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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lacombe, 2019 ONCA 938
DATE: 20191128
DOCKET: C66988

Juriansz, Pepall and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Richard Lacombe

Respondent

Katie Doherty, for the appellant

Ian McLean, for the respondent

Heard: September 17, 2019

On appeal from the order of Justice Rick Leroy of the Superior Court of Justice, dated May 7, 2018, dismissing an appeal from the acquittal entered on March 1, 2017, by Justice Peter J. Wright of the Ontario Court of Justice.

Pepall J.A.:

INTRODUCTION

[1] The Crown appeals from the acquittal of the respondent on two charges of sexual assault.

[2] The Crown submits that the Summary Conviction Appeal Judge ("SCAJ") committed two errors. The SCAJ erred in holding that the trial judge did not rely on

impermissible myths and stereotypes about the behaviour of sexual assault victims in assessing the complainant's credibility. The SCAJ also erred in concluding that the trial judge's reasonable doubt analysis was not tainted by his reliance on such myths and stereotypes such that it did not have a sufficient nexus to the verdict.

[3] The respondent submits that the trial judge considered the proper factors and did not make any unreasonable finding. His credibility finding should be accorded deference on appellate review. The Crown is inviting this court to re-try the case and that is not the function of this court. In oral argument, the respondent accepted that if the trial judge did wrongly rely on stereotypical reasoning in his credibility assessment, it would inevitably have affected his assessment of the evidence as a whole.

[4] For the reasons that follow, I would allow the appeal.

A. BACKGROUND FACTS

[5] The complainant and the respondent were tenants in an adult assisted care residence for persons with disabilities. Each resident had their own room. The complainant alleged that the respondent sexually assaulted her on two consecutive days on April 18 and 19, 2015. At trial, the version of events described by the complainant and the respondent differed. The trial judge identified credibility and reliability as the sole issue(s) in the case. The complainant asserted that the respondent touched her in a sexual way without her consent; the respondent

testified that he did not touch the complainant in a sexual way without her consent. Consent lay at the heart of the case.

(1) Complainant's Testimony

[6] With respect to the first alleged assault, the complainant testified that the respondent knocked on her room door and invited her to go out for a cigarette. She agreed and the two of them then went outside onto the fire escape. She was dressed in a sleeveless pyjama top and bottom, and wore no bra or underwear. They smoked and engaged in small talk. According to the complainant, the respondent then began to touch her breasts and pinch her nipples. She told the respondent to stop a few times, but he refused to do so, and laughed each time she asked him to stop. He then put his hands inside her pants and played with her clitoris. He also French kissed her. She testified that she kissed him back because he was not listening to her, and she was scared he would hit her. They then left and the complainant went back to her room where she realized her clitoris was bleeding. She told no one about these events and made no report to the police. Her explanation was that she was terrified.

[7] The following evening, the second alleged assault took place in the same location. According to the complainant, the respondent again came to her bedroom and asked if she wanted to go out onto the fire escape and smoke cigarettes. They did so. The complainant was wearing different pyjamas with a loose top and short bottoms, and wore no bra or underwear. She testified that the respondent touched

her breasts again, pinched her nipples harder, put his hand down her pants, and rubbed her clitoris hard. She told the respondent to stop several times and told him to get his hands out of her pants. While this was going on, the respondent asked the complainant to touch and play with his penis and masturbate him. She declined to do so and he got mad. He then started French kissing her. She testified that she kissed him back because she was scared that if she did not, he would get mad and hit her. They then left and the complainant went back to her room.

[8] Days after the second incident, the complainant advised her boyfriend and a girlfriend what had occurred. They advised her to call the police. She did so, and a police officer attended and questioned her. She also attended at the police station and gave a video statement.

[9] The complainant testified that she did not call the police immediately because she did not know what to do at the time. She moved out of the residence about a month after the incidents.

[10] At trial, the complainant testified that she did not want or expect the sexual contact she had with the respondent. She denied the respondent's version of events.

(2) Respondent's Testimony

[11] For his part, the respondent testified that the complainant had come to his room, knocked, and entered. She lifted up her shirt, played with her breasts, and

invited the respondent to touch her breasts. He touched the complainant's breasts as she asked, but then as she started to take her clothes off, he stopped her and they went out onto the fire escape to smoke cigarettes. Outside, the complainant asked to see the respondent's penis, which he showed her, but she was disappointed because it was small. The respondent denied pinching the complainant's breasts, putting his hands down her pants, touching her clitoris, or French kissing.

[12] On the following evening, the respondent testified that he met the complainant in the hallway, gave her a "peck on the lips", and they went their own ways. The respondent denies pinching the complainant's breasts, reaching inside her pants, touching her clitoris, or French kissing. To the extent there was any touching that involved any sexuality, it was consensual.

[13] The respondent testified that he was heavily medicated, and that one of the medication's side effects was that he had no sex drive. It was very difficult for him to obtain an erection and he had "very seldom" had erections in the past 15 years.

[14] The respondent was subsequently charged with two counts of sexual assault.

(3) Trial Judge's Reasons

[15] The trial judge acquitted the respondent. In his oral reasons, he identified credibility and reliability as the sole issue(s) in the case.

[16] The trial judge noted that the rule of reasonable doubt applies to the issue of credibility, and that triers of fact are not to treat the standard of proof as a credibility contest between Crown and defence witnesses. He correctly instructed himself that he had a duty to assess the accused's evidence in light of all the evidence, including that of the complainant: *R. v. Hull*, [2006] O.J. No. 3177, at paras. 4-5. He noted that it would be open to him to be satisfied of the accused's guilt beyond a reasonable doubt following careful consideration of the complainant's evidence along with the credibility enhancing effects of any other evidence: *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252. He observed that this case fell "squarely" within the principles identified in *Hull* and *J.J.R.D*. He also instructed himself on the principles set forth in *R. v. W.D.*, [1991] 1 S.C.R. 742.

[17] The trial judge then turned to his analysis. He noted that if he were to accept the complainant's evidence in isolation, he could find the respondent guilty of the offences with which he was charged, but he had to consider all of the evidence in the case. He proceeded to summarize that evidence, and then listed 11 factors that he described as not being determinative, but nonetheless significant to the case:

> While not determinative of the issue it is significant that when Richard Lacombe began to touch [the complainant's] breasts and nipples on the first occasion, April the 18th, and she told him to stop and he would not, she did not immediately leave or withdraw.

While not determinative it is significant that when Richard Lacombe put his hands inside the pants of [the complainant] and began to rub her clitoris without her consent, she did not leave, she remained.

While it is not determinative it is significant that when Richard Lacombe engaged in French kissing [the complainant], she did not immediately stop and leave or say no. She did none of that.

While it is not determinative it is significant that she said that she remained with Richard Lacombe and continued to French kiss him putting her tongue into his mouth.

While not determinative it is significant that these events occurred on a fire escape outside the building in which they live and the events continued for some considerable period of time. [The complainant] was unable to say for how long, or even how the events ended.

While not determinative it is significant that [the complainant] presented herself to Richard Lacombe dressed in a loose fitting pyjama top with no bra and underwear, engaging with a man that she really did not know well at all, including significant French kissing.

While not determinative it is significant that upon returning to her bedroom she became aware of the fact that Richard Lacombe had actually injured her sexually by rubbing her clitoris and noted that it had been bleeding. She said she was terrified. No medical assistance was provided, no medical evidence was tendered at court. This incident was not reported at that time to friends, or to staff, or to the police.

Context is important because there was a second incident that occurred on April the 19th.

While not determinative it is significant that [the complainant] the very next night accepted another invitation from Richard Lacombe to re-attend with him on the same fire escape to smoke, an invitation from a man

> who on her earlier evidence had sexually assaulted her the night before.
>
> While not determinative it is significant that the next night April the 19th, [the complainant] was dressed in a loose pyjama top with no bra, shorty pants, PJ pants, and no underwear, and was quite prepared to go down the hallway and out onto the fire escape and smoke cigarettes with Richard Lacombe.
>
> While not determinative it is significant that [the complainant] alleges that Richard Lacombe engaged in much the same sort of behaviour on April 19th that he had on April 18th, but pinched her breasts and nipples harder, and she did not leave.
>
> While it is not determinative it is significant that [the complainant] was with Richard Lacombe for about an hour during which period of time they again engaged in French kissing voluntarily in which both Richard Lacombe put his tongue into the mouth of [the complainant], and she put her tongue into the mouth of Richard Lacombe.

[18] Having recited these non-determinative significant factors, the trial judge then concluded that he was troubled by the reliability of the complainant's evidence: "Common sense and life experiences would comport with the notion that something was happening on April 18th and 19th between [the complainant] and Richard Lacombe, but not as [the complainant] would have this court believe."

[19] The trial judge then turned to the respondent's testimony, stating that "[h]is evidence was troubled with some inconsistencies and contradictions internally in terms of other evidence at trial and his statements to the police." The trial judge stated that there was nothing in the respondent's evidence that would allow him to

conclude that the respondent was lying about the degree of contact that he had with the complainant; despite weaknesses in the respondent's evidence, the trial judge could not reject his evidence of denial of sexual assaults.

[20] Quoting from Martin J.A.'s observation in *R. v. Nimchuk* (1977), 33 C.C.C. (2d) 209 (Ont. C.A.), that an acquittal should ensue if a reasonable doubt exists in view of the conflicting testimony as to exactly where the truth of the matters lay, the trial judge acquitted the respondent of the two charges. The trial judge did say that he may provide more detailed written reasons to incorporate some of the evidence, but this does not appear to have occurred.

(4) Summary Conviction Appeal Judge's Decision

[21] The Crown appealed, arguing that the trial judge's analysis was tainted by reliance on discredited stereotypical assumptions and biases about how victims of sexual assault behave.

[22] The SCAJ noted that the Crown's burden was to establish an error of law, and to show with a reasonable degree of certainty that, had the errors not occurred, there would not necessarily have been an acquittal.

[23] The SCAJ succinctly and properly observed that there was a consensus about the following:

> i. Complainants are entitled to reliance on a system free from discredited myths and stereotypes as to how a victim ought to respond and a judiciary whose

impartiality is not compromised by biased assumptions;

ii. The complainant's clothing is no indication of willingness to engage in sexual relations; going somewhere alone with a man does not signify consent; fear of violence vitiates consent; consent is required for each incident of sexual contact; passivity is not consent;

iii. In assessing credibility the timing of the complaint is simply one circumstance to consider in the context of the case; delayed disclosure standing alone will never give rise to an adverse inference against the credibility of the complainant – *R. v. D.D.*, [2000] 2 S.C.R. 275 at para. 65. The trier may use the evidence of the making of the complaint as narrative evidence for the permissible purpose of showing the fact and timing of the complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility – *R. v. Dinardo*, 2008 SCC 24 at para. 37.

iv. These cases should never be decided on how abuse victims are expected to react by people who have never suffered abuse – *R. v Shearing*, [2002] 3 SCR 33.

[24] The SCAJ was not satisfied that the trial judge had committed an error of law. The SCAJ found that while it was arguable that the trial judge relied on discredited rape myths in his analysis, the trial judge did not articulate the assumptions, if any, he had relied on.

[25] The SCAJ went on to find that even if the trial judge's references to the complainant's behaviours and attire did constitute an error in law, the required nexus between the error and the acquittal had not been made out.

[26] The SCAJ therefore dismissed the appeal.

(5) Leave to Appeal

[27] The Crown sought leave to appeal to this court. To warrant leave, an applicant must show that the case raises: (i) a question of law; and (ii) the question is of general significance to the administration of justice or the SCAJ made a clear error: *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 564, at paras. 24, 28 and 30-33.

[28] Leave to appeal was granted by Watt, Lauwers and Hourigan JJ.A. on May 24, 2019.

B. ANALYSIS

[29] The onus on the Crown on an appeal from acquittal is a heavy one: *R. v. A.R.D.*, 2017 ABCA 237, 422 D.L.R. (4th) 471, at para. 24. Crown appeals of acquittals must be based on errors of law, which are reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 39. Not only must the Crown identify an error of law, but the Crown must also establish a nexus between the error of law and the acquittal.

[30] As I will explain, the Crown has met its heavy onus in this case.

(1) Improper Reliance on Sexual Stereotypes and Myths

[31] The Supreme Court has repeatedly held that myths and stereotypes about sexual assault victims have no place in a rational and just system of law. Relying on myths and stereotypes to assess the credibility of complainants jeopardizes the court's truth-finding function: *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, at para. 2. As Lamer C.J.C. explained in *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 624-625:

> Historically, a host of factors were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault. In *Seaboyer*, *supra*, I discussed at length the hurdles that complainants faced in sexual assault trials due to these unfounded presumptions. … These myths suggest that women by their behaviour or appearance may be responsible for the occurrence of sexual assault. …They suggest that the presence of certain emotional reactions and immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event. Furthermore, they are built on the suggestion that women, out of spite, fickleness or fantasy and despite the obvious trauma for victims in many, if not most, sexual assault trials, are inclined to lie about sexual assault.

[32] A trial judge’s credibility assessment is entitled to substantial deference from this court. However, a credibility assessment that is tainted by an error of law may displace the deference usually afforded to a trial judge’s credibility assessment and

warrant appellate intervention: *R. v. Luceno*, 2015 ONCA 759, 331 C.C.C. (3d) 51, at para. 34.

[33] Reliance on discredited stereotypes in the assessment of credibility is an error of law: *A.R.D.*, at para. 9. As stated by Paperny and Schutz JJ.A. in *A.R.D.*, at para. 9, "[R]easonable doubt is not a shield for appellate review if that doubt is informed by stereotypical and therefore prejudicial reasoning."

[34] Martin J. described the dangers associated with myth-based and stereotypical reasoning in *R. v. C.M.G.*, 2016 ABQB 368, 41 Alta. L.R. (6th) 374, at para. 60:

> Broadly speaking, myths and stereotypes rest on untested and unstated assumptions about how the world works or how certain people behave in particular situations. They often involve an idealized standard of conduct against which particular individuals are measured. Sometimes general, assumed or attributed characteristics are applied to a particular individual or circumstance, often without an analysis of whether there is any merit in the general assumption or whether it truly applies in a particular situation.

[35] In this appeal, the trial judge identified credibility and reliability as the sole issue(s) in the case. In assessing those issues as they related to the complainant, the trial judge turned to factors, each of which he described as significant, but not determinative. Almost all these factors relied by implication on long-discredited myths and stereotypes about sexual assault complainants.

(a) Dress

[36] The trial judge stated that it was significant that the complainant "presented herself to Richard Lacombe dressed in a loose-fitting pyjama top with no bra and underwear". He again referenced her clothing as being significant when addressing the second encounter the following evening, when he stated that it was significant that the complainant "was dressed in a loose pyjama top with no bra, shorty pants, PJ pants, and no underwear". The trial judge did not explain how the complainant's dress could have been significant.

[37] In *R. v. Find*, 2001 SCC 32, [2001] 3 S.C.R. 209, at para. 101, McLachlin C.J.C., for a unanimous court, noted:

> However, strong, sometimes biased, assumptions about sexual behaviour are not new to sexual assault trials. Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases – the belief that women of "unchaste" character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some women invite sexual assault by reason of their dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes: see, for example, *Seaboyer*, *supra*; *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 669-71; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 94-97.

[38] The stereotypical assumption that “if a woman is not modestly dressed, she is deemed to consent” no longer finds a place in Canadian law”: *R. v. Ewanchuk*, 1999 SCC 71, [1999] 1 S.C.R. 330.

[39] Dress does not signify consent, nor does it justify assaultive behavior. As such, it had no place in the trial judge’s assessment of the complainant’s credibility and reliability. The trial judge’s attribution of significance to this factor impermissibly adopted discredited reasoning.

(b) Absence of Immediate Reporting

[40] The trial judge stated that at the time of the first incident, the complainant did not report the assault to friends, staff, or the police. Again, the trial judge attributed significance to these facts without explaining how they could be significant.

[41] The myth that a sexual assault complainant is less credible if she does not immediately complain is one of the “more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law”: *R. v. Mills*, [1999] 3 S.C.R. 668, at p. 741, per McLachlin and Iacobucci JJ. It is unacceptable to rely, as the trial judge did here, on the stereotypical view that victims of sexual aggression are likely to immediately report the acts, and conversely, to conclude that the lack of immediate reporting reflects either absence

of assaultive or non-consensual behaviour. See also: *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 63; *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 136.

[42] Delayed reporting, standing alone, does not assist in evaluating whether an account alleging a consensual encounter is true or raises a reasonable doubt.

(c) Expected Conduct

[43] The complainant testified that she French kissed the respondent on both occasions because she was scared that he would hit her and, that on the second occasion when she refused to 'masturbate' him, he got mad. When asked why she would have allowed a second occurrence, she replied that she was scared that the respondent would hit her. The trial judge did not include these facts in his enumeration of significant factors, nor did he reject the complainant's testimony in this regard. Rather, he considered it significant that the complainant did not leave in spite of telling the respondent to stop.

[44] As Major J. wrote in *Ewanchuk*, at paras. 38-39:

> …there is no consent as a matter of law where the complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force.
>
> …The complainant's fear need not be reasonable nor must it be communicated to the accused in order for consent to be vitiated.

[45] There is no rule as to how victims of sexual assault are apt to behave: *R. v. Kiss*, 2018 ONCA 184, at para. 101. The trial judge's reference to the fact that the

complainant remained reflects that he was comparing her conduct to conduct he expected of a sexual assault complainant without giving any consideration to her evidence of fear.

(d) Cumulative effect of "significant" factors

[46] The trial judge engaged in reasoning that for the most part attached significance to factors that were insignificant. Importantly, the trial judge relied on substantially nothing else in assessing the complainant's credibility; the listed factors constituted the trial judge's analysis.

[47] Moreover, no explanation was given by the trial judge as to why the factors he enumerated and clearly relied upon were significant. Any significance to be attributed to these factors was anchored in assumptions that failed to reveal anything about the complainant's credibility and reliability. Nothing could be drawn from the trial judge's determination that it was significant that the complainant "presented herself" to the respondent "dressed in a loose fitting pyjama top with no bra and underwear", or that although she testified that she was terrified, the first incident was not reported at the time to friends, staff, or the police.

[48] The SCAJ's conclusion that the trial judge was entitled to rely on the complainant's dress because her loose clothing was relevant to the respondent's evidence that she exposed her breasts to the respondent does not pass muster.

The trial judge's language does not reflect such an interpretation either expressly or inferentially.

[49] In a similar vein, nor does the SCAJ's supposition that "[t]he references to the complainant's attire and behaviours in the trial judge's reasons were equally consistent to a general finding or statement that behavioural changes in the complainant 'would not be unexpected'" withstand scrutiny. The trial judge made no such comment and his reasons simply do not bear that interpretation.

[50] After listing these factors, the trial judge then invoked "common sense and life experiences" to conclude that he should reject the complainant's testimony. This is the precise discredited reasoning identified in cases like *Find* and *A.R.D*. As McLachlin C.J.C. wrote in *Find*, at para. 103:

> These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

[51] Similarly, in *A.R.D.,* Paperny and Schutz JJ.A. wrote, at para. 9, "to suggest that stereotypical thinking is merely logic or common sense is a licence for it to continue unmasked and unabated."

[52] The trial judge's ultimate reliance on "common sense and life experiences" did not cleanse his assessment as his common-sense inferences reflected

stereotypical sexual and myth-based reasoning. They infected his consideration of the complainant's evidence and his assessment of reasonable doubt. His conclusions were the product of legally flawed reasoning. Again, "reasonable doubt is not a shield for appellate review if that doubt is informed by stereotypical and therefore prejudicial reasoning": *A.R.D*, at para. 9.

[53] That recourse to "common sense" also was coloured by improper considerations is evident from the following exchange between the trial judge and the Crown:

> Crown: […] And upon going back inside, she realized that her clitoris was bleeding and that she saw that bleeding occur for approximately five seconds.
>
> Court: So she immediately reports this to the staff and to the police, does she?
>
> Crown: No, Your Honour, doesn't re … .
>
> Court: She goes out with a virtual stranger onto a – on a – on a fire escape with no bra, no underpants, and would – how many times you – you have asked me to use common sense.
>
> Crown: Right.
>
> Court: How many times would it take for this kind of touching to take place before such a person would get out of that situation immediately? Would it take one or two, five, eight, how many would it take?
>
> Crown: Frankly, I don't know, Your Honour.

> Court: No, I don't either, but common sense tells me not much.
>
> Crown: Common sense tells me not much as well.
>
> …
>
> Court: All, right, okay. So we've got French kissing, touching nipples.
>
> Crown: And that she kissed back …
>
> Court: And she kissed back, yeah.
>
> Crown: …as a result of being scared.
>
> Court: What does common sense say? All right, I supposed I – that's – that's speculative. I suppose anything could happen. But she did kiss back…

[54] The SCAJ's primary reason for finding no error in the trial judge's reasons was that although it was "arguable" that the trial judge relied on discredited rape myths in his analysis, "the trial judge did not articulate the assumptions, if any, he relied on." The SCAJ noted that the trial judge "reviewed portions of the evidence but did not plainly relate them to the complainant's credibility". Respectfully, I disagree.

[55] Express identification by the trial judge of the impugned assumptions is unnecessary. The very problem with this type of reasoning is that it is insidious. It masquerades as "common sense". It is evident from a review of the trial judge's reasons that impermissible stereotypical sexual and myth-based reasoning was utilized in his assessment of the complainant's credibility and reliability and underpinned his analysis of reasonable doubt.

(2) Nexus

[56] Having established that the SCAJ committed legal error in his treatment of the trial judge's assessment of the evidence, the Crown must also establish with a reasonable degree of certainty that the verdict would not necessarily have been the same if the legal error had not been made. In other words, the Crown must establish a nexus between the error of law and the resulting acquittal; that is, that the identified error "in the concrete reality of the case at hand … had a material bearing on the acquittal. The [Crown] is not required, however, to persuade [the court] that the verdict would necessarily have been different": *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

[57] The respondent accepts that if the trial judge relied on stereotypical reasoning, that error would have inevitably affected his assessment of the evidence, including the respondent's testimony. I agree.

[58] This case turned on the trial judge's assessment of the evidence of the complainant and the respondent. The trial judge set out the governing principles in his reasons. He recognized that it was his duty to assess the respondent's evidence in light of all the evidence, including that of the complainant.

[59] The trial judge's analysis of the complainant's evidence in his oral reasons was tainted by his consideration of the outlined significant but non-determinative factors. Because the trial judge was required to consider the respondent's

evidence in light of all the evidence, including the complainant's, it is not possible to divorce the trial judge's acquittal of the respondent from his flawed reasoning.

[60] The totality of the evidence of the events in issue emanated from only two people. The trial judge had to carefully, and without preconceived notions, consider the totality of the evidence.

[61] The trial judge stated that he was troubled by some of the inconsistencies and contradictions in the respondent's testimony. This is understandable as there were inconsistencies. Indeed, in closing submissions, the trial judge asked defence counsel whether he should prefer the evidence the respondent gave at trial or in his police statement. For instance, in his police statement, the respondent stated it was his idea to take his penis out, he asked the complainant to touch it, and she refused. At trial, the respondent testified that it was the complainant's idea and request.

[62] The trial judge's assessment of the complainant's credibility played a prominent role in determining both whether he would believe the respondent and whether he was left with a reasonable doubt as to his guilt. The trial judge's closing reference to *Nimchuk* reflects that he acquitted the respondent because he was unable to say what happened following his assessment of the conflicting testimony. However, his assessment of the entirety of the evidence was fatally flawed by the approach he took to the complainant's evidence. The verdict would not necessarily have been the same in the absence of the trial judge's legal errors.

[63] In *R. v. A.B.A.*, 2019 ONCA 124, 145 O.R. (3d) 634, Justice Pardu stated at para. 18:

> Here I am satisfied that the verdict might have been different had the legal errors not occurred. The errors had a material bearing on the acquittals, that is to say, the errors may well have affected the outcome. I am not satisfied that the verdict necessarily would have been different but for the errors, but the Crown is not required to meet that more stringent test.

[64] The same must be said in this case. The SCAJ erred in concluding otherwise.

[65] For these reasons, I would allow the appeal, set aside the acquittal, and order a new trial.

Released: November 28, 2019 (“S.E.P.”)

“S.E. Pepall J.A.”
“I agree. R.G. Juriansz J.A.”
“I agree. L.B. Roberts J.A.”