoxicated.

[26] The appellant testified that they were talking "just being friendly", and after they had both drank their two beers, he prepared to leave but the complainant told him that she did not want to be alone; she then started "kissing and hugging and grabbing" at him. He was shocked at first, but then did not mind her advances and the complainant led him to the bedroom where they had consensual sexual intercourse. When it was over, the complainant said "wow, that was good. We should do this more often."

[27] The appellant stated he then went back to his house to get more beer and returned to the complainant's house. While he did not expect to have more sex when he returned, the complainant met him at the door not wearing any pants, and she invited a second round of sexual intercourse which took place on the stairs and in the bedroom. He then returned home and went to sleep.

[28] The appellant remembered being arrested the next day, and claimed that he was not intoxicated when he interacted with members of the RCMP.

B. The Trial Judge's Reasons

[29] At the outset of her decision, the trial judge commented on the presumption of innocence, that the burden of proof lay with the Crown to prove all elements of each offence beyond a reasonable doubt, that the standard of proof does not apply to individual pieces of evidence but to the total body of evidence upon which the Crown relies, and that a trial judge may accept all, part of, or none of the evidence given by a witness.

[30] The trial judge also set out the elements of each of the offences charged and summarized the parties' theories of the case. She found that the issue before her was whether the appellant "broke and entered into [the complainant's] residence and whether he had sexual intercourse with her without her consent and knowing she did not consent and whether he threatened her as he left the residence." She set out the mandated three-part test in ***W(D)***, [1991] 1 SCR 742, and began her analysis by summarizing the evidence of the appellant.

[31] In determining that the appellant's testimony was not credible or reliable, the trial judge found that the appellant had overstated the extent of his friendship with the complainant and DE, describing the complainant as "always there" when he smoked regularly with DE, while those witnesses described him as more of a passing acquaintance. She determined that the appellant's previous interaction with the complainant was actually "infrequent". She then provided:

> The accused testified that [the complainant] greeted him at the door and that she was happy to see him. He described her as a bit giggly. He testified that she was happy-go-lucky that night. That seems at odds with the relationship that they had at the time and with other evidence regarding [the complainant's] mood that night. [DE] and [the complainant] both testified they were fighting. [DE] called the police at 9:42 pm, and the police responded to the residence.
>
> ....
>
> At the residence, [MS] entered the residence and spoke with [the complainant] for 10 to 15 minutes. She observed that [the complainant] was crying and upset, talking about her son that had passed away a few months before. [The complainant] was also upset because she didn't know why [MS] had taken her children out of the house. [MS] described [the complainant] as being drunk, crying, upset and mad.
>
> On the accused's evidence, he would have arrived at [the complainant's] residence at 10:30 or 11, which would have been shortly after [MS] left [the complainant] upset, crying and mad. It seems implausible that [the complainant] could greet him and seem happy and a bit giggly with no hint that she was upset or had been crying.

[32] The trial judge also found that the appellant's account of how the sexual encounter unfolded was of "some concern".

> On his evidence, [the complainant] initiates every aspect of the sexual contact. She kisses him as he is leaning against the wall. She hugs him. She grabs his private parts. She leads him up the stairs. At the top of the stairs he leans on a railing and she kisses him again and rubs him between his legs and pulls him into the room. They lie on the bed. Then she removes her pants and straddles him. She reaches down to put his penis in her vagina.
>
> In the second encounter, he returns with the beer. [The complainant] lets him into the residence wearing no pants, walks over to the stairs and bends over saying, "Let's have sex from behind." She is the one who then says, "Let's go upstairs," and then they had sex on the bed.
>
> On the accused's evidence, every aspect of the sexual encounter between the accused and [the complainant] is instigated by [the complainant]. While that is not impossible, it certainly seems improbable. [The complainant] goes from upset, mad, and crying to happy and giggling in a short period of time and then initiates multiple sexual encounters with the accused, whom she barely knows. It seems implausible.

[33] Regarding the appellant's claim that he was not expecting to have sexual intercourse with the complainant when he returned to the complainant and DE's home the second time, the trial judge noted that "[t]his is despite his evidence that [the complainant] said that the sex was good and they should do it more often. He then goes to his residence to get two more beer and returns to [the complainant's] residence." The trial judge found that "[i]n these circumstances it seems incredible that the accused would not have at least entertained the possibility that they might have intercourse again."

[34] The trial judge noted that the appellant's evidence that he was not intoxicated at the time of his arrest contradicted the observations of the arresting police officers, and while "admittedly some of their observations were made when [the appellant] was handcuffed and walking down the stairs... their impression was that the accused was still under the influence of alcohol." The trial judge found that the appellant was either minimizing the extent of his intoxication or had forgotten how much he drank. The trial judge indicated that where alcohol is involved "the Court must keep in mind whether the evidence of a witness is reliable and should be accepted, given the effects of alcohol on memory."

[35] Following this self-instruction, the trial judge concluded:

> When I consider the accused's version of events, I have a number of concerns, and I am of the view that the accused's version of events does not make sense. Overall, considering the alcohol consumption of the accused and the implausibility of the version of events related by the accused, I do not believe his evidence. I do not

> believe that it is credible or reliable. His evidence regarding what occurred at [the complainant's] house does not raise a reasonable doubt.

[36] The trial judge then considered whether on the basis of the evidence she did accept, the guilt of the accused had been proven beyond a reasonable doubt. She reviewed the evidence of the complainant and that the defence had pointed to major problems with the complainant's memory, arguing her testimony was otherwise argumentative and attempted to raise bad character evidence about the appellant.

[37] The trial judge cautioned herself about undue reliance on demeanor and noted that there is no stereotypical victim or reaction "and a formulaic approach to assessing behaviour and demeanor should be avoided." The trial judge agreed that the complainant was occasionally argumentative but found this was "understandable" given the questions and subject-matter. She noted that the complainant was emotional when describing the alleged sexual assault, and seemed confused by some questions in cross-examination and the differences in similar words, but concluded that neither the complainant's demeanor nor her reactions while testifying rose to a level where her credibility should be questioned.

[38] The trial judge found that the complainant was intoxicated at the time of the events and into the next morning, that she was "clear about the evidence she does remember, but there are gaps in her memory". She noted the complainant's evidence was that she was a 7 out of 10 in terms of sobriety, with 10 being black out drunk, and the testimony of both police officers noted signs of intoxication, one describing those signs as being "subtle". The trial judge further noted inconsistencies between the complainant's evidence and that of other witnesses; for example the complainant was unable to remember speaking with MS for about 10 to 15 minutes that night which was found to be "a significant inconsistency", as well as other more "minor" inconsistencies. She determined however that "[t]he consumption of alcohol, while of concern, does not mean that none of the evidence of [the complainant] can be accepted."

[39] The trial judge accepted the evidence of MS, and when it conflicted with other evidence, the trial judge preferred the version of events provided by MS, who was sober the night of the alleged sexual assaults. This included the evidence that MS had a discussion with the complainant that night and that the complainant had been upset, crying and mad, as well as her evidence that she had observed the appellant on the sidewalk near the complainant's house when she had first arrived to pick up DE and the children. She also accepted the evidence of DE that he had a conversation with the appellant outside his home just as MS also arrived in her vehicle.

[40] The trial judge also assessed the injuries reported to be present on the complainant's body and convicted the appellant of sexual assault and uttering threats as follows:

> In my view, the bruising is consistent with what [the complainant] testified happened to her. There was nothing in the accused's evidence regarding his encounter with [the complainant] that would suggest a reason for her later to have a

> bruise. [DE's] evidence also was that they had argued that night and there was no physical altercation... [ME's] evidence was that while [the complainant] was drunk, she was walking and talking fine and she did not observe any injuries.
>
> Overall, I am aware of the frailties in [the complainant's] evidence and the problems with her memory. These arise from the consumption of alcohol. In my view, the problems she has with her memory are ones that are typical when someone has consumed alcohol. However, [the complainant] was consistent and unshaken regarding her evidence surrounding the sexual assault.
>
> ...
>
> The only two individuals who were present at the time are [the complainant] and [the appellant]. I have already stated that I do not believe the accused. However, I also have to believe the evidence of [the complainant] on this point. I find [the complainant's] evidence regarding the events that occurred in her bedroom with the accused can be considered credible and reliable in the circumstances.

[41] Finally, the trial judge went on to find that while it was likely that the appellant entered the complainant's residence without permission, given the complainant's memory problems and her inability to say how the appellant got into the residence, there was a reasonable doubt with respect to offence of break and enter.

III. Grounds of Appeal

[42] The appellant raises two issues on appeal:

1. Did the trial judge err in law by relying on stereotypical and unproven inferences about the complainant's likelihood to initiate sexual contact in order to reject the evidence of the appellant to that effect?

2. Were the trial judge's reasons sufficient to allow for meaningful appellate review to ensure that the trial judge's findings on credibility did not descend into a credibility contest?

IV. Standard of Review

[43] The standard of review is critical to the outcome of this appeal. It is trite that an appeal is a review of the trial decision for error; it is not a second trial. It is not the function of an appellate court to reassess the credibility of the witnesses, make new findings of fact, reweigh the evidence, or render the decision it might have otherwise rendered on that basis.

[44] Trial judges have considerable leeway in their appreciation of the evidence and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt: ***R v Biniaris***, [2000] 1 SCR 381 at paras 24, 37, 2000 SCC 15. Findings of fact and assessments of credibility by a trial judge are entitled to great deference, and should only be interfered with on appeal if they are unreasonable, or if they display palpable and overriding error: ***FH v McDougall***, 2008 SCC 53 at paras 55, 72, [2008] 3 SCR 41; ***Housen v Nikolaisen***, [2002] 2 SCR 235 at paras 10-18, 2002 SCC 33.

[45] However, reliance on impermissible stereotypes in assessing the credibility of sexual assault complainants raises an error of law, for which the standard of review is correctness: ***R v ARJD***, 2017 ABCA 237 at paras 9, 28 [***ARJD***].

[46] An error related to sufficiency of reasons is an error of law. As set down in ***R. v. Sheppard***, 2002 SCC 26, [2002] 1 SCR 869 [***Sheppard***], the test is whether there are deficiencies in the trial judge's reasons to such an extent as to prevent meaningful review of the correctness of the decision. "More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict": ***R v REM***, 2008 SCC 51 at para 53, [2008] 3 SCR 3 [***REM***]. However, a trial judge is not required to give reasons mentioning and resolving every piece of evidence or controverted fact, so long as there is a logically discernible link between the evidence and verdict: ***REM*** at paras 20, 24; ***R v Dinardo***, 2008 SCC 24 at para 30, [2008] 1 SCR 788.

V. Analysis

Did the trial judge err in law by relying on stereotypical and unproven inferences about the complainant's likelihood to initiate sexual contact in order to reject the evidence of the appellant to that effect?

[47] It may fairly be said that a bulk of judicial attention has been expended on various types of stereotypical thinking, assumptions or generalizations identified as being unfairly applied to sexual assault complainants.

[48] More than 25 years ago, in ***R v Seaboyer***, [1991] SCJ No 62 at para 91, 2 SCR 577, the Supreme Court of Canada said that : ". . . evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent . . . [myths] have no place in a rational and just system of law".

[49] More recently in ***ARJD*** at para 60, this Court warned that "judges must be hypervigilant against the incursion of stereotypical analyses or assumptions into their judicial reasoning" because "speculative myths, stereotypes, and generalized assumptions about sexual assault victims . . . have too often in the past hindered the search for truth."

[50] In this appeal, the appellant urges that the same prohibition against the incursion of judicial stereotypicality ought to be summoned in his aid because he, too, has fallen victim to a trial judge's impermissible use of stereotypical assumptions in assessing the evidence in this matter, and in deciding his ultimate guilt.

[51] The main point made by the appellant is that evidence given by a complainant about her sexual proclivities was linked, by impermissible stereotypical thinking, to the trial judge's findings about what the complainant's conduct was with the appellant. More specifically, that the trial judge made a stereotypical assumption about the implausibility of the complainant initiating multiple sexual encounters which materially eroded the trial's truth-seeking function and unfairly compromised the fairness of the trial, rendering the appellant's conviction unsafe. The appellant argues that in rejecting the appellant's evidence that the complainant had initiated the sexual contact as "implausible", the trial judge resorted to myth-based assumptions and beliefs about how a woman would sexually engage in this situation.

[52] The appellant did not expressly raise the issue of the general admissibility of the Redirect, a hypothetical put to the complainant, as a ground of appeal. As such, this is not an appropriate case to comment directly on that issue.

[53] However, the first aspect of the appellant's argument is that the Redirect set out in paras 11-15 above, resulted in speculative evidence about the complainant's sexual proclivities that the defence could not cross-examine on. The appellant argues that through this Redirect, the Crown sought to adduce evidence upon which the trial judge could find that the complainant's past behaviour would reliably predict her sexual behaviour in the factual matrix before the court. And the evidence given during the Redirect, to the effect that she would not have had sex with the appellant "[b]cause I just don't go have sex with people I don't know", invited speculation that could not be challenged without engaging in prohibited questioning about the complainant's past sexual history. This created a particular unfairness to the appellant, which was fully realized in this matter by the trial judge's reliance on this evidence to reject the appellant's testimony.

[54] The second aspect of the appellant's argument on this first ground of appeal was that based on the Redirect, the trial judge resorted to impermissible stereotypes or assumptions about how a woman would engage sexually in the circumstances of this case. And, that reliance on an impermissible assumption led the trial judge to find, improperly, that the appellant's version of events – that the complainant instigated every aspect of the sexual activity – was not credible.

[55] The appellant points to the following statement in the trial judge's decision as evidencing these two points:

> On the accused's evidence, every aspect of the sexual encounter between the accused and [the complainant] is instigated by [the complainant]. While that is not impossible, it certainly seems improbable. [The complainant] goes from upset, mad, and crying to happy and giggling in a short period of time and then initiates

> multiple sexual encounters with the accused, whom she barely knows. It seems implausible.

[56] It is argued that the crux of the trial judge's rejection of the appellant's evidence comes down to the fact that she found it implausible that the complainant would have *initiated* the sexual contact, and not merely that she would have *consented*. The appellant contends that this reasoning arose out of the complainant's evidence in the Redirect to the effect that she would not have had sex with someone she did not know - effectively a one-sided story upon which the appellant could not cross-examine. This resulted in a reasoning process based upon an impermissible stereotype (that a woman would not initiate sexual contact with a person she did not know), that lead to a direct and dangerous finding about the sexual conduct of the complainant in this matter.

[57] With this, the appellant argues that there were significant reliability issues with this complainant who was "combative" during cross-examination. Further, at the time of the events the complainant was intoxicated, even to the point of not remembering a conversation she had that night with MS. The complainant had admitted in her testimony that when intoxicated, she may do things she does not remember, that she may later regret, or that she would not otherwise do when sober. And despite all this, implausibility as to the complainant initiating the sexual encounter formed the first and foremost reason given by the trial judge for rejecting the appellant's evidence.

[58] In our view, the Redirect did not have a material bearing on the appellant`s conviction. First, we are satisfied from the trial judge's interactions with counsel both at the time these questions were asked and during closing argument, that she was very much alive to the issue of the relevancy and speculative nature of the answers provided by the complainant, and the need to guard against improper use of that evidence particularly given the lack of cross-examination.

[59] Second, and as illustrative of this awareness by the trial judge, she did not mention the Redirect at all in her reasons. While not necessarily determinative in its own right, it appears clear from this that the evidence was given very little, if any, weight in either assessing the credibility of the complainant or the appellant, or in determining whether the Crown had proven its case beyond a reasonable doubt.

[60] Third, we have determined that the finding of implausibility as to the events described by the appellant, was based on an evidentiary foundation that was available on the record, sufficiently explained by the trial judge, and entirely unrelated to the Redirect evidence.

[61] The first and second of these findings are self-evident from the appeal record.

[62] With respect to the third finding, we conclude that the trial judge did not resort to impermissible stereotypes or assumptions about how a complainant would engage sexually in the circumstances of this case. There is nothing in the trial judge's decision that hints at such a stereotype being considered or assessed, or any such generalized assumption being made; and the appellant's reliance on one small portion of the decision concerning implausibility is no evidence

of such an error, either in its own right or when necessarily considered in the context of the entire decision. Moreover, the trial judge specifically cautioned herself that there is no stereotypical victim: that a formulaic approach cannot be taken to such evidence. The actual "implausibility" finding was firmly rooted in a principled engagement in the evidence at trial, and comported with the facts as found by the trial judge.

[63] The appellant raised this issue generally as it related to the trial judge's assessment of his credibility. In the context of this appeal, there are two layers to this issue: 1. what evidence from the record, if any, supports the trial judge's finding of implausibility of the complainant's consent, and 2. whether the trial judge's conclusion about implausibility, should it survive appellate review, ought to have been a factor in adversely assessing the appellant's credibility.

[64] The appellant submits that the trial judge made a reversible error by making an assumption borne of impermissible stereotypical thought that *a woman would not instigate every aspect of multiple sexual encounters*. Since the appellant testified that this is precisely what occurred, the trial judge chose to disbelieve him.

[65] In our view, the conclusion reached by the trial judge was not based on a stereotypical generalized assumption about sexual behaviour, but was grounded in and arose directly from the evidence. Her conclusions were not impermissibly anchored in some personal worldview unrelated to the evidence, and did not find any genesis, or provenance, in dangerously presumptive generalizations or assumptions about the normative behaviour of a sexual assault complainant, or this particular sexual assault complainant.

[66] Rather, we conclude that this finding rested upon the totality of the evidence the trial judge did accept: that in the factual matrix of *this* case, *this* complainant, would not have instigated multiple sexual encounters with the appellant. In her reasons, this finding was directly tied to the evidence of the complainant as to her distressed state arising from an argument with her spouse and him leaving with the children, as well as the testimony of DE and MS – both of whom confirmed the complainant was upset a short while before the sexual encounter took place. It was also uncontradicted that the police had attended at the residence earlier that night on a domestic dispute call. The complainant further testified that she had gone to bed after the police left and awoke to the appellant having sexual intercourse with her; when she told him to get off, he punched her in the head and threatened her. She admitted she was intoxicated throughout.

[67] The trial judge's reasons in this regard are detailed and responsive to all of the evidence before her:

> The accused testified that [the complainant] greeted him at the door and that she was happy to see him. He described her as a bit giggly. He testified that she was happy-go-lucky that night. That seems at odds with the relationship that they had at the time and with other evidence regarding [the complainant's] mood that night.

> [DE] and [the complainant] both testified they were fighting. [DE] called the police at 9:42 pm, and the police responded to the residence.
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> At the residence, [MS] entered the residence and spoke with [the complainant] for 10 to 15 minutes. She observed that [the complainant] was crying and upset, talking about her son that had passed away a few months before. [The complainant] was also upset because she didn't know why [MS] had taken her children out of the house. [MS] described [the complainant] as being drunk, crying, upset and mad.
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> On the accused's evidence, he would have arrived at [the complainant's] residence at 10:30 or 11, which would have been shortly after [MS] left [the complainant]
>
> upset, crying and mad. It seems implausible that [the complainant] could greet him and seem happy and a bit giggly with no hint that she was upset or had been crying.
>
> . . .
>
> On the accused's evidence, every aspect of the sexual encounter between the accused and [the complainant] is instigated by [the complainant]. While that is not impossible, it certainly seems improbable. [The complainant] goes from upset, mad, and crying to happy and giggling in a short period of time and then initiates multiple sexual encounters with the accused, whom she barely knows. It seems implausible.

[68] The trial judge's findings in this respect are entitled to the highest degree of appellate deference. There was ample support in the evidence for the found fact that the complainant had been upset, mad and crying shortly before appellant came into her home. The appellant's evidence that the complainant was happy and giggly and initiated multiple sexual encounters when he arrived at her residence, was entirely contrary to the evidence tendered by the Crown. His evidence cannot be assessed in a vacuum, and these differences were available in assessing the appellant's (and the complainant's) credibility.

[69] There was a logical connection between the evidence and the reason the trial judge found the appellant's evidence to be implausible, and that connection was not based on any kind of impermissible stereotype. The complainant's evidence given during the Redirect was never relied upon by the trial judge, nor were any other assumptions made that either breached the boundaries of the available evidence or were founded in improper or generalized notions about how a complainant, or this complainant, would behave or react in this, or any other, sexual context or situation.

[70] This ground of appeal is dismissed.

Were the trial judge's reasons sufficient to allow for meaningful appellate review to ensure that the trial judge's findings on credibility did not descend into a credibility contest?

[71] The purpose of reasons are well known and need not be repeated.

[72] On this ground of appeal, the appellant argues that whereas the trial judge made no findings as to how the complainant's intoxication related to frailties in her evidence, she made a number of findings with respect to how intoxication created gaps and inconsistencies in the appellant's memory. More specifically, that while there was some evidence of the appellant's alcohol consumption and intoxication, there was no specific evidence that linked the accused's intoxication to issues concerning the reliability of his evidence or his credibility, whereas the opposite is true for the complainant. All of which is in conflict with the resulting credibility findings made by the trial judge in disbelieving the appellant's evidence, and finding the complainant both reliable and credible.

[73] The appellant contends that it is impossible to discern on this record how the appellant's intoxication prevented his evidence from raising a reasonable doubt. The evidence from cross-examination reveals no meaningful contradictions or lapses in memory that would affect either his reliability or credibility. It is argued that the confusion in the reasoning becomes acute when the effects of the appellant's intoxication are contrasted with the effects of the complainant's intoxication. Whereas the significant lapses noted in the complainant's recall were described as "minor", the intoxication of the appellant, absent any lapses or other inconsistencies in his evidence, rendered his evidence unreliable and insufficient to raise a reasonable doubt.

[74] In essence, the appellant posits that while the principles of ***W(D)*** were correctly articulated, the rigour of that mandated analysis was not followed, nor were its fundamentals applied. More specifically, the appellant contends that the trial judge unfairly weighed against his credibility his level of intoxication, but did not apply the same rigour or give the same adverse weight to the evidence of the complainant's intoxication.

[75] The argument that the trial judge erred in applying ***W(D)*** and applied an uneven level of scrutiny between the appellant and the complainant based on intoxication, is not made out on this record. Nor is the argument that the reasons do not meet the standard set out in ***Sheppard.*** The assessments made with respect to intoxication must be read as a whole, and in the context of the entire decision, which clearly reveals that the trial judge was alive to the potential frailty of both witness' evidence based on their own testimony, and third party evidence, about the state of their intoxication.

[76] Under her ***W(D)*** assessment of the evidence, the trial judge dealt with the appellant's evidence first. Again, however, an accused's evidence is not to be assessed as devoid of the rest of the evidence; but rather, as here, in the context of the evidence given by the complainant, the other

Crown witnesses, and the agreed statement of facts which included a description of the complainant's injuries.

[77] The reasons given by the trial judge for disbelieving the appellant were not limited to intoxication, and were both detailed and extensive as set out in paras 31-36 above. She reviewed the version of the events provided by the appellant and provided a number of reasons for disbelieving that evidence including: that he exaggerated the extent of his relationship with the complainant and her husband, that his evidence about the complainant's "happy-go-lucky" mood was contradicted by other witnesses, that it was implausible that the complainant would have initiated multiple sexual encounters with the appellant given her distressed state as described by the other witnesses, and that his evidence to the extent that he had left the complainant's residence to retrieve more beer after having sex with the complainant, but did not expect that the two might have further sexual activity when he returned, was "incredible".

[78] The trial judge further found that the appellant's evidence that he was not intoxicated at the time of his arrest the next morning, was contradicted by the evidence of the two RCMP officers who dealt with him at that time. As a result, she found that he was either minimizing his level of intoxication, or had forgotten how much he had to drink. This finding was one that the trial judge was entitled to make and does not raise a palpable and overriding error. Nor does her general observation that "the Court must keep in mind whether the evidence of a witness is reliable and should be accepted, given the effects of alcohol on the memory." In our view, the trial judge applied this approach equally to the evidence of both the appellant and the complainant, and the totality of the reasons illustrates her balanced treatment of the intoxication issue.

[79] Regardless, the trial judge's findings as to the appellant's intoxication was but one factor in determining that his evidence was disbelieved and did not raise a reasonable doubt. As she concluded:

> When I consider the accused's version of events, I have a number of concerns, and I am of the view that the accused's version of events does not make sense. Overall, considering the alcohol consumption of the accused and the implausibility of the version of events related by the accused, I do not believe his evidence. I do not believe that it is credible or reliable. His evidence regarding what occurred at [the complainant's] house does not raise a reasonable doubt.

[80] As it relates to the complainant's evidence as set out at paras 37-41 above, the trial judge specifically found that the complainant "was intoxicated", and that while she was "clear about the evidence she does remember... there are gaps in her memory". She noted inconsistencies between the complainant's evidence and the other witnesses, including a significant inconsistency between the evidence of MS and the complainant concerning a conversation they had on the night of the events which the complainant had no memory of. The trial judge found she preferred the evidence of MS, who was sober and found to be credible and reliable.

[81] The trial judge held that the complainant's alcohol consumption was "of concern", but that did not necessarily mean that none of her evidence could be accepted. In doing so however, the trial judge specifically considered whether there was other evidence corroborative of the complainant's testimony about the alleged sexual assault. The trial judge noted that the evidence of MS and DE to the effect that when they left the complainant that night, she was uninjured, as well as the evidence that when she was examined the next day there was "evidence of bruising ... which appears consistent with her being struck in the face by the accused, as she related in her evidence." The trial judge further found that there was nothing in the evidence of the appellant which would have explained such injuries. The trial judge concluded:

> Overall, I am aware of the frailties in [the complainant's] evidence and the problems with her memory. These arise from the consumption of alcohol. In my view, the problems she has with her memory are ones that are typical when
>
> someone has consumed alcohol. However, [the complainant] was consistent and unshaken regarding her evidence surrounding the sexual assault.

[82] We discern no error in this finding, nor any support for the notion that the evidence of the appellant and the complainant was dealt with in an uneven manner as it related to intoxication, or otherwise. The reasons, read as a whole, considered all of the relevant evidence and deference is owed to the trial judge's findings that the appellant's testimony did not raise a reasonable doubt. Similarly, the trial judge was entitled to accept that the complainant's impairment affected her memory in some aspects, but did not significantly impair her memory of the sexual assault that occurred when she awoke in her bed, in her home, and found the appellant on top of her.

[83] The primary question raised by the appellant is whether the trial judge's reasons permitted meaningful appellate review to ensure that the trial judge's findings on credibility did not descend into a credibility contest. The reasons make clear that the trial judge was alive to the issues raised, articulated correctly the applicable legal principles, undertook appropriate analyses, made reasonable findings of fact, reached conclusions and told us why. The reasons were sufficient and we have been able to discharge our appellate function.

VI. Disposition

[84] For the reasons above, the appeal is dismissed.

Appeal heard on October 17, 2017

Memorandum filed at Yellowknife, N.W.T.

this day of December, 2017

Authorized to sign for: Rowbotham J.A.

Schutz J.A.

Strekaf J.A.

Appearances:

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for the Respondent

K. Teskey
for the Appellant

A-1-AP-2017-000003

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

Between:

Her Majesty the Queen

Respondent

- and -

Richard Stanley Roberts

Appellant

MEMORANDUM OF JUDGMENT
