

R. v. G.F., [2019] O.J. No. 3106

Ontario Judgments

Ontario Court of Appeal

D. Watt, G.I. Pardu and I.V.B. Nordheimer JJ.A.

Heard: May 1, 2019.

Judgment: June 14, 2019.

Dockets: C65125 and C65126

[2019] O.J. No. 3106 | 2019 ONCA 493

Between Her Majesty the Queen, Respondent, and G.F. and R.B., Appellants

(56 paras.)

Case Summary

Criminal law — Criminal Code offences — Offences against person and reputation — Assaults — Sexual assault — Consent — Appeal by GF and RB from convictions for sexual assault allowed — New trial ordered — Complainant, 16-years-old at time of incident, testified that during camping trip with appellants she fell asleep in appellants' trailer, while intoxicated, and woke up to find appellants engaging in sexual activity with her — Appellants maintained complainant consented — Trial judge's reasons could be read as equating any degree of impairment by alcohol with incapacity, which was error of law — Trial judge failed to, first and separately, consider issue of consent apart from issue of capacity, which was also error of law.

Appeal by GF and RB from their convictions for sexual assault. The appellants, common law spouses, were co-workers of the complainant's mother. The complainant, 16-years-old at the time of the incident, testified that during a camping trip with the appellants, she fell asleep in the appellants' trailer, while intoxicated, and woke up to find both appellants engaging in sexual activity with her. She testified that throughout the incident she was in and out of consciousness. The appellants maintained the complainant was alert and consented to the sexual activity. The complainant estimated the appellants had given her eight to 10 shots of alcohol that evening. A toxicology report detected no alcohol in the complainant's blood 24 hours after the incident. The trial judge concluded the appellants forced the complainant into having non-consensual sex.

HELD: Appeal allowed; new trial ordered.

The trial judge did not identify the relevant factors to be considered when assessing whether the complainant had the capacity to consent to sexual activity. He failed to assess whether the degree of impairment by alcohol was such that the complainant was incapable of consenting to sexual activity. His reasons could be read as equating any degree of impairment by alcohol with incapacity, which was an error of law. The trial judge failed to, first and separately, consider the issue of consent apart from the issue of capacity, which was also an error of law. It was not clear from the trial judge's reasons if he found the complainant did not consent, regardless of her capacity.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 265(3), s. 273.1, s. 273.1(1), s. 273.1(2), s. 273.1(2)(b), s. 273.1(2)(d), s. 273.1(3), s. 486.4(1), s. 486.4(2), s. 486.4(2.1), s. 486.4(2.2), s. 486.4(3), s. 486.4(4), s. 486.6(1), s. 486.6(2)

Appeal From:

On appeal from the convictions entered by Justice Edward J. Koke of the Superior Court of Justice on June 9, 2016, with reasons reported at 2016 ONSC 3465 and from the sentences imposed on September 6, 2017, with reasons reported at 2017 ONSC 5203.

Counsel

Eva Taché-Green and Richard Posner, for the appellants.

Philippe G. Cowle, for the respondent.

[Editor's note: A correction was released by the Court June 19, 2019; the change has been made to the text and the correction is appended to this document.]

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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 at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
 - (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
- (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).
- (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
- (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
 - (b) on application made by the victim, the prosecutor or any such witness, make the order.
- (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.
- (2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
- (a) as soon as feasible, inform the victim of their right to make an application for the order; and
 - (b) on application of the victim or the prosecutor, make the order.
- (3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.
- (4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..
- 486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.
- (2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

The judgment of the Court was delivered by

G.I. PARDU J.A.

1 The appellants were convicted of sexual assault. The complainant, referred to as C.R., was 16 years old at the time of the incident. The complainant and her family attended a camping trip with the appellants. One night, the complainant slept in the appellants' trailer. She was intoxicated from drinking. She testified that she woke up to one of the appellants pulling down her pants and that both appellants engaged her in sexual activity. The appellants maintained that the complainant consented to the sexual activity.

2 The appellants raise numerous grounds of appeal. I am satisfied that the appeal must be allowed on two grounds. First, the trial judge did not identify the relevant factors to be considered when assessing whether the complainant had the capacity to consent to sexual activity. His reasons may be read as equating any degree of impairment by alcohol with incapacity; this is an error of law. Secondly, the trial judge failed to, first and separately, consider the issue of consent, apart from the issue of capacity; this is also an error of law. While the convictions could have been sustained on the basis that the complainant did not consent to the sexual activity regardless of her capacity, the reasons of the trial judge do not make it clear that he made a finding in that regard, or whether his statement that she did not consent dealt only with the invalidity of any consent because of the effects of alcohol.

A. SUMMARY OF THE EVIDENCE

3 On the Canada Day long weekend in 2013, C.R. accompanied her mother, stepfather and her seven-year-old brother on a camping trip. Four of her mother's co-workers also attended, including the appellants, who were common law spouses.

4 The group arrived at the campground on Friday, June 28. The appellants set up a hardtop camper trailer, the sides of which were made of canvas. Two beds extended from each end of the trailer. The appellants slept in the trailer. The appellants and the other members of the group used the trailer to store food, snacks, alcohol and other drinks. C.R. and her family slept in a tent about 20 feet from the trailer.

5 On the Sunday night, C.R. and her younger brother planned to sleep in the trailer with the appellants. C.R. said her parents and the appellants agreed to this arrangement; the appellant G.F. said there was no such agreement. That night, while sitting around the fire, C.R. testified that G.F. gave her shots of a liqueur; she also consumed some beer. C.R. began to feel nauseous and dizzy, and decided to lie down in the trailer. She had been in the sun all day. C.R. said her brother was in the trailer playing games with her on her iPhone for some time, but then he left. C.R. said G.F. entered the trailer and gave her more alcohol -- shots of peach vodka. C.R. estimates that G.F. gave her between 8 and 10 shots in total. She then vomited with some of her vomit spilling onto the mattress cover, leaving a basketball-sized stain. At some point, the appellant R.B. entered the trailer to clean up and offered the complainant a plastic bag if she continued to vomit. Eventually, C.R. passed out or fell asleep.

6 C.R. testified that she woke up when she felt her pants being pulled down. She heard G.F. tell R.B. to perform oral sex on C.R. R.B. did so. G.F. then moved the complainant's hips toward him and began vaginal intercourse. He pushed the complainant's face into R.B.'s vagina and

instructed her to perform oral sex on R.B. C.R. testified she was scared, in shock, and did not know what was going on at that point. C.R. testified that she was so intoxicated that she had no control of herself, and said she "kept blacking out and going in and out of it." Asked whether, at the time, she felt that she could make a choice about whether or not to have sex, she answered: "No".

7 C.R. testified that she said the word "stop" a few times, and was crying and groaning, to which G.F. responded, "be quiet, your parents are gonna hear you." She did not call out for help, testifying that she was confused and "scared to do anything" such as scream or yell while the sexual assault was occurring. She last remembers G.F. and R.B. having sex together before she passed out.

8 She next recalls waking up in the morning, lying naked next to R.B. The complainant said her breasts were tender and her vagina was swollen. She could not find her shirt or her iPhone. She left the trailer.

9 On her way home that Monday morning, C.R. covered herself in a blanket and was quiet. That evening, C.R. text messaged her aunt, from her mother's phone, saying she needed to talk and it was "really bad." Later that evening, she told her aunt about what had happened between her and the appellants. The aunt told her husband. They then informed C.R.'s parents.

10 The appellants consider themselves "swingers". G.F.'s evidence was that he and the complainant's mother had a flirtatious relationship and there was a sexually charged atmosphere on the camping trip. He said that he, R.B., and the complainant's mother planned to have a threesome while on the trip that weekend and the complainant knew this. G.F. testified that he touched the complainant's mother's breasts while on a dirt bike ride with her.

11 G.F. agrees he saw C.R. with a beer but says he was only responsible for providing her two half-ounce shots of alcohol by the fire and nothing more. G.F. said R.B. advised him that C.R. vomited in the trailer. He said he informed C.R.'s mother about this but she was not overly concerned. When he entered the trailer, he asked C.R. how she felt and she responded she was "a lot better now." He said he then went fishing.

12 G.F. said he returned to the trailer at 3:15 a.m., surprised to find C.R. in bed under a blanket with R.B. He said he was interested in engaging in sexual activity with R.B., and hinted at C.R. to leave. He testified that C.R. said she liked them and wanted to remain in the trailer. He asked the two if they had kissed, and to his surprise, R.B. and C.R. began to kiss. G.F. was uncertain as to whether he was welcome to participate in the sexual activity, so he rubbed C.R.'s thigh over the blanket and she responded by removing the blanket to let him touch her bare thigh. The three of them then participated in what he described as consensual oral and vaginal sex. Throughout the sexual encounter, G.F. said he asked C.R. repeatedly if she was okay with engaging in sex with them, and she assured him she was. He said C.R. was coherent and alert throughout.

B. THE TRIAL JUDGE'S DECISION

13 All parties agree that G.F. and R.B. engaged in sexual relations with C.R. The trial judge concluded that C.R. did not validly consent to the sexual activity. The trial judge was of the view that the main issue in the trial was one of credibility. Both C.R. and G.F. testified at trial.

14 The trial judge found that C.R.'s testimony was consistent and provided in a "straightforward fashion": at para. 53. He was "impressed" that her evidence was consistent with other accounts of the Sunday night incident which she provided on different occasions at trial: at para. 53. The trial judge, at para. 53, highlighted several examples of evidence, which he said supported C.R.'s account, including the following:

- * There were few, if any, inconsistencies between C.R.'s evidence at the preliminary hearing and her testimony at trial.
- * C.R.'s evidence was consistent with her police statement and the information she gave to her aunt.
- * C.R.'s evidence was also consistent with the injuries noted by the nurse who examined her after the assault; C.R.'s evidence was that the appellants sucked and licked her breasts and had vaginal intercourse with her.
- * C.R.'s evidence about the amount of alcohol she consumed was consistent with the presence of a basketball-sized stain of vomit on the mattress cover, and her evidence that she felt nauseous and was so impaired by alcohol consumption that it did not occur to her to call out for help during the assault.
- * C.R.'s testimony that she had no romantic interest in the appellants is consistent with the fact that they were more than twice her age, her parents' friends, and virtual strangers.
- * The fact that C.R. left the trailer in the morning without her iPhone is consistent with her evidence that she woke up in a state of confusion and was anxious to leave the trailer.
- * C.R.'s parents' evidence that she was unusually quiet on the drive home is consistent with C.R.'s evidence that she was still "hungover" and in a state of shock and confusion.
- * C.R.'s decision to talk to her aunt about the incident the day after the alleged sexual assault is consistent with the behaviour of someone who has undergone a traumatic incident and requires guidance from an adult. Further, this decision is inconsistent with someone who has voluntarily engaged in sexual activity.
- * C.R. explained she did not immediately report the incident in the morning because she was afraid it would result in a physical confrontation between her stepfather and the appellants. This fear was supported by evidence at trial that C.R.'s stepfather punched a fence multiple times after learning about the incident.
- * C.R.'s fears that she might be pregnant or might have contracted a sexually transmitted infection support her evidence that she did not plan to engage in sex with the appellants.

15 In contrast, the trial judge, at para. 54, found G.F.'s evidence to be "riddled with inconsistencies", including:

- * G.F.'s denial about his sexual interest in C.R. is contradicted by his zoomed in video recording of C.R. when the top half of her bathing suit came off; telling C.R.'s mother he thought C.R. was "cute" and would revisit his relationship with

her when she turned 18; his sexual comments toward and about C.R.; asking C.R. in the trailer if she had kissed R.B. yet; and engaging in a discussion with C.R. about her love life.

- * G.F.'s denial that he was in a state of heightened sexual arousal throughout the weekend is contradicted by evidence of comments he made caught on his video camera.
- * G.F.'s denial of an agreement for C.R. and her brother to sleep in the trailer on Sunday night is contradicted by the fact that C.R. retreated to the trailer when she began to feel nauseous and remained in the trailer after she vomited. G.F.'s denial of this arrangement is also inconsistent with the complainant's mother's evidence.
- * G.F.'s evidence that he repeatedly asked C.R. if she was okay with engaging in sex with him and R.B. is inconsistent with his evidence that C.R. voluntarily engaged in sex with them. He would not have required assurances if C.R. had willingly consented to the sexual activity.
- * G.F.'s evidence that he had a lengthy conversation with C.R. while on the dirt bike is inconsistent with the fact that this was a very brief ride on a noisy motorcycle with no stops.
- * G.F.'s testimony that the complainant's mother was anticipating a three-way sexual relationship that weekend was not supported by any other evidence and is inconsistent with the fact that the stepfather accompanied the mother for the weekend with her two children. G.F. was trying to normalize the activities in which he engaged with C.R. on Sunday night.
- * G.F.'s general assertion that he does not lie was contradicted by the aunt's husband's evidence, who asked G.F. what happened to his niece. G.F. initially denied any sexual activity but eventually admitted he engaged in sex with C.R.
- * G.F. admitted he did not wear a condom and that there was no prior discussion about the risk of C.R. contracting sexually transmitted infection or becoming pregnant. Given C.R.'s concerns, it is difficult to accept that C.R. consented to sex with these risks present.
- * G.F. agreed that C.R. had vomited yet maintained that she still wanted to have sex. This runs contrary to the obvious inference to draw that when someone vomits, that person is unwell, likely not interested in sex, and not in the best condition to make decisions.

16 The trial judge also rejected various other arguments and defences raised by the appellants at trial.

17 The appellants pointed to a toxicology report which detected no alcohol in C.R.'s blood or urine about 24 hours after the incident. The Center for Forensic Sciences (the "CFS") was given two scenarios to determine what C.R.'s blood alcohol concentration would be at the time of the taking of blood samples: (1) 10 shots of liquor and one bottle of beer between 10 p.m. and 3 a.m., and (2) 8 shots of liquor and one beer between 10 p.m. and 3 a.m. For scenario (1), the projected blood alcohol concentration would be 0 to 160 mg of alcohol in 100 ml of blood when C.R.'s blood was tested. For scenario (2), the projected blood alcohol concentration would be 0 to 80 mg of alcohol in 100 ml of blood. The calculations assumed full or total absorption of all the alcohol consumed. The CFS noted that if an individual vomits shortly after consuming alcohol,

the alcohol consumed would likely be expelled from the stomach and not absorbed into the bloodstream.

18 The trial judge found that the significance of the toxicology finding was questionable given that the samples were collected almost 24 hours after the events transpired and given the CFS's view on the effect of vomiting shortly after consumption: at para. 63. Accordingly, the trial judge found that the absence of alcohol revealed by the toxicology report did not assist the defence in its argument that C.R.'s ability to consent to sexual activity was not impaired by alcohol: at para. 64.

19 In dealing with concerns about C.R.'s failure to report the incident immediately, the trial judge held that delayed disclosure of improper sexual conduct is not uncommon, especially in circumstances where it involves children or adolescents: at para. 62. The trial judge was reluctant to impose adult expectations on C.R. when assessing her conduct the morning following the incident: at para. 62.

20 The trial judge did not consider that C.R.'s evidence was undermined because she did not call for help during the incident: at para. 69.

21 The accused did not raise a defence of honest but mistaken belief in communicated consent during closing submissions, likely because of the dramatically different accounts of what happened on the part of the complainant, and the accused G.F.

22 The trial judge concluded that the appellants forced C.R. into having non-consensual sex: at para. 71. He then noted that s. 273.1(2)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46, indicates that no consent is obtained where the complainant is incapable of consenting to the activity, such as when a complainant is intoxicated: at para. 72. He found both appellants guilty.

C. ANALYSIS

(1) Appellants' argument that the verdict was unreasonable

23 The appellants submit that the coherence of the complainant's narrative of the events belies the suggestion that she was so impaired as to lack capacity to consent to sexual relations. In their view, the totality of the evidence at trial, particularly C.R.'s testimonial evidence, could not reasonably support such a finding of incapacity. The appellants also point to evidence of C.R.'s alcohol consumption and toxicology evidence to support this argument. They submit that the verdict was unreasonable in the sense described in *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, Fish J., dissenting but not on this point, at para 21:

A verdict is likewise unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict if that inference or finding of fact is "demonstrably incompatible" with evidence that is neither contradicted by other evidence nor rejected by the trial judge" (*Beaudry*, at para 79, *per* Binnie J.). Here, an essential inference that appears compatible with the evidence from which it is drawn implodes on contextual scrutiny. This is so where a trial judge infers from *some* of the available evidence that an accused had the requisite intent to obstruct justice and this inference is supportable on the evidence relied upon but is not supportable on consideration of other evidence that has been neither contradicted by other evidence nor rejected by the trial judge. Here, too,

a verdict of guilt "would lack legitimacy and would properly ... be treated as 'unreasonable'" (*ibid.*). [Citations in original.][Emphasis in original.]

24 The appellants submit that a new trial is required because the trial judge did not deal with the evidence suggesting a lesser degree of intoxication.

25 I do not agree that the nature of the account given by the complainant in itself is demonstrably incompatible with incapacity to consent to sexual relations, or that the trial judge failed to consider this evidence. The complainant's intermittent awareness, her waking from sleep to find sexual acts performed upon her, her saying no, and her own description of her condition could allow a reasonable trier to conclude beyond a reasonable doubt that she did not consent to the sexual activity or that she was incapable of consenting to the activity.

26 Complete unconsciousness and absence of memory are not the only conditions which establish incapacity. Varying degrees of awareness, memory, and ability to articulate what happened have supported findings of incapacity: see *R. v. Tariq*, 2016 ONCJ 614, 343 C.C.C. (3d) 87, at paras. 5, 116, 120-121, 124; *R. v. Daigle* (1998), 127 C.C.C. (3d) 130 (Que. C.A.), at pp. 133, 137, aff'd [1998] 1 S.C.R. 1220; *R. v. Bell*, 2007 ONCA 320, 223 O.A.C. 243, at paras. 7, 44-46, 48, leave to appeal refused, [2007] S.C.C.A. No. 351; *R. v. Wobbles*, 2008 ONCA 567, 235 C.C.C. (3d) 561, at paras. 12, 15, 24; *R. v. L.G.*, 2007 ONCA 654, 228 C.C.C. (3d) 194, at paras. 23-24, 94-99.

27 I would not conclude that the testimony the complainant gave about her incapacity was plainly contradicted by other evidence or that it was incompatible with evidence not otherwise contradicted or rejected by the trial judge: see *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 9.

(2) Analytical approach to consent and capacity

28 While I am not of the view that the trial judge erred in reaching a verdict that was unreasonable on the basis that the complainant's coherent narrative was incompatible with incapacity on her part, I am of the view that the trial judge did err in his analysis of consent and capacity. The trial judge failed to consider the issue of consent separately from the issue of capacity, and further, did not apply the jurisprudence discussing the level of intoxication which could result in a finding of incapacity. Before analyzing the trial judge's errors in detail, I will first review the concepts of consent and capacity, in the context of sexual activity, and will then proceed to articulate the correct approach for analysis when both consent and capacity are potentially in issue.

29 While this is not the precise argument advanced by the appellants, the issues related to consent and capacity were central to the arguments made on appeal by both the appellants and the Crown. As noted in *R v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 33, "issues that are rooted in or are components of an existing issue are not 'new issues'" for the purposes of appellate review.

(a) What is consent?

30 Subsection 273.1(1) of the *Criminal Code*, as it was at the relevant time, provides that consent means the voluntary agreement of the complainant to engage in the sexual activity in

question. Subsections 273.1(2)(b) and (d) provide that no consent is obtained where the complainant is incapable of consenting to the activity or where the complainant expresses by words or conduct, a lack of agreement to engage in the activity. Subsection 273.1(3) provides that nothing in s. 273.1(2) shall be construed as limiting the circumstances in which no consent is obtained.

31 In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 25, the Supreme Court delineated the elements of the *actus reus* of sexual assault:

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour.

32 Further, in *R. v. Ewanchuk*, at paras. 26-27, the court held that the absence of consent is a subjective matter and determined by reference to the complainant's subjective internal state of mind towards the touching at the time it occurred.

33 In *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 31, McLachlin C.J. concluded that the relevant statutory provisions of the *Criminal Code* suggest that Parliament saw consent as "the conscious agreement of the complainant to engage in every sexual act in a particular encounter". Consent means voluntary agreement as to the touching, its sexual nature and the identity of the partner: *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 5. The court indicated that in this context, given the *Criminal Code* provisions pertaining to incapacity that "Parliament intended consent to mean the conscious consent of an operating mind": *J.A.*, at para. 36.

(b) When is a complainant incapable of consenting to sexual contact?

34 What then are the characteristics of a conscious consent of an operating mind at the time the sexual activity occurs?

35 As noted in Janine Benedet, "The Sexual Assault of Intoxicated Women", (2010) 22 Can. J. Women & L. 435, at p. 442:

Turning first to incapacity, there are numerous cases in which courts find a complainant incapable of consent due to intoxication, but in almost all of these cases the complainant is also asleep or unconscious when the sexual assault begins. Where the complainant is not unconscious, but merely drunk or high, courts have struggled to articulate a threshold for incapacity short of total non-responsiveness.

36 An unconscious or sleeping person is incapable of consenting to sexual activity. On the other hand, capacity for considered evaluation of the collateral risks and consequences of sexual activity sets the bar too high for capacity to consent to sexual relations.

37 In *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, Beveridge J.A. discussed elements of capacity to consent to sexual relations established by the jurisprudence, at paras. 60-61, 66-67,

and I adopt that summary, subject to the caveat that, in light of the varieties of human conditions which may raise issues of incapacity, it may not describe all of the circumstances in which a complainant could be found to lack an operating mind:

[60] This begs the question: what constitutes an operating mind? Comatose, insensate or unconsciousness cannot qualify. Major J., in *R. v Esau, supra*, reflected that being unconscious due to intoxication is not the only state capable of removing a complainant's capacity to consent (para. 24). Mere awareness of the activity is also insufficient to ground capacity where the trial judge accepted that the complainant was "out of control" and "not able to say no" due to the involuntary ingestion of drugs (*R. v. Daigle* (1997), 127 C.C.C. (3d) 130 (Que. C.A.), aff'd [1998] 1 S.C.R. 1220).

[61] On the other hand, requiring the cognitive ability necessary to weigh the risks and consequences of agreeing to engage in the sexual activity goes too far.

[66] Therefore, a complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity.

[67] In cases where consent and capacity to consent are live issues, the trial judge must determine if it has been established beyond a reasonable doubt that the complainant did not consent, or lacked the capacity to consent. As detailed above, these inquiries are entirely subjective. [Citations in original.]

38 Here, I agree with the submissions of the Crown on appeal that while mere proof of drunkenness, loss of inhibitions, regret for a bad decision or some memory loss do not of themselves negate capacity for consent, some physical actions such as walking a short distance, making a phone call, speaking, and some awareness of or resistance to sexual activity do not necessarily preclude a finding of incapacity. I also agree that some memory of the events is not necessarily inconsistent with incapacity: *R v. C.P.*, 2017 ONCJ 277, at paras. 69-70, aff'd 2019 ONCA 85, leave to appeal to S.C.C. requested, 38546 (March 11, 2019), [2019] S.C.C.A. No. 50; *Tariq*, at paras. 5, 116, 120-121, 124; *Daigle*, at pp. 133, 137; *Bell*, at paras. 7, 44-46, 48; *Wobbes*, at paras. 12, 15, 24; *L.G.*, at paras. 23-24, 94-99; *R v. Merritt*, [2004] O.J. No. 1295 (Ont. Sup. Ct.), at paras. 56-59; *R v. Powers*, 1999 CanLII 7332 (Ont. C.A.), at paras. 2, 7; *R v. Dixon*, 2018 ONCA 949, at paras. 3, 17-18; *R v. Crespo*, 2016 ONCA 454, 132 O.R. (3d) 287, at paras. 5, 9. As the case law demonstrates, the trier of fact must consider all the evidence to make the factual determination of the complainant's capacity at the relevant time. Issues of incapacity can arise in a multitude of circumstances, including sleep, intoxication, illness, and intellectual disability.

39 I observe that s. 273.1 of the *Criminal Code* was amended effective December 13, 2018¹. It now provides as follows:

- (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
 - (1.1) Consent must be present at the time the sexual activity in question takes place.
 - (1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.
- (2) For the purpose of subsection (1), no consent is obtained if
 - (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (a.1) the complainant is unconscious;
 - (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

40 The section now specifies that no consent is obtained where the complainant is unconscious or where the complainant is incapable of consenting to the activity for any reason other than unconsciousness. This indicates that incapacity may arise from conditions short of unconsciousness.

(c) Where both consent and capacity are potentially in issue

41 How then should a trial judge approach the evidence when dealing with potential issues of both consent and capacity to consent? He or she should first consider whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to sexual contact. If the complainant did not consent, then there is no ostensible consent which is vitiated by lack of capacity. This two-step process was described in *R. v. Hutchinson*, at para. 4:

The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2) (c)).

42 Where the Crown proves beyond a reasonable doubt that the complainant did not affirmatively and subjectively consent to sexual contact, this absence of a subjective mental state may establish the requisite *actus reus* and there need not always be a further inquiry as to capacity.

43 To repeat, the absence of consent is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching at the time it occurred: *Ewanchuk*, at paras. 25-26.

44 In *Ewanchuk*, the court held that a lack of verbal resistance is not "implied" consent and that a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law and provides no defence to an accused asserting reasonable belief in consent: at paras. 31, 51; see also *R v. Barton*, 2019 SCC 33, at para. 82.

45 For the purposes of establishing the *actus reus* there is no "third option"; either the complainant consented or he or she did not: *Ewanchuk*, at para. 31. As indicated in *R. v. J.A.*, at para. 37, "[t]he complainant is not required to *express* her lack of consent or her revocation of consent for the *actus reus* to be established" (emphasis in original).

46 Further support for the notion that where non-consent is proven, there need not be an inquiry into capacity is found in *Ewanchuk*. The court referred to s. 265(3) of the *Criminal Code* which provided that "no consent is obtained where the complainant submits or does not resist" by reason of the application of force, threats or the fear of application of force, fraud or the exercise of authority, and observed, at para. 40:

Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea*. [Emphasis added.]

47 Support for this two-step approach is also found in academic commentary on capacity and consent: Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52:2 McGill L.J. 243. The authors, at p. 270, suggest that an inquiry as to capacity to consent should not be necessary where the Crown has proven non-consent:

A finding of incapacity leads inevitably to a finding of nonconsent because the complainant is unable to provide a legally valid consent. Yet the precise relationship between capacity and consent is complex. It might appear logical to say that capacity should be addressed prior to consent because capacity is a prerequisite to consent. Thus, one could argue that a woman who is incapable of giving consent is also incapable of withholding consent.

We believe, however, that the level of understanding required to give meaningful consent to sexual activity may be higher than that which is required to withhold it. In other words,

we believe it is possible for a woman to be incapable of giving consent in a particular situation, and yet be capable of withholding it. For example, a woman could know that she doesn't want any physical contact with the man in question, even if she does not understand the sexual nature of the activity or its potential consequences. Because of the serious implications of finding someone incapable of consenting, we suggest that where there is evidence of nonconsent, that evidence should be looked at before considering capacity. [Emphasis added.]

48 It is difficult to apply the idea of capacity to an absence of a subjective state of mind. Recall that the Crown need not prove that the complainant made a conscious decision to refuse sexual contact, for which an operating mind might be required: *J.A.*, at para. 37. Rather, the Crown is required to prove the absence of consent by reference to the complainant's subjective internal state of mind: *Ewanchuk*, at paras. 25-27. Where it is proven that the complainant did not affirmatively consent to sexual touching, it may serve no purpose to inquire further to assess whether, had he or she consented, he or she would have had the capacity to do so, although in some cases a trier may elect to make alternative findings. In any case, the analysis should not be blurred between the two separate issues, consent and capacity to consent.² Further, where potential incapacity relates to non-transient conditions, avoiding unnecessary inquiries as to capacity where non-consent is proven is more respectful of a complainant's autonomy and privacy.

49 This is not to say that the factual circumstances of, for example, intoxication may not be relevant to both whether there was subjective consent and to incapacity to consent. In the present case, for example, the Crown argued that the complainant's profuse vomiting made it unlikely she would have consented to sexual contact. The same vomiting, was relevant to the degree of consumption of alcohol and the effect it may have had on her capacity to consent.

(d) Application to the trial judge's reasons

50 In light of the aforementioned principles, I turn now to the reasons of the trial judge with two questions in mind. Did the trial judge properly address the separate issues of consent and capacity to consent, and more specifically, did the trial judge err by failing to consider the degree of the complainant's impairment by alcohol?

51 The difficulty with the trial judge's reasons for conviction are that he failed to assess whether the degree of impairment by alcohol was such that the complainant was incapable of consenting to sexual activity. The trial judge was led to this position in part by the submissions of the Crown suggesting that he did not have to explore the degree of intoxication versus sobriety:

Mr. Scharger: So your Honour doesn't really have to, in the Crown's submission, delve into degrees of intoxication versus sobriety, at least, insofar as, as it applies to applying 273.1. Rather, in the Crown's submission, you're presented with a starker choice, of either accepting C.'s evidence, which was that she was quite intoxicated -- in the Crown's submission, if you accept her evidence, it's, it's pretty much a given that 273.1 will apply on the basis that she was incapable. On the other hand, the other stark choice you've been given is F. telling the court that she was as sober as when she appeared her in court. So by that assessment of things, if you do conclude that that's the case, then 273.1 would have no application whatsoever. So I just thought I'd mention that, Your Honour, in terms of framing the legal analysis in this case.

THE COURT: So you're saying it's more an issue of credibility?

Mr. Scharger: Very much so, as, as opposed to assessing [the] degree of how drunk or not drunk she was.

THE COURT: I don't see a big difference in your position, in that respect, from that of the position that's been set out by the defence. It's, it's, it's, it's a case of credibility.

Mr. Scharger: Yes, sir.

The CROWN: She was either too impaired, or she wasn't.

Mr. Scharger: Agreed.

52 The trial Crown did argue in his submissions that the complainant would not have consented to sexual contact with the appellants for a variety of reasons such as the difference in age, the fact she hardly knew them and the fact that they were her mother's friends. However, he did not invite the trial judge to convict on the ground that the complainant did not in fact consent to sexual contact, separate and apart from the issue of whether or not the complainant had the capacity to consent.

53 This blending of the issues as to whether the complainant consented, and whether any consent was vitiated by a lack of capacity is mirrored in the trial judge's reasons for judgment, at paras. 51-52, 71-73:

[51] The main issue in this case is one of credibility. The parties agree that G.F. and R.B. engaged in sexual relations with 16 year old C.R. If I find beyond a reasonable doubt that C. was unable to provide her consent to this sexual activity because she was impaired by alcohol consumption and that G.F. and R.B. knew or should have known that she was unable to give her consent, then they are guilty of the charges against them. If I find that C.'s ability to give consent was not impaired by alcohol consumption and that she freely gave her consent, then the two accused persons are not guilty.

[52] I have considered the evidence and the submissions of counsel, and after doing so I have concluded that C.R. did not consent to the sexual activity, and that G.F. and R.B. are guilty of the offence of Sexual Assault.

...

[71] R.B. did not testify. I find G.F.'s evidence to be unbelievable. It does not leave me with reasonable doubt as to his or R.B.'s guilt, and in my view, the balance of the evidence at trial convincingly supports the conclusion that F. and B. forced C. into having non-consensual sex.

[72] Section 273.1(2)(b) of the Criminal Code indicates that no consent is obtained when the complainant is incapable of consenting to the activity. This applies in instances where a complainant is intoxicated.

[73] Accordingly I find the two accused guilty of sexual assault as charged.

54 The manner in which the reasons are structured leaves me uncertain as to whether the trial judge considered the issue of consent separately from the issue of capacity. It is clear that the trial judge did not engage the two-step analytical process I have articulated in these reasons, by first evaluating whether the complainant did not consent and then turning, if necessary, to whether or not the complainant had the capacity to consent. He also did not apply the

jurisprudence discussing the level of intoxication which could result in a finding of incapacity, if it were necessary to go to that step. His statement that no consent is obtained where a complainant is intoxicated suggests that in his view, any level of intoxication was sufficient to vitiate consent. It is not clear that this belief did not constitute the basis for his statement that there was no consent.

55 Although the trial judge states, at para. 52, that he "concluded that C.R. did not consent to the sexual activity" and, at para. 71, that "the balance of the evidence at trial convincingly supports the conclusion that G.F. and R.B. forced C.R. into having non-consensual sex", the convictions cannot be upheld on such a basis. First, as discussed above, the trial Crown did not invite the trial judge to convict on this basis. Second, the vague statement from the trial judge that the "balance of the evidence" at trial supports such a finding is not a sufficient basis to ground a conviction; it is not clear the trial judge was making a finding that the convictions could be sustained on the basis that the complainant did not consent, regardless of her capacity.

D. DISPOSITION

56 In view of these errors, I would set aside the convictions and order a new trial. It is not necessary to consider the other arguments raised by the appellants.

D. WATT J.A.

G.I. PARDU J.A.:— I agree

I.V.B. NORDHEIMER J.A.:— I agree

* * * * *

CORRECTION

Released: June 19, 2019

At para. 38, second sentence the word "capacity" has been changed to "incapacity" and now reads:

"... I also agree that some memory of the events is not necessarily inconsistent with incapacity."

1 *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29, s. 19.

2 In *R v. Jensen* (1996), 106 C.C.C. (3d) 430, this court held that findings of incapacity to consent and of non-consent were mutually exclusive, however this analysis has been overtaken by *Ewanchuk*.