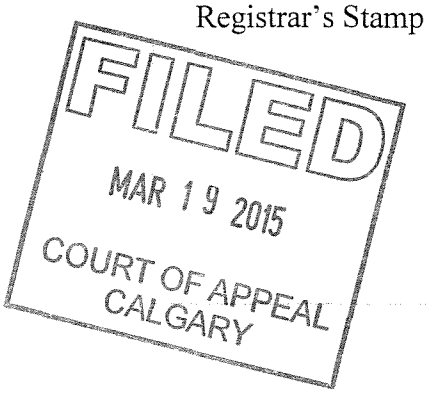
COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1401-0233A
TRIAL COURT FILE NUMBER:	130288731P1
REGISTRY OFFICE:	Calgary
APPELLANT:	**Her Majesty the Queen**
RESPONDENT:	**Alexander Scott Wagar**
DOCUMENT:	**FACTUM**

Registrar's Stamp



Appeal from the Acquittal of
The Honourable Judge Camp
Dated the 9th day of September, 2014
Filed the 23rd day of September, 2014

FACTUM OF THE APPELLANT

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Respondent

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PART 1 – FACTS

Overview

1. Nineteen year old J.M. ("the Complainant") first met Alexander Scott Wagar ("the Respondent") at a youth centre where she was picking up groceries. She was broke and homeless at the time. At the invitation of another, the Respondent returned to the residence where the Complainant was temporarily staying. The next morning, she reported to the youth centre staff that the Respondent had sexually assaulted her the night before.

2. The Trial Judge acquitted the Respondent on the single count of sexual assault. He found that the Respondent's version of events was more credible than the Complainant's. In his reserved Reasons for Judgment, the Trial Judge repeatedly referred to the Complainant as "the accused".

3. The Crown appeals the not guilty verdict and seeks a new trial. The Trial Judge's comments throughout the proceeding, some reflecting discredited rape myths and stereotypes, gave rise to a reasonable apprehension of bias. He also committed other legal errors. These included permitting the Respondent to elicit irrelevant evidence of the Complainant's other sexual activity without an application and hearing, and for a prohibited purpose.

Facts

4. On June 5, 2014, the Respondent's sexual assault trial commenced.[1] The Complainant testified for the Crown, followed by the Respondent and his two friends for the defence. The Respondent admitted at the outset that his DNA matched the DNA recovered from the Complainant's jeans and that the Complainant attended hospital for treatment where two bruises were observed on her back.[2]

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[1] *Criminal Code*, section 271 [Appellant's Authorities, Tab 1]. On June 5, 2014, the Complainant and two defence witnesses testified. On August 1, 2014, the Respondent testified. Preliminary submissions followed. On August 6, 2014, final submissions were made and the Trial Judge reserved his decision. On September 9, 2014, he was acquitted.

[2] AR 3/25-4/22. The first bruise (located in the middle of her back) was 10 x 2 cm, brown, and tender. The second bruise (located at her tailbone) was 4 x 2 cm, red, and tender in the centre.

5. In his Reasons for Judgment, the Trial Judge made credibility findings but did not knit the evidence into a narrative. Accordingly, the Appellant will summarize the witness testimony before reviewing counsel submissions and the Trial Judge's Reasons.

Evidence

Testimony of the Complainant

6. On December 13, 2011, the 19 year old Complainant was staying at Mike Gallinger's residence. "Lance" had invited her to stay there a couple of days before. She didn't know Mike and had been living on the streets. She couldn't afford a place and also had drug and alcohol issues. She believed Lance, "Dustin", and Skylar Porter also stayed at Mike's her first night there.[3]

7. On December 13, 2011, she and Skylar went to the Alex Youth Centre to pick up groceries. They ran into the Respondent (Lance's brother). The Complainant had never met the Respondent before. He knew Skylar and ended up returning to Mike's with them. Later that day, she and some others left Mike's to steal some liquor. When they returned, a party was in progress. She knew some of the people present and was friends with Dustin.[4]

8. She ended up drinking in the laundry room and in the bathroom with Dustin and Skylar. She got really drunk. The Respondent was not drinking. He was dancing. She liked his dancing and danced with him. It was jumping around, mosh, head-banging dancing. He could have been talking to her while they danced and was probably flirting with her. She never touched him.[5]

9. When she began to feel sick, she went to the bathroom. She locked the bathroom door, sat on the toilet, and looked at her phone and Facebook. After vomiting, she cleaned up. When she unlocked the door to leave, the Respondent snuck in. He shut and locked the door. He was about 6'1 and 240 pounds. She was 5'5-5'6 and 100 pounds. He began flirting with her.

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[3] AR 7/15-8/39, 10/34-11/18, 50/28-56/10. At the time of trial, she had a conviction for theft and arson. Before Lance took her to Mike's for the first time, the Complainant and Lance went to the mall where they snuck into movies and shoplifted some clothes. AR 11/12-15, 52/8-33

[4] AR 9/18-14/24, 69/8-71/26

[5] AR 14/26-16/36, 71/28-74/36

Although she couldn't remember his words, he communicated that he was interested in her. She didn't respond.[6]

10. The Respondent took her hands while she was against the sink counter. He then grabbed her pants and pulled them down (breaking a button) along with her underwear. She was naked from the waist down. One of her pant legs was off, while the other was on. He picked her up, put her on the counter, and began licking her vagina. She didn't say anything and didn't know why. He was smiling like it was a good time. When he asked her if she liked it, she said "no". He continued. She denied cooperating with him, but confirmed she did not attempt to stop him. She denied that her hands were on his shoulders to balance or caress him.[7]

11. She didn't know if the Respondent said anything when he put her on the counter. He was generally talking about her body, what he wanted to do to her, and relationships. She told him she liked him as a friend, was gay, and liked Skylar.[8]

12. She tried to get off the counter when she thought the Respondent was done. He took his pants off and said he was going to fuck her. She said he couldn't without a condom (so that he wouldn't have sex with her). He replied he could. When she said "no" again, he told her he would pull out. She still said "no." He picked her up, put her on the counter, and put his penis in her vagina. She pushed at his shoulders. She told him that it hurt, that it wasn't comfortable, that she wanted to stop, and that she didn't want him to do that. He laughed, smiled, and kept going. She felt gross and violated. It wasn't consensual. She denied using her hands for balance or encouragement.[9]

13. She testified that the sex could have been fast even though it seemed to take a long time. The Respondent eventually pulled out and ejaculated on the counter. He turned on the shower and removed her shirt, tank top, and bra. He led her to the shower and washed her body. When he told her to wash him, she did because he had the control. She didn't tell him that she didn't want to be there and couldn't recall if she told him that she didn't want to wash his body. He licked her vagina in the shower. She didn't say anything. He penetrated her with his penis. She

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[6] AR 16/36-18/5, 26/37-27/12, 74/38-76/10, 77/39-81/5, 89/20-21, 117/26-27
[7] AR 18/7-20/8, 21/36-22/32, 81/3-82/17, 83/33-85/8, 110/22-111/6
[8] AR 20/13-21/24, 82/32-39
[9] AR 21/26-34, 22/34-26/35, 85/10-87/22

denied that he was touching her body in a compassionate almost loving way or that she was caressing him.[10]

14. While in the shower, she saw Lance in the bathroom staring and smiling at her. He commented on her vagina and said he was going to tell everybody. She freaked out and told him to "fuck off". He and the Respondent were laughing and left together. She stayed behind and washed herself. She didn't want to leave. They were going to tell everybody what happened and it wasn't like that. He was going to say that she was okay to have sex when she wasn't.[11]

15. When she left the bathroom, she continued drinking. She didn't want to think about what happened. She told Dustin that the Respondent raped her, but nothing came of it. He was probably drunk and maybe didn't hear. She eventually passed out in the kitchen.[12] When she awoke at 3 or 4:00 a.m., she tried sleeping on the edge of the bed that Lance and the Respondent were on. When Lance woke up, he called her a slut. He said he was going to tell everybody and told her that he put the Respondent up to it. When Lance started videotaping her, she got mad and tried to kick the phone out of his hand. After she hit and pushed him, he knocked her to the ground. Tired, she left the room.[13]

16. At 6 or 7 a.m., she showered and walked to the youth centre. She left at that time because everybody was sleeping. She didn't leave earlier because she had nowhere to go, she had no money, she was drunk, and it was winter. Her phone had died that morning. She didn't call police at Mike's because she was scared. She told the youth centre staff what happened. She didn't want police called at first. She thought no one would believe her. Everybody at the house was friends and she was the new person. She changed her mind at the hospital and gave a statement that day.[14]

17. She ran into the Respondent with Lance after she reported the incident. They acted like nothing happened. The Respondent wanted to give her a hug. He told her it was consensual because she made eye contact during oral sex. She couldn't recall if she said anything. She walked away. She saw him again. While they were smoking his meth in a stairwell, he said he

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[10] AR 24/20-22, 26/25-30, 27/24-28/38, 49/28-35, 87/24-88/36, 90/9-18, 92/25-94/24
[11] AR 28/38-29/39, 89/2-92/23, 93/13-94/1, 95/6-98/37
[12] AR 31/7-32/3, 104/39-105/11, 107/19-30
[13] AR 32/1-35/10, 105/13-38, 119/21-37
[14] AR 36/1-40/1, 49/37-50/18, 111/8-113/30, 115/23-117/9

wouldn't charge her with lying if she stopped the charge. She said "sure, whatever". She was really tired and addicted.[15]

18. She denied telling Skylar (before she went into the bathroom) that she was going to have sex with the Respondent. She had just met Skylar. She was interested in Skylar and had tried flirting with her. She would not have told Skylar that she was going to have sex with the Respondent when she wanted to sleep with Skylar. She did tell Skylar that he had taken advantage of her in the bathroom. She couldn't recall if Skylar responded.[16]

19. She agreed that living on the streets required learning to take care of yourself or else you would be taken advantage of (especially females). She had a lot of experience taking care of herself.[17] She agreed that attraction was not always reciprocal, that she had been in such situations, and that she had techniques to be polite to people she wasn't interested in. She had no idea if anyone was more attentive to her the first night at Mike's. She felt Lance was attracted to her. He kept saying she was his girlfriend and she repeatedly told him she wasn't. She knew he liked her a lot but didn't encourage him. She tried to push him away by telling him she wasn't his girlfriend. She agreed there were times in her life where she was jealous of or hurt by others but disagreed that Lance was hurt to find her in the shower with the Respondent.[18]

20. She couldn't remember if she smoked a marijuana cigarette in the bathroom with Dustin, Skylar or the Respondent. She denied that the Respondent entered the bathroom with Skylar and Dustin and that the four of them then smoked a marijuana cigarette after which Dustin and Skylar left (leaving her and the Respondent behind). [19]

<u>Testimony of Mike Gallinger (Defence Witness)</u>

21. In December 2011, 21 year old Mike was renting a basement suite. It had two bedrooms, a bathroom, a kitchen, and no living room. There was always a lot of people coming and going. He kind of remembered the weekend of the incident. Lance brought the Complainant over a couple of days before. He had never met her before. He couldn't remember who was all present

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[15] AR 40/3-44/9
[16] AR 107/32-109/4, 111/8-11, 114/5-115/6. The Complainant testified that, at some point, she heard Skylar had slept with the Respondent. AR 30/14-22, 34/2-6
[17] AR 51/12-39
[18] AR 65/21-67/22, 99/7-102/25
[19] AR 76/14-77/30

on the date of the incident. He was not drinking, but had probably taken speed. He believed the Respondent was sober because he had just been released from jail.[20]

22. On the night of the incident, he and Lance went to the bathroom to talk. He saw two blurred outlines standing in the shower. He didn't see if they were facing each other − he was only there for a couple of seconds and didn't look that closely. He assumed it was the Complainant and the Respondent because they weren't in the other room. He didn't know they were there until he saw them. He didn't know if they saw him. Seeing no signs of a struggle, he left immediately. He pushed Lance out and closed the door. He thought Lance stayed out.[21]

23. He didn't see who (the Respondent or the Complainant) came out of the bathroom first. He felt what happened was consensual because "she would have been screaming or something" if it wasn't. Also, she was clinging onto the Respondent after the bathroom and following him around like they were having a good time. Asked to clarify, he noted they were in the same room at one point. Then, after the Respondent went into another room, the Complainant did as well. He assumed she was following him into the other room because they were talking. He couldn't hear what they were saying. He couldn't remember if he actually saw them touching. He was not paying any particular attention to what they were doing. The Complainant never said anything to him about the incident.[22]

24. He met the Respondent in the summer of 2011. They stayed in contact after the incident and may have discussed what happened after detectives came to the house. After the incident, the Respondent and Lance stayed at his house until he was evicted. He cared about them and didn't want them on the street. They were still friends. He talked to Lance about what happened and Lance may have given him details. Mike also met Skylar in the summer of 2011. They were friends at the time of the incident. She was also friends with Lance and the Respondent. She said something about the incident when he was talking to Lance, but he couldn't remember the details.[23]

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[20] AR 122/34-124/23, 125/17-27, 131/8-132/29, 135/1-137/23, 138/10-139/18. He had a criminal record and his last conviction was for assault.
[21] AR 125/3-126/39, 139/23-141/2, 151/28-153/12
[22] AR 126/41-130/16, 141/10-32, 143/9-148/17
[23] AR 132/31-134/40, 142/13-143/7, 148/19-150/26

Testimony of Skylar Porter (Defence Witness)

25. In 2011, 22 year old Skylar was living on the streets. She was friends with the Respondent and Lance. They had partied together a few times which usually included drinking and drugs. They invited her to Mike's. She had a pretty long criminal record for a bunch of stuff including assaulting a police officer, breaching court orders, and a bunch of thefts.[24]

26. She was at Mike's house party in 2011, but wasn't drinking. She just remembered smoking a joint in the bathroom with the Respondent, the Complainant, and Dustin. She saw the Complainant (whom she referred to as "the accused") having sexual feelings with the Respondent. They were stroking each other's arms and shoulders. She couldn't hear what they were saying. She took the Complainant aside and asked her in front of everyone if she was going to have sex with the Respondent. The Complainant admitted she was. After the joint was finished, Skylar and Dustin left. She saw the Complainant and the Respondent 10 or 20 minutes later when they exited the bathroom. They were acting warm and affectionate. He was holding her hand on her back. They were flirting and touching through the whole weekend.[25]

27. Skylar asked the Complainant (whom she had just met) if she was going to have sex with the Respondent because she was curious and because the Respondent was her friend. She testified that you are curious and tend to ask questions when you are stoned. She didn't ask the Complainant anything else. She didn't ask for any details such as when they were going to have sex. She didn't know why she assumed the sex was going to happen right then and there. She must have thought it would happen in the bathroom because there was only one bedroom and she was pretty sure someone was sleeping there although she couldn't say who.[26]

28. She was vaguely familiar with the Complainant at the time of the incident. They had met at Mike's a couple of days before. The Complainant was also staying at Mike's. The Complainant never said anything to her after the incident. Skylar couldn't remember the last time she saw her and she held no animosity toward her. She had known the Respondent for four

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[24] AR 164/9-166/7
[25] AR 159/3-163/7, 166/9-168/37, 169/13-171/41, 173/36-174/32, 175/32-176/24, 181/30-32
[26] AR 172/2-30, 173/27-31, 174/34-175/30, 176/26-177/19

years. He wasn't her boyfriend and never had been. He was a fairly good friend. They knew each other a long time.[27]

29. She had only recently learned from Lance that police were investigating and that the Respondent had been charged. The Respondent never said he was in trouble or asked her to come to court. His mother told her to come to court. She did not contact police with her information because she didn't think the charge would go through. She never discussed the incident with Lance, Dustin, the Respondent, or the Complainant.[28]

Testimony of the Respondent

30. The Respondent had lived in Calgary for the past three years and had struggled with a crystal meth addiction. His criminal record consisted mostly of property offences. His most recent conviction was for assault.[29] On the day of the incident, Lance introduced him to the Complainant at the youth centre. Skylar was also there. He was 22, 6'1" and 215 pounds. Lance invited him to stay at Mike's. He had been staying at a homeless shelter. A party was thrown in his honour at Mike's because he had spent the previous 45 days in gaol. [30]

31. No one at the party was sober. He and the Complainant drank hard liquor straight out of the bottle all night. She was drunk but not inebriated. She wasn't falling over drunk or slurring her words. He and Dustin were drunker. Skylar was tipsy. Mike was pretty sober; he had a few drinks but wasn't going overboard. The music was loud and everyone was dancing.[31]

32. The Respondent was attracted to the Complainant. He saw she had no intention of dating Lance. Lance was pissed off and frustrated because he had been trying so hard to get with her. The Respondent saw her flirting with Dustin. He could tell she was attracted to Dustin because body language says a lot. He viewed this as a challenge and Dustin as a rival. He wanted to get her to want him more. He knew he was a good dancer so he started dancing. That's how he attracted her to him.[32]

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[27] AR 156/41-157/17, 159/2-3, 163/26-40, 168/39-169/11, 172/32-173/25
[28] AR 177/21-182/15
[29] AR 207/5-209/6
[30] AR 209/36-212/11, 222/7-32, 230/2-236/5, 237/15-242/32
[31] AR 212/20-36, 225/40-227/5, 242/34-244/27, 245/34-246/21, 251/3-28, 293/19-294/38
[32] AR 222/34-224/2, 225/24-38, 247/32-248/34, 249/19-250/25

33. He felt he had a really good connection with her because she was dancing with him. They said a few things to each other while they were dancing. The conversation was mainly shouting back and forth over the loud music. She told him he was a good dancer and she liked his dancing. He thought she was attracted to him because she told him this. He was pretty sure he told her she was really cute. He couldn't remember if she said she liked him too. She never touched him while they were dancing.[33]

34. To prevent alcohol burn out, he smoked a joint in the bathroom with Skylar, Dustin, and the Complainant. Skylar asked them if they wanted to. He and the Complainant started talking in the bathroom. The joint was pretty potent. Everyone was high. He was talking to Dustin and the Complainant was talking to Skylar. He didn't know what she and Skylar said. They were both bisexual and liked each other. She stayed behind when Dustin and Skylar left and smiled at him. He shut and locked the door to prevent anyone from coming in.[34]

35. Once they were alone, he told her he really liked her and she was a beautiful girl. She said she liked him too. They started kissing and groping. He pulled down her pants (possibly breaking a button), sat her on the sink, and performed oral sex on her. When he told her she had "a really nice pussy", she thanked him and was all smiles. Her leg was on his shoulder. He pulled down his pants. She grabbed his penis hard and said "[o]h my God, you got a really big dick". He thanked her. When she asked if he had a condom, he said he didn't but would pull out right away. She said okay. He started having sex with her. She fell into the sink. Because of the angles, it was difficult to get his penis into her vagina. He had to do some manoeuvering. In about two minutes, he ejaculated on the sink, her stomach, and her leg. He apologized, explaining he had been in gaol for 45 days. She replied "it's okay, hon".[35]

36. After he cleaned them both with toilet paper, he turned on the shower and probably helped her undress. He then took her into the 4 x 4 shower and washed her down. They tried having sex again. They were sitting in the shower and she was riding him. They were really drunk, really high, and going for round two. He may have performed oral sex on her in the shower before she straddled him. He didn't think he entered her from behind after telling her to

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[33] AR 224/4-11, 225/5-8, 244/29-245/27, 246/23-247/30, 248/36-249/17, 250/27-39, 273/19-27
[34] AR 212/38-213/12, 224/12-30, 225/9-13, 245/27-32, 246/9-13, 252/2-259/37, 273/29-34, 291/25-27. The Respondent denied that the Complainant ever vomited in the bathroom.
[35] AR 213/14-214/41, 225/13-22, 250/41-251/1, 259/39-261/4, 261/15-264/17, 273/36-283/17, 291/29-37

pick up the soap because he is a gentleman. He may have told her to wash his back and had her wash his penis.[36]

37. While they were in the shower, Mike walked in and out. He didn't know how Mike got in. He may have screwed up when he locked the door. After Mike left, Lance came in and sat there looking all pissed off. Lance had really wanted this girl bad and was so mad he didn't get her. Lance may have commented on the Complainant's vagina because he isn't a very nice guy. When she saw Lance, she screamed at him to get out. After he left, they went at it a bit longer but he was too drunk and couldn't keep it up. He dried her off. They left the bathroom holding hands and were happy.[37]

38. He and the Complainant went to the laundry room where she and Skylar started making out. When they returned to the party, he continued drinking and dancing. People started to crash. Skylar and Dustin were sleeping beside each other on the living room futon. He cuddled up to Skylar. The Complainant came in while Lance was badgering her. He told her to come and sleep. She went to Mike's room and he fell asleep.[38]

39. He didn't see the Complainant again for a couple of days. The next day he saw Dustin. Dustin told him that the Complainant was going around saying he and Lance raped her. Soon after a detective came to the house. The Respondent wasn't there and didn't become involved with police until a year later.[39] When he saw the Complainant, he told her she had to stop this. When she apologized, he hugged and forgave her. He ran into her nearly a year later. She hadn't stopped the rumours, so he told her she needed to stop screwing around. They did some crystal meth and had a heart-to-heart. She said she would go to court and say what happened. He said he would come after her for "deformation" of character if she didn't.[40]

40. He didn't know Mike before the incident.[41] He knew Skylar for about a year and a half; they were good friends then and even better friends when he testified. He discussed the accusations with her. She was angry and called the Complainant "a piece of shit".[42]

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[36] AR 214/1-19, 261/6-13, 282/33-287/9, 260/30-261/10, 283/17-284/27, 286/5-287/9
[37] AR 214/21-37, 284/29-286/3, 291/14-23
[38] AR 214/39-219/8
[39] AR 219/10-221/22
[40] AR 287/11-290/41
[41] AR 241/1-18
[42] AR 236/7-238/37, 291/39-293/17

41. He denied that the Complainant told him she only liked him as a friend, tried to get off the counter, said his penis was too big, tried to push him off, complained, or ever said "no".[43] It was only in cross-examination that the Respondent mentioned telling the Complainant he wanted to have oral sex and being pretty sure she said "yes" (then allowing it); [44] asking the Complainant if she "wanted to fuck";[45] and anything about a condom.[46]

Defence Submissions

42. In preliminary submissions, the Respondent argued that it was consensual. Mike and Skylar were independent and credible witnesses who gave clear evidence of the Complainant's participation and consent.[47] The Complainant's conduct was also strong evidence of consent.[48] Finally, there was sufficient evidence in the Respondent's version to find that he had reasonable grounds for believing there was consent.[49]

43. In final submissions, the Respondent maintained that the sexual activity was consensual − it was a lovemaking not a rape or a "wham bam". Alternatively, there was an air of reality to the mistaken belief defence given the Complainant's conduct. She was enjoying "a weekend of thievery and promiscuous activity."[50] She fabricated the allegations because she was angry that Lance was going to tell everyone she was a slut and because she thought the Respondent was having sex with Skylar.[51] She had also been flirting with Skylar and looking to hook up with Dustin. That "type of activity" by its very nature suggested that the hook up with the Respondent was equally mutual and consensual.[52]

Crown Submissions

44. In preliminary submissions, the Crown noted that Skylar's statement evidence was never put to the Complainant. In any event, the relevant evidence was what happened when the door was shut. The fact that the Complainant may have flirted earlier didn't mean she was more

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[43] AR 277/32-36, 278/26-279/29, 281/14-26
[44] AR 278/2-9
[45] AR 279/31-280/5
[46] AR 260/26-28
[47] AR 297/5-24, 298/18-301/29, 304/1-8, 305/27-306/5
[48] AR 297/30-298/1, 301/28-302/13, 305/10-25
[49] AR 298/3-16, 302/34-303/2
[50] AR 336/14-21, 342/25-29, 344/16-18, 350/12-18
[51] AR 344/22-28, 345/13-16
[52] AR 347/7-10

likely to have consented later. Such evidence would be relevant for a mistaken belief defence.[53] The Complainant's post-bathroom conduct could not be used to support a mistaken belief defence or to conclude she was more likely to have consented.[54] There had to be evidence to support a mistaken belief defence. Complimenting someone on their dancing, smiling, or telling someone you like them is not an invitation to engage in sexual contact.[55] It was incumbent on the Respondent to take reasonable steps because he knew she was drunk.[56]

45. In final submissions, the Crown reviewed the contradictions and frailties in the defence evidence including Skylar's statement testimony which was never put to the Complainant and which the Respondent never claimed to overhear. The relevant time was what happened in the bathroom after the Respondent shut and locked the door. The Complainant's failure to cry out or make inquiries when he locked the door did not equal consent.[57]

46. The Crown reviewed the relevant sections of the *Criminal Code*, the elements of the offence, and the *W.D.* analysis.[58] The Respondent's defence at the time of vaginal intercourse was actual consent. The mistaken belief defence was not available to the Respondent prior to this point because he took no steps to ensure the Complainant was consenting. There was a heightened need for reasonable steps because they were strangers and she was intoxicated.[59] The Trial Judge had to examine all of the evidence on the issue of whether the Complainant, in her mind, wanted the sexual activity.[60]

Trial Judge's Reasons for Judgment

47. The Trial Judge commenced his Reasons with tips to the Respondent. He advised him that the way the law approached sexual activity had changed. He wanted him to tell his male friends that they had to be far more gentle and patient with women. To protect themselves, they had to be very careful. The Respondent had to tell them that they had to be very sure a girl wants to do it so that they don't upset women and so that they don't get into trouble. Society was far

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[53] AR 308/24-314/20
[54] AR 314/22-318/14
[55] AR 318/22-324/41
[56] AR 325/2-326/35
[57] AR 357/23-367/10
[58] AR 367/12-373/17
[59] AR 373/19-389/37
[60] AR 389/39-413/3

more protective of young and older women than before. Although it is far more difficult when you are high or drunk and she is high and drunk, he had to be sure she was saying yes. Her keeping quiet wasn't necessarily a sign of saying yes.[61]

48. Following this speech, the Trial Judge reviewed the charge and the jurisprudence on the *actus reus* of sexual assault. He found implied consent was not an issue in this case. He confirmed that he had a reasonable doubt that the Complainant in her mind did not want the sexual touching. He did not base this conclusion on the Complainant's evidence (which he did not accept), but on all of the evidence relating to her conduct before, during, and after the incident.[62]

49. The Trial Judge rejected the Crown's argument that the Complainant was a credible witness. He reviewed the morality and testimony of each witness. He identified significant and insignificant inconsistencies in the Complainant's evidence. He found he was not in a position to reject the Respondent's testimony of consensual, even tender, sex despite its flaws (the Respondent volunteered evidence on material issues such as actual consent late in cross-examination). He noted that the Respondent's version received some confirmation from the two defence witnesses.[63]

50. The Trial Judge decided that things "went wrong" when Lance came in and spoiled things. The Complainant then became upset because she thought the Respondent had slept with Skylar. She wanted to sleep with Skylar and had just slept with the Respondent.[64]

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[61] ARD F3/19-38
[62] ARD F4/1-F7/7
[63] ARD F7/17-F27/31. See also AR 347/38-349/21. The quotes reproduced in the Trial Judge's Reasons are incomplete and inaccurate. They are not a verbatim account of the testimony. The Trial Judge also misapprehended some of the evidence he found confirmatory. He stated Mike walked into the bathroom and saw the Complainant and the Respondent embracing; this was not Mike's evidence. See F27/25-26. He also found the Complainant's evidence not credible, in part, because she testified she looked at Facebook in the bathroom and there was no evidence of a laptop. He appeared to be unfamiliar with smartphones. See F15/26-28
[64] ARD F27/33-41

PART 2 – GROUNDS OF APPEAL

Ground A **The Trial Judge's comments throughout the proceeding gave rise to a reasonable apprehension of bias.**

Ground B **The Trial Judge erred in law in admitting evidence of the Complainant's other sexual activity in the absence of an application and hearing, and for a prohibited purpose.**

Ground C **The Trial Judge erred in law in his assessment of the evidence in relation to the applicable legal principles.**

PART 3 – STANDARD OF REVIEW

51. A Crown appeal from acquittal is restricted to questions of law alone.[65] The standard of review is correctness.[66] Legal errors must be plainly identified and shown to have affected the result.[67] Questions of law include the interpretation of a legal standard;[68] the admissibility of evidence including its proposed relevance;[69] the admissibility of a complainant's other sexual activity;[70] a reasonable apprehension of bias;[71] relying upon discredited myths and stereotypes;[72] the legal effect of findings of fact or of undisputed facts;[73] and, an assessment of the evidence based on a wrong legal principle.[74]

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[65] *Criminal Code*, section 676(1)(a) [Appellant's Authorities, Tab 1]
[66] *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.) at paras. 8, 10-12, 26, 31 and 101 [not reproduced]
[67] *R. v. Clark*, 2005 CarswellBC 137 (S.C.C.) at para. 9 (S.C.C.) [not reproduced]; *R. v. G. (L.)*, 2006 CarswellOnt3559 (S.C.C.) at para. 10 [not reproduced]; *R. v. Graveline*, 2006 SCC 16 at paras. 13-16 [not reproduced]
[68] *R. v. Ewanchuk*, 1999 CarswellAlta 100 (S.C.C.) at para. 21 [Appellant's Authorities, Tab 2]
[69] *R. v. Churchill*, 2002 CarswellBC 3150 (C.A.) at para. 18 [not reproduced]
[70] *Criminal Code*, section 276.5 [Appellant's Authorities, Tab 1]
[71] *R. v. S. (R.D.)*, 1995 CarswellNS 245 (C.A.) [not reproduced], rev'd without reference to this point 1997 CarswellNS 301 (S.C.C.) [Appellant's Authorities, Tab 3]
[72] *R. v. B. (R.G.)*, 2012 CarswellMan 15 (C.A.) at para. 59 [Appellant's Authorities, Tab 4]
[73] *R. v. H. (J.M.)*, 2011 CarswellOnt 9952 (S.C.C.) at para. 28 [Appellant's Authorities, Tab 5]
[74] *Ibid*. at paras. 29-30 [Appellant's Authorities, Tab 5]

PART 4 – ARGUMENT

Ground A – Reasonable Apprehension of Bias

52. The Trial Judge's comments throughout the proceeding would lead an informed person to conclude that the Trial Judge, consciously or unconsciously, would not decide the matter fairly. The comments reflected discredited stereotypes and myths, opinions not grounded in the evidence, and a distorted view of legislation meant to protect sexual assault victims and the integrity of the trial process.

Applicable Jurisprudence

53. Clear evidence is required to rebut the presumption of impartiality, but judges will be held to stringent standards. A reasonable apprehension that a judge might not act impartially is ground for disqualification. It will not matter that a judge appeared to make proper findings of credibility or came to the correct result. Findings of credibility tainted by real or apprehended bias do not warrant appellate deference. Although bias allegations are typically made by an accused, the Crown has a duty to do so in appropriate circumstances.[75]

54. The test for reasonable apprehension of bias is whether an informed person (viewing the matter realistically and practically and having thought the matter through) would conclude that it is more likely than not that the trial judge, consciously or unconsciously, would not decide fairly.[76]

Application to Instant Case

55. In *R. v. Seaboyer*, Justice L'Heuruex-Dube canvassed the 10 most common myths/stereotypes in relation to sexual assault.[77] In *R. v. Osolin*, the Supreme Court of Canada held that such myths and stereotypes cannot infect the trial process:

> … [E]liciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper. A number of rape

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[75] *R. v. S. (R.D.)*, *supra* note 71 at paras. 32-33, 49, 96, 100-101 [Appellant's Authorities, Tab 3]. See also *R. v. Abukar*, 2007 CarswellAlta 1219 (C.A.) at paras. 1-2 [Appellant's Authorities, Tab 6]

[76] *Ibid.* at para. 31 [Appellant's Authorities, Tab 3]

[77] *R. v. Seaboyer*, 1991 CarswellOnt 109 (S.C.C.) at paras. 147-151 [Appellant's Authorities, Tab 7]. See Myth/Stereotype Chart [Appellant's Factum, Appendix A] and Trial Judge's Comments [Appellant's Factum, Appendix B]

> myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented. (See C. MacKinnon, *Toward a Feminist Theory of the State* (1989), at p. 175; L.L. Holmstrom and A.W. Burgess, *The Victim of Rape: Institutional Reaction* (1983); and *Gender Equality in the Canadian Justice System*, supra, at p. 18.) …
> …
> … Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility.[78]

56. The Supreme Court has repeatedly sounded this caution in the years that followed:

> …The myths that a woman's testimony is unreliable unless she made a complaint shortly after the event (recent complaint), or if she has had previous sexual relations, are but two 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.…[79]

and

> … *Seaboyer, Osolin* and *Mills* all make the point that these cases should be decided without resort to folk tales about how abuse victims are expected by people who have never suffered abuse to react to the trauma. …[80]

57. Unfortunately, these myths and stereotypes were prevalent in the Trial Judge's comments. The Crown concedes that some of the comments individually may not give rise to a reasonable apprehension. Others, however, are more significant. Collectively, they satisfy the stringent standard to be met for reasonable apprehension of bias.

58. The first myth reflected in the Trial Judge's comments is "Reporting Rape". It posits that **sexual assault victims report at their first opportunity**.[81] In the Crown's preliminary submissions, the Trial Judge commented that the Complainant "abused the first opportunity to report" before conceding this was "no longer contemporarily relevant".[82] In the Crown's final submissions, he commented that the recent complaint doctrine (defined as complaining to your

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[78] *R. v. Osolin*, 1993 CarswellBC 512 (S.C.C.) at paras. 36-37 [Appellant's Authorities, Tab 8]. See also *R. v. Ewanchuk*, *supra* note 68 at paras. 95 and 103 [Appellant's Authorities, Tab 2]
[79] *R. v. Mills*, 1999 CarswellAlta 1055 (S.C.C.) at para. 119 [Appellant's Authorities, Tab 9]
[80] *R. v. Shearing*, 2002 CarswellBC 1661 (S.C.C.) at para. 121 [Appellant's Authorities, Tab 10]. See also *R. v. Seaboyer*, *supra* note 77 at para. 104 [Appellant's Authorities, Tab 7]
[81] *Ibid.* at para. 77 [Appellant's Authorities, Tab 10]; *R. v. Seaboyer*, *supra* note 77 at para. 151 [Appellant's Authorities, Tab 7]. See also R. v. D. (D.),
[82] AR 314/22-29

family or someone in authority as soon as you can) was "followed by every civilized legal system in the world for thousands of years" and "had its reasons" although "[a]t the moment it's not the law".[83] When the Crown submitted that the antiquated thinking had been set aside for a reason, he replied "I hope you don't live too long, Ms. Mograbee".[84]

59. The second myth reflected in the Trial Judge's comments is "Struggle and Force: Woman as Defender of Her Honour". It posits that **a woman cannot not be raped against her will**.[85] In his own questioning of the Complainant, the Trial Judge asked "why didn't you just sink your bottom down into the basin so he couldn't penetrate you?" and "why couldn't you just keep your knees together"?[86] In the Crown's final submissions, the Trial Judge distinguished *R. v. Livermore* on the basis that the complainant in that case struggled and fought the accused away. The Trial Judge requested references when the Crown reminded him of the Complainant's evidence that she tried to push the Respondent off, said "no" repeatedly", and told him he was hurting her.[87]

60. The Crown had argued that not every sexual assault victim acts the same way and noted the Complainant's evidence that she was scared. The Trial Judge asked whether there was any evidence the Complainant was frightened or threatened. As the Crown attempted to describe the relevant circumstances in the bathroom, the Trial Judge asked if there was a weapon. He noted the Complainant didn't complain when the Respondent locked the door and, if frightened, could have shouted or screamed.[88]

> Well … do I test her fear? It's easy for her to say it, but are there … any reasons for it and are there -- did she show any signs of it? And did she do anything about it? Or do I look at those and say, listen, you say you're frightened but I just don't see -- see that it's true. If you were frightened you could have screamed.[89]

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[83] AR 394/35-38
[84] AR 395/2-6
[85] *R. v. Seaboyer*, *supra* note 77 at paras. 147-149 [Appellants Authorities, Tab 7]
[86] AR 119/10-11, 119/14-15
[87] AR 397/35-398/26
[88] AR 395/8-397/23
[89] AR 396/18-29

61. This myth found its way into the Trial Judge's Reasons. He commented that "the accused" had not explained "why she allowed the sex to happen if she didn't want it" and that her efforts to push the Respondent away sounded like "a very ineffectual attempt".[90]

62. The comments reflect a tendency to **blame the victim**. In the Crown's final submissions, the Trial Judge asked what the Complainant did at the point she saw a man much larger than her locking the door.[91] When the Crown replied that there was no evidence she did anything, he asked what he did with that. The Crown reminded him that failure to act did not equal consent and the Complainant had no obligation to cry out or repel what she thought could be coming.[92] The Trial Judge commented:

> Well, she doesn't have to do any of these things. She doesn't have to say don't lock the door. *She can take her chances. Foolishly she could do that.* If she sees the door being locked, *she's not a complete idiot, she knows what's coming next.*
>
> In our law she doesn't have to say unlock the door I'm getting out. *She can take her chances,* perhaps in the hope of *getting him into trouble.* …[93] [emphasis added]

63. It is difficult to imagine the same analysis being used to blame a convenience store clerk for being robbed in the middle of the night. What did the clerk think when she saw a man enter the business and lock the door? She doesn't have to tell him not to lock the door. She could take her chances. She's not a complete idiot; she knows what's coming next. She can take her chances in the hopes of getting him in trouble.

64. These comments reflect the third myth − "Woman as Fickle and Full of Spite". It posits that **the female character is especially filled with malice**. Women are seen as fickle and as seeking revenge on past lovers.[94] Contrary to the Trial Judge's suggestions, there was no evidence that the Complainant had any reason or plan to take her chances in the bathroom in the hopes of getting the Respondent in trouble. By each account, they were strangers who had enjoyed dancing together with some limited conversation. The myth was repeated when the Trial Judge suggested the following scenario as an explanation for the complaint in this case:

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[90] ARD F13/8-9, F19/36
[91] AR 363/41-364/6
[92] AR 364/8-30
[93] AR 375/27-35
[94] *R. v. Seaboyer*, *supra* note 77 at para. 151 [Appellant's Authorities, Tab 7]

> … Two young people made love, and *somebody came afterwards and poisoned the girl's mind*. And the young man would happily have continued with the relationship and the young woman wanted that. But in the way that these things do work, she was told that he had gone straight off and made love to somebody else and that *he'd said ugly things about her and her mind was poisoned* and what could have been a promising happy relationship, just never took place. Instead of which she reacted.[95] [emphasis added]

65. The fourth myth reflected in the Trial Judge's reasons is "Emotionality of Females". It posits that **a woman who is raped will get hysterical** during the event and will be visibly upset afterwards. If a woman retains her cool, people assume nothing happened.[96] In his Reasons, the Trial Judge stated (during his *W.D.* analysis) that he could not discard the fact that the Complainant only seemed to get angry, and was far more upset, when Lance humiliated her. She didn't appear to react after the Respondent allegedly had unwanted sex with her.[97]

66. The fifth myth reflected in the Trial Judge's comments is "General Character: Anything Not 100 Percent Proper and Respectable". It posits that being on welfare or drinking/drugs is used to imply that women consented to sex. In other words, **only good girls get raped**.[98] The Trial Judge commented on the Complainant's morality throughout the trial. He found it relevant whether the Complainant had the moral (and physical) strength to rebuff men if she felt like it;[99] he characterized her as "amoral" during counsel submissions;[100] and, in his Reasons, he stated that her morality left a lot to be desired.[101]

67. The fact that the Complainant snuck into movies and/or shoplifted did not make her "amoral". Unfortunately, the Trial Judge's comments would lead an informed person to conclude that the Complainant, not the Respondent, was on trial. In his Reasons, the Trial Judge stated that he would go through the Complainant's evidence to "try and establish her credibility".[102] Ten years ago, the Supreme Court of Canada recognized a trend in the cross-examination of sexual assault victims:

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[95] AR 414/11-18
[96] *R. v. Seaboyer, supra* note 77 at para. 151 [Appellant's Authorities, Tab 7]
[97] AR F27/8-11
[98] *R. v. Seaboyer, supra* note 77 at para. 151 [Appellant's Authorities, Tab 7]
[99] AR 62/18-23
[100] AR 353/30-31
[101] ARD F7/29-30
[102] ARD F5/18-19

> It has been increasingly recognized in recent years, however, that cross-examination techniques in sexual assault cases that seek to put the complainant on trial rather than the accused are abusive and distort rather than enhance the search for truth.[103]

Significantly, in this case, the Trial Judge repeatedly referred to the Complainant as "the accused" in his reserved Reasons (even after he was corrected by the Crown).[104]

68. The Trial Judge appeared to retreat from some of his comments at various stages of the proceeding (including in his Reasons).[105] By then, the damage had been done. And, his comments to the Respondent at the start of his Reasons were alarming. He warned the Respondent that he and his male friends had to be far more *gentle, patient, and careful* with women in order to *protect themselves*; they had to be very sure that a girl wants to do it so that they *don't upset women and get into trouble*; and that a woman *keeping quiet* isn't necessarily a sign she's saying yes.[106] These comments reflect a view that women are weak, that women send mixed signals, that upset women fabricate sexual assault allegations, and that men need to protect themselves from women.[107]

69. The Trial Judge made additional comments supporting a reasonable apprehension of bias finding. First, he expressed opinions reflecting his own views and experiences rather than the actual evidence. For example, the Crown argued that it was extremely unlikely the Complainant would have consensual sex with the Respondent in the bathroom because they just met and had little conversation.[108] The Trial Judge disagreed:

> *But this happens all the time, I'm afraid*. … People get drunk. Young people's -- the morals today are different from Victorian times. Aren't you stuck with antiquated thinking, Ms. Mograbee.[109] [emphasis added]

70. The Trial Judge also commented that it was "seductive" for him to give credence to Skylar's claim that the Complainant told her she was going to have sex with the Respondent

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[103] *R. v. Shearing*, *supra* note 80 at para. 76 [Appellant's Authorities, Tab 10]
[104] ARD F8/5, F8/16, F9/20, F13/9, F18/41, F19/6, F22/41, F26/29, F27/34. The Trial Judge referred to the Complainant as "the accused" during the Crown's final submissions. AR 348/26-29, 360/6, 360/21, and 380/2
[105] See, for example, F5/29-32, F6/14-20, F8/5-9
[106] ARD F3/19-38
[107] Notably, during the trial, the Trial Judge advised defence counsel that one of his questions was going to "enrage" the female Crown. He also told the female defence witness "don't be frightened" during her cross-examination. AR 128/3, 176/1
[108] AR 319/16-18
[109] AR 319/20-26. These comments were made in the context of the mistaken belief defence submissions.

because it had a ring of truth and was "the kind of thing that young women will talk about, particularly if they're both interested in the same man."[110]

71. There was no evidentiary foundation for either generalization. It is inevitable and appropriate that differing experiences will assist judges in their decision-making and be reflected in their judgments. However, such experiences must be relevant to the case, cannot be based on inappropriate stereotypes, and must not prevent a fair and just determination of the case based on the facts in evidence. It is the law that governs, not a judge's beliefs that may be in conflict with the law. The record must reflect that a judge undertook a dispassionate deliberate investigation into the facts.[111]

72. Other comments by the Trial Judge trivialized the allegations and/or the offence. For example, when reminded of the Complainant's evidence that she was in pain during the intercourse, the Trial Judge commented that "sex and pain sometimes go together … that's not necessarily a bad thing" before conceding that the implication from her was that she wasn't enjoying the pain.[112] He remarked that "[s]ex is very often a challenge".[113] And in the context of the allegations in this case, he commented that "I don't believe there's any talk of an attack really" (during counsel submissions) and "there's no talk of real force" (in his Reasons).[114]

73. Other comments by the Trial Judge reflected an unsupportable view of legislation designed to protect both sexual assault victims and the trial process. When the issue of the Complainant's other sexual activity arose, the Trial Judge commented that section 276 "for better or worse" prevents questions by an accused. He stated that both he [the Trial Judge] and the framers recognized that the section does hamstring the defence.[115] It had to be interpreted narrowly.[116] It was "very, very incursive legislation" which stopped an accused from asking

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[110] AR 359/31-33, 360/40-41
[111] *R. v. S. (R.D.), supra* note 71 at paras. 29, 39, 40 [Appellant's Authorities, Tab 3]. See also *R. v. Wald*, 1989 CarswellAlta 20 (C.A.) at para. 64 [Appellant's Authorities, Tab 11]; *R. v. Kaminsky*, 2008 CarswellAlta 787 (C.A.) at para. 22 [Appellant's Authorities, Tab 12]
[112] AR 407/24-32
[113] AR 411/34
[114] AR 306/9-10, ARD F13/6-7. Such comments trigger the *Seaboyer* "**Stereotype of the Rapist**" myth.
[115] AR 58/29-39
[116] AR 60/30-32

otherwise permissible questions "because of contemporary thinking".[117] The Trial Judge didn't think anybody would argue that "the rape shield law always worked …fairly."[118]

74. These complaints were rejected 15 years ago. In *R. v. Darrach*, the Supreme Court of Canada held that the section does not violate the right to make full answer and defence, the right to a fair trial, or the presumption of innocence. Instead, it enhances the fairness of the hearing by excluding misleading evidence while preserving the right to make full answer and defence (by allowing relevant evidence meeting certain criteria to be adduced).[119] The Trial Judge's view of the legislation resulted in the admission of irrelevant, prejudicial, and presumptively inadmissible evidence without an application or hearing and for a prohibited purpose. As the following section will demonstrate, myths and stereotypes were apparent in his analysis.

Ground B – The Complainant's Other Sexual Activity

75. The Respondent did not bring an application, before or during the trial, to adduce evidence of the Complainant's other sexual activity. Despite this, and over the Crown's objections, the Trial Judge allowed him to elicit such evidence in the Complainant's cross-examination and in the Respondent's direct examination. The myths and stereotypes previously canvassed are evident.

Applicable Legislation and Jurisprudence

76. Evidence of a complainant's other sexual activity is presumptively inadmissible. It cannot be used to infer that a complainant is more likely to have consented or is less worthy of belief. A written application and hearing will be required before such evidence can be adduced for a non-prohibited purpose. A complainant is not compellable at the hearing. The judge must consider enumerated factors in determining whether the evidence is admissible. If the evidence is deemed admissible, reasons must be provided.[120]

77. The section applies to all sexual activity. An accused does not have the right to adduce irrelevant or misleading evidence to support illegitimate inferences. Nor can he distort the truth-seeking function of the trial. The issue cannot be raised in a way that surprises the complainant.

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[117] AR 63/5-7
[118] AR 217/2-4
[119] *R. v. Darrach*, 2000 CarswellOnt 3321 (S.C.C.) at para. 21 [Appellant's Authorities, Tab 13]
[120] *Criminal Code*, sections 276(1)-(3), 276.1(1)-(3), 276.2(2) [Appellant's Authorities, Tab 1]

The right to make full answer and defence does not include the right to defend by ambush and the Crown is entitled to consult with a complainant.[121]

78. Evidence of prior sexual activity will rarely be relevant to support a denial of sexual activity or to establish consent. It will most often be used to substantiate mistaken belief claims. An accused must provide some evidence of what he believed at the time to establish that the evidence is relevant to such a defence. To compel the complainant to be examined on her sexual history before the evidence is found to be relevant would be an invasion of the complainant's privacy and would discourage the reporting of sexual violence crimes.[122]

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79. The Respondent first elicited evidence of the Complainant's other sexual activity in her cross-examination. He asked if anybody attempted to hook up with her during her first night at Mike's (days before meeting the Respondent). The Respondent advised the Trial Judge that he was not seeking to elicit evidence of sexual history. When he then suggested to the Complainant that somebody had been flirtatious with her, she agreed that Dustin was and testified that she declined these flirtations. The Respondent asked how she declined and whether she said "no". The Trial Judge ruled that there had not yet been a question about sexual activity. The question was whether the Complainant was flirted with and what she did about it.[123]

80. When the Crown submitted that the evidence was irrelevant, the Respondent submitted that the purpose of the questions was the *mens rea* and whether he had an honest belief in consent. He was looking at talk, not sex acts. The questions were not likely to raise issues of whether the Complainant was more likely to have consented. They related to her efforts or her ability to shrug off unwanted advances and indicated how a young lady of her age, experience, and skill disarmed an unwanted suitor. He understood that the Complainant had done this in the past. The issue wasn't whether she was more or less likely to have indulged in sex, but whether she was more or less likely to have had the ability to stop it.[124]

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[121] *R. v. Darrach*, *supra* note 119 at para. 33, 37, 55 [Appellant's Authorities, Tab 13]. See also *R. v. Wright*, 2012 CarswellAlta 1725 (C.A.) at paras. 8-10, 16 [not reproduced]
[122] *Ibid*. at paras. 57-59, 68 [Appellant's Authorities, Tab 13]
[123] AR 56/15-58/11
[124] AR 58/13-60/26

81. After commenting that section 276 had to be interpreted narrowly, the Trial Judge ruled that the evidence was relevant because it demonstrated that the Complainant had the wherewithal to deal with the Respondent.[125] The Crown reiterated that what the Complainant did with other men was not relevant; what mattered was what she did with the Respondent. The Trial Judge replied that it mattered whether "she was physically able to deal with it" and that all sorts of circumstances surround this issue including whether she had the moral or physical strength to rebuff men if she felt like it.[126]

82. The Trial Judge acknowledged that section 276 referred to other "sexual activity", but found this evidence was the opposite of sexual activity. It was the Complainant being able to say "no". When the Crown submitted that it was sexual activity whether a complainant says "no" or "yes", the Trial Judge disagreed.[127] Finding this was the kind of case that had to be dealt with as quickly as possible; he ruled that the questions were permissible.[128]

83. The Trial Judge committed a number of errors in his treatment of this evidence. First, the evidence was irrelevant. How the Complainant handled the sexual advances of men before she ever met the Respondent was not relevant to the issues to be determined and reinforced myths and stereotypes. Second, his interpretation of "sexual activity" was too narrow. It is unclear whether kissing would even have fallen within the definition:

> Do you – do you regard the kissing as sexual contact? Then should he not have kissed her? … And is that – is that improper? It happens all the time even for – for youngsters who have known each other only for a few hours. At parties it happens all the time. Goodness, it happened in my days in the '60s. It's not unlikely. … [A] man is not going to get into trouble for just kissing a girl. On his version you say it's sexual – it's – it's – is it sexually reprehensible to kiss a girl?[129]

84. The Trial Judge's narrow interpretation of "sexual activity" was contrary to the jurisprudence.[130] The judiciary has confirmed that its scope extends beyond touching and is best

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[125] AR 60/21-62/7
[126] AR 62/9-23
[127] AR 63/9-39
[128] AR 64/7-30
[129] AR 320/19-321/16. The only evidence of kissing came from the Respondent's testimony.
[130] See *R. v. A. (J.)*, 2011 CarswellOnt 3515 (S.C.C.) at paras. 58-59 [Appellant's Authorities, Tab 14]; *R. v. Chase*, 1987 CarswellNB 25 (S.C.C.) at paras. 9-12 [Appellant's Authorities, Tab 15]

determined by examining the true purpose for which evidence is introduced.[131] The Respondent advised the Trial Judge it was being advanced for his *mens rea* and his honest belief in consent. This alone should have alerted the Trial Judge that the section was triggered. The Trial Judge's comments also evidenced the myth that **a woman cannot be raped against her will**.

85. The Trial Judge's errors resulted in the admission of prejudicial evidence without the compulsory procedure. The Crown and the Complainant were effectively ambushed as the Respondent engaged in a fishing expedition. Significantly, during counsel submissions, the Trial Judge appeared to question whether or not there was a lot of relevant stuff excluded by the rape shield provision.[132] He failed to appreciate that such an analysis takes place at the start, not the end, of a trial.

86. The Trial Judge errors also allowed the inadmissible evidence to be relied upon for prohibited reasoning. The fact that the Complainant did not "rebuff" the Respondent's advances, when she had the advances of others, could only be used for two prohibited inferences – she was not credible or was more likely to have consented.

87. Unfortunately, evidence of the Complainant's other sexual activity was not elicited solely in her cross-examination. It was also adduced through the Respondent. He testified that he witnessed her flirting with Dustin on the couch before he started dancing with her.[133] As already noted, the Respondent relied on this evidence in final submissions to suggest she was more likely to have consented in the bathroom.

88. The Respondent also testified that the Complainant and Skylar were making out and kissing after they left the bathroom. This evidence, never put to the Complainant, would have

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[131] See, for example, *R. v. Drakes*, 1998 CarswellBC 90 (C.A.) at paras. 13-16 [Appellant's Authorities, Tab 16] (communication for the purpose of prostitution constitutes "sexual activity" which is not restricted to overtly sexual acts); *R. v. Holley*, 1999 CarswellAlta 444 (C.A.) at paras. 32-34 [Appellant's Authorities, Tab 17] (previous discussions with an accused about having sex does not constitute "sexual activity"); *R. v. Zachariou*, 2013 CarswellOnt 14978 (Sup. Ct. Just.) at paras. 18-21 [Tab 18] (a kiss and discussion of threesomes constitutes "sexual activity"); *R. v. Beilhartz*, 2013 CarswellOnt 13054 (Sup. Ct. Just.) at paras. 20-21 [Appellant's Authorities, Tab 19] (sending nude photo constitutes "sexual activity"); *R. v. L. (D.)*, 2014 CarswellOnt 8161 (Sup. Ct. Just.) at paras. 51-56 [Appellant's Authorities, Tab 20] (text messages constitute "sexual activity"); *R. v. I. (J.)*, 2015 CarswellOnt 1860 (Ct. Just.) at paras. 16-20 [Appellant's Authorities, Tab 21] (postings on social media constitute "sexual activity"). See also, McWilliams' Canadian Criminal Evidence (Hill, Tanovich & Strezos), "The Meaning of Sexual Activity" at 16:20.40.10 [Tab 22]

[132] AR 307/15-308/1

[133] AR 225/24-30

required a section 276 application. When the Crown objected, the Trial Judge asked what the section prevented in terms of evidence and requested that the section be read to him. The Respondent advised the Trial Judge that the evidence was tendered not for the sex act, but for the atmosphere and conduct of the parties.[134] He then decided that there was more than enough information of that. The Trial Judge agreed, stated he was going to stop that form of evidence, and cautioned the Respondent. The Respondent continued to volunteer evidence of the Complainant's other sexual activity.[135] In final submissions, the Respondent relied on this evidence claiming that the Complainant had enjoyed a weekend of promiscuous activity.[136]

89. Unfortunately, this evidence made its way into the Trial Judge's analysis. In the Crown's final submissions, he suggested that previous flirting made it "less unlikely that she's – that she would say, no."[137] In his Reasons, he found that the Complainant wasn't frightened in the bathroom because she was quite capable of asserting herself with other men when they did things she didn't like.[138]

Ground C – Assessment of the Evidence & "Consent"

90. Discredited myths and stereotypes infected the Trial Judge's analysis of the issues and resulted in the admission of irrelevant and presumptively inadmissible evidence. The Trial Judge committed further errors in his assessment of the evidence. All of these errors arose out of his flawed understanding of "consent" in the context of sexual assault offences.

Applicable Jurisprudence

91. Consent is the conscious agreement of the complainant to engage in every sexual act in a particular encounter at the time it occurs. The only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or revocation of consent for the *actus reus* to be established. A failure to tell the accused to stop does not mean that a complainant must have been

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[134] AR 214/39-216/41
[135] AR 217/2-218/5
[136] AR 342/29
[137] AR 378/37-379/11
[138] ARD F13/10-11

consenting.[139] A complainant is not required to offer some minimal word or gesture of objection; lack of resistance is not equated with consent.[140] One "no" will put a person on notice that there is a problem with consent.[141]

Application to the Instant Case

92. The Trial Judge's flawed understanding of "consent", in the context of both the *actus reus* and the *mens rea*, was evident in witness testimony, counsel submissions, and his Reasons. These errors directly impacted his assessment of the evidence, including the Complainant's credibility. Examples of these errors have been identified in the preceding two sections. There are others.

93. One example is found in the Trial Judge's assessment of the condom evidence. Both parties testified that the Complainant expressed her objection to intercourse without a condom. In the Respondent's final submissions, the Trial Judge commented:

> Well, at one -- on one -- at one point she seems to have demurred and that was when she asked him whether he had a condom. … What-- what were her words? Do you have a condom? That seems to indicate con -- *qualified consent*. …Because asking him whether he has a condom indicates to me that *there's some kind of consent, if only qualified*.[142] [emphasis added]

94. The Trial Judge added a form of retroactive consent to this qualified consent in the Crown's final submissions. He asked how he escaped the inevitable conclusion that, when the Complainant asked the Respondent to wear a condom, all of the activity leading up to that point was consensual. This indicated to him that "she's willing to do it on certain conditions".[143]

> … *it's an either or situation*. She's saying do you have a condom? That *it's an inescapable conclusion is if you have one I'm happy to have sex with you*.[144] [emphasis added]

When the Crown attempted to explain why this wasn't the case, the Trial Judge responded "please, Ms. Mograbee, we're grown ups here".[145]

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[139] *R. v. A. (J.), supra* note 130 at paras. 31, 34, 37, 41, 43-48, 65 [Appellant's Authorities, Tab 14]. See also *R. v. Hutchinson*, 2014 CarswellNS 160 (S.C.C.) at paras. 4, 17, 27 [Appellant's Authorities, Tab 23]
[140] *R. v. M. (M.L.)*, 1994 CarswellNS 21 (S.C.C.) at para. 2 [Appellant's Authorities, Tab 24]
[141] *R. v. Ewanchuk*, *supra* note 68 at paras. 51-52 [Appellant's Authorities, Tab 2]
[142] AR 350/20-26, 351/22-23
[143] AR 390/21-391/41
[144] AR 392/2-4

95. This flawed reasoning continued. In his Reasons, he noted:

> I also pause to make the point that one version is that she's unequivocally against having sex. It can't live with the version that she doesn't want sex unless there's a condom involved. I understand that one can say, I don't want sex without a condom, and then, if the man insists, that is unwanted sex. My point is a different one. That her evidence sometimes is that she didn't want sex at all. And then it changes to she was prepared to have sex as long as there was a condom.[146]

96. Contrary to the Trial Judge's view, a sexual assault victim's request that her attacker wear a condom does not establish that she has consented to the sexual activity up to that point, that she has provided some form of qualified consent, or that she is affirmatively communicating consent.[147]

97. The Trial Judge's flawed understanding of "consent", and its impact on his assessment of the evidence, is also reflected in his analysis of "reasonable steps" in relation to the mistaken belief defence. The Crown had argued that there was a heightened need for reasonable steps given the fact that the parties were strangers and the Respondent knew the Complainant was intoxicated. The Trial Judge commented:

> Is it -- is it unreal for me to accept that a young man and a young woman -- young woman want to have sex, particularly if they're drunk?[148]
>
> …
>
> …*why must I use in any way at all the fact that they hardly knew each other*? What's sauce for the goose is sauce for the gander.[149] [emphasis added]
>
> …
>
> You're saying that it -- that it -- a drunk man has a higher standard, or the fact that he knew she was drunk places a higher standard on him? … He must be doubly careful. … She knew she was drunk. ... Is not an onus on her to be more careful? … *to make it clear that she's not consenting*. … There's -- there's no -- there's no higher on -- there's -- there's not an equal onus on a drunk woman as on a drunk man?[150] [emphasis added]

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[145] AR 392/6-27
[146] ARD F12/9-14
[147] See, for example, *R. v. Flaviano*, 2013 CarswellAlta 990 (C.A.) at paras. 10, 14 [Appellant's Authorities, Tab 25] aff'd 2014 CarswellAlta 244 (S.C.C.); *R. v. Rand*, 2012 CarswellOnt 13468 (C.A.) at paras. 4, 15 [Appellant's Authorities, Tab 26]
[148] AR 322/22-24
[149] AR 323/35-37
[150] AR 325/27-326/24. The Trial Judge stated that not much turned on the sobriety levels of the parties. (AR 349/23-31). He failed to appreciate that the Respondent's intoxication barred a mistaken belief defence.

98. It is clear from this passage, and the one that follows, that the Trial Judge assessed the Complainant's testimony (and ultimately her credibility) on a flawed belief that she was obliged to communicate a lack of consent and that the Respondent could assume consent until that time:

> [CROWN] If you -- all right. So if I follow you correctly you're saying, if you find as a fact that there was flirting prior to the incident in the washroom, is --
>
> THE COURT: Yeah.
>
> [CROWN]: --that your question? Can you use that?
>
> THE COURT: And flirting on the dance floor.
>
> [CROWN]: Can you use that --
>
> THE COURT: As part of the --
>
> [CROWN]: -- to find that she was likely to have consented when that door in the bathroom was closed, is that your question?
>
> THE COURT: And the fact that she didn't complain about the door being closed, the fact that she -- the other two people walked out, that *she must have realized that something was coming down the track*. Does that play into the final consent? Obviously she can change her mind, she can say -- or she can say this – *she can show it was an incorrect signal*. But those are signals, do I ignore them?[151] [emphasis added]

99. The Trial Judge had to be reminded that, in terms of the *actus reus*, the focus is on the Complainant's state of mind at the time the sexual activity is occurring and that the Respondent's perception of her state of mind is not relevant:

> THE COURT: Well, from his view he's being tender. And does that not indicate that he sees it in a certain way? He thinks that she's enjoyed herself, that they've had a tender, intimate time?
>
> [CROWN]: That the sexual -- that the -- that that mind set is not relevant to an assessment of consent, it's what's in her mind, not what's in his mind.[152]

100. The errors were inextricably linked to the verdict. The Trial Judge found that the Complainant was not credible and rejected her evidence.

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[151] AR 376/19-40

[152] AR 400/35-41. The Trial Judge attempted to retreat from these comments in his Reasons. See ARD F6/14-20

PART 5 – RELIEF SOUGHT

101. The Appellant requests that the appeal be allowed and a new trial order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Estimate of time required for the oral argument: 45 Minutes

CER/clk

March 19, 2015

TABLE OF AUTHORITIES

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18. *R. v. Zachariou*, 2013 ONSC 6694, 2013 CarswellOnt 14978 (Sup. Ct. Just.) at paras. 18-21, 115 W.C.B. (2d) 638

19. *R. v. Beilhartz*, 2013 ONSC 5670, 2013 CarswellOnt 13054 (Sup. Ct. Just.) at paras. 20-21, 109 W.C.B. (2d) 173

20. *R. v. L. (D.)*, 2014 ONSC 3668, 2014 CarswellOnt 8161 (Sup. Ct. Just.) at paras. 51-56, 114 W.C.B. (2d) 109

21. *R. v. I. (J.)*, 2015 ONCJ 61, 2015 CarswellOnt 1860 (Ct. Just.) at paras. 16-20

22. McWilliams' Canadian Criminal Evidence (Hill, Tanovich & Strezos), "The Meaning of Sexual Activity" at 16:20.40.10

23. *R. v. Hutchinson*, 2014 SCC 19, 2014 CarswellNS 160 (S.C.C.) at paras. 4, 17, 27, 2014 CarswellNS 160

24. *R. v. M. (M.L.)*, 1994 CarswellNS 21 (S.C.C.) at para. 2, [1994] 2 S.C.R. 3

25. *R. v. Flaviano*, 2013 ABCA 219, 2013 CarswellAlta 990 (C.A.) at paras. 10, 14, 309 C.C.C. (3d) 163 – aff'd 2014 SCC 14, 2014 CarswellAlta 244 (S.C.C.), [2014] 1 S.C.R. 270

26. *R. v. Rand*, 2012 ONCA 731, 2012 CarswellOnt 13468 (C.A.) at paras. 4, 15, 307 O.A.C. 64

APPENDICES

A. Chart – Common Stereotypes/Rape Myths – *R. v. Seaboyer* (1991)

B. Chart – Trial Judge's Comments

COMMON STEREOTYPES/ MYTHS (1991)

R. v. Seaboyer

1. **Struggle and Force: Woman as Defender of Her Honour**

   A woman cannot be raped against her will. If she really wants to prevent a rape, she can.[1]

2. **Knowing the Defendant: The Rapist as a Stranger**

   Rapists are strangers who leap out of bushes to attack their victims.[2]

3. **Sexual Reputation: The Madonna-Whore Complex**

   Women are one-dimensional. They are maternal or they are sexy, they are good or they are bad, they are madonnas or they are whores.[3]

4. **General Character: Anything Not 100 Percent Proper and Respectable**

   Being on welfare or drinking or drug use is used to imply that a woman consented to sex or contracted to have sex for money.[4]

5. **Emotionality of Females**

   Females are "more emotional" than males. If a woman is raped, she will get hysterical during the event and will be visibly upset afterward. If she retains her cool, people will assume nothing happened.[5]

6. **Reporting Rape**

   If a woman is raped she will be too upset and ashamed to report it. Alternatively, if a woman is raped, she will be so upset that she will report it.[6]

7. **Woman as Fickle and Full of Spite**

   The feminine character is especially filled with malice. Women are fickle and seek revenge on past lovers.[7]

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[1] *R. v. Seaboyer*, 1991 CarswellOnt 109 (S.C.C.) at paras. 147-149
[2] *Ibid*. at paras. 149-150
[3] *Ibid*. at paras. 150-151
[4] *Ibid*. at para. 151
[5] *Ibid*.
[6] *Ibid*.
[7] *Ibid*.

8. **The Female Under Surveillance: Is the Victim Trying to Escape Punishment**

A female's sexual behaviour, depending on her age, is under the surveillance of her parents or her husband, and of the community. If a woman says she is raped, it must be because she consented to sex that she was not supposed to have. She got caught, and now wants to get back into the good graces of whomever's surveillance she is under.[8]

9. **Disputing that Sex Occurred**

Females fantasize about rape. They make up stories that sex occurred when nothing happened. Alternatively, they fabricate sexual activity out of spite.[9]

10. **Stereotype of the Rapist**

The rapist is a stranger who leaps out of bushes to attack his victim and later abruptly leaves her. Stereotypes of the rapist are used to blame the victim. His behavior is held against her because what she says he did often does not match what jurors think rapists do.[10]

[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*

TRIAL JUDGE'S COMMENTS

R. v. Wagar

	COMMENT	Reference
1	Q You do -- okay. Do you remember if anybody had attempted to hook up with you that night? MS. MOGRABEE: I'm-- I'm going to rise, Sir, if I may. Section 276 of the *Criminal Code* governs any questions regarding any previous sexual history. And I'm wondering if my friend is raising issue now, because if he is, then I -- I'd like to address you on it. I don't know if at this point we need to excuse the witness, but I think that that question is inappropriate at this point. Q MR. FLYNN: I believe it's my terminology, Sir. If I can just -- and I'm not looking for sexual history or anything along this nature. It's more -- would I suggest if somebody was flirtatious with you? A Yes, Dustin. Q Flirtatious? A Yes. Q Okay. And so Dustin was flirtatious with you that night? A Yes. Q Okay. And did you accept his flirtations or did you decline his flirtation? A Declined. Q You declined? A Yes. Q Okay. And how did you decline his flirtation? Did you say, No? MS. MOGRABEE: Again, Sir, I -- I -- this -- this is still going into this area that I -- I raised this issue about. We're talking about -- we're talking about flirtation. We're talking about embarrassing stuff. MR. FLYNN: Well, we're talking flirtation. We're not talking sex here. We're talk – MS. MOGRABEE: Could this witness be excused, please, Sir? THE COURT: [redacted], would you mind waiting in one of those two rooms just outside the glass door. The lawyers is going to talk law for a moment. MS. MOGRABEE: Thank you. (WITNESS STANDS DOWN) MS. MOGRABEE: Sir, I take flirtation to mean an interest, a sexual interest perhaps, unless my friend wants to suggest it's something else. But this -- first of all, I raise my objection on that basis, that we're talking about her conduct sexually, whether or not -- you know, regardless of how far something might of went. That's what these questions are geared around, that issue. And that is not evidence that is admissible without a proper application under section 276. If my -- and so the -- THE COURT: Well, le -- let's just take that slowly. MS. MOGRABEE: Yeah. THE COURT: Sexual activity. MS. MOGRABEE: Yes. THE COURT: In proceedings with respect of defence under various things --	AR 56/15-58/39

	MS. MOGRABEE: Yes. THE COURT: -- including the present charge, 271, yes, evidence the complainant has engaged in sexual activity. And so far, there -- there hasn't been a question in that regard. There's been a question as to whether -- MS. MOGRABEE: Well -- THE COURT: -- whether she was flirted with and what she did about it. MS. MOGRABEE: Right. THE COURT: I can understand that it might end there, but right now it's not there yet. MS. MOGRABEE: Right. And my concern is that it's going down that line. And I think if we put aside 276 for a moment even because I do still make my objection based on 276, but just put aside. My other objection is that this is not relevant to the sexual assault that would have taken place between this accused as alleged and this complainant. Is the suggestion here somehow that she was flirting with someone else or someone was flirting with her, that that -- that somehow should lead to a thinking or a line of questioning that invites an outdated, antiquated way of thinking that somehow she would have been also interested in the other individuals in the house? THE COURT: Well, we're thinking that it's not presently acceptable. Mr. Flynn, why are you asking -- asking the questions? MR. FLYNN: Yes, Sir. The reason is, Sir, for the -- for the mens rea of this event, Sir, does my client have the honest belief that this woman is giving him consent to this act. We also, Sir, are not looking beyond -- THE COURT: But your problem is -- is 276, for better or worse -- MR. FLYNN: Well-- THE COURT: --prevents -- prevents those questions. MR. FLYNN: --I understand, Sir. And I'm -- and I'm -- THE COURT: And I recognize that it -- I recognize and I think the framers of the section recognize that it -- it does hamstring the defence.	
2	THE COURT: Mr. Flynn, I made -- I made the point to Ms. Mograbee that -- that section 276 in the preamble talks about sexual activity. But it does go further to say: (as read) "By reason of the sexual nature of the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief." So while -- while the preamble talks about sexual activity, and even -- even if sexual activity is limited to the sex act rather than the talk that goes with it -- MR. FLYNN: Yes, Sir. THE COURT: -- and the -- the ruffling of feathers and the showing off that goes with it, still the principle applies. Are your questions likely to give rise to issues of whether or not the complainant was more likely to have consented to sex? MR. FLYNN: No, Sir. The purpose of my question, Sir, relates to her efforts or her ability to shrug off unwanted advances, how does a young lady of her age and experience and skill -- how does she disarm an unwanted suitor. And my understanding, Sir, is that she has done this in the past. And that's what I want to just examine very quickly on that issue. It's not the issue of sex, Sir. It's the issue of how does she rebuff someone's advances. And -- and I think that's -- THE COURT: So you're -- you're saying that it isn't that she's more or less likely to	AR 59/21-61/26

	have indulged of sex -- MR. FLYNN: No, Sir. THE COURT: -- but she's more or less likely to have had the ability to -- MR. FLYNN: To say no. To -- not -- not to say no, Sir, but -- THE COURT: --to -- to stop it. MR. FLYNN: --but to stop it. And -- and I think that that's asking -- to put this, I think, bluntly, Sir, it's almost the opposite. I'm asking – not looking for information about sex. I'm looking for information of how she -- THE COURT: All right. I think I've got the argument -- MR. FLYNN: --the negative of that. THE COURT: -- and I think Ms. Mograbee has. Ms. Mograbee, it's a subtle argument. What do you say to that? MS. MOGRABEE: It's also -- THE COURT: Bearing in mind that -- that any -- any – any legislation that prevents an accused from cross-examining fully I think has to be interpreted narrowly. MS. MOGRABEE: I say the interpretation has to be narrow, too, to avoid the kind of dangerous thinking that that line of questioning would engender. And I think that what my friend is saying is, Look -- THE COURT: Well, surely we're -- we're not talking about dangerous thinking, Ms. Mograbee. We're talking about the law. MS. MOGRABEE: Yeah. Well, the law -- if you look at the -- THE COURT: The law doesn't stop people thinking. MS. MOGRABEE: Well, the law does talk about -- that particular section talks about, you know, a way of thinking that would lead a co -- that would re -- that would essentially cause one to conclude that a person was more likely or less likely to consent to activity. And I still think that we're in the ballpark, where you say, Well, she was dealing with this guy this way -- THE COURT: Yeah. MS. MOGRABEE: -- so she had -- she had -- she has to deal with this guy the same way. I mean, I -- I just don't think that that's a fair line of questioning. THE COURT: No, I'm not sure that Mr. Flynn's saying that. He's not saying that -- that she should have dealt with this person the same way but that she was able to. She -- she did have the wherewithal. It's much the same kind of argument surely as -- as -- as it's the inverse of your argument when you said to – when you put to her: How big are you? How big did you think he was? Now Mr. Flynn is trying to show, well, it doesn't matter how small you were. You were able to -- to -- to deal with other men. Maybe the other man was even bigger. I don't know. Perhaps Mr. Flynn's going there. MS. MOGRABEE: It's still not relevant to how she dealt with this man.	
3	THE COURT: Yeah. But it also matters whether she was -- whether she was physically able to deal with it. All sorts of circumstances surround the -- surround the issue. MS. MOGRABEE: The-- THE COURT: Were there people close by that she could call on for help, did she have a telephone, all those things are permissible. And one of them would be, presumably, in the ordinary course, absent 276 and what you call antiquated thinking or con -- con -- contemporary thinking, would be is she morally, and by 'morally', I don't mean in terms of ethic morally but in terms of having the inner	AR 62/12-23

	strength, or physically strong enough to rebuff men if she feels like it.	
4	THE COURT: And on its -- on its face it doesn't cover what you're saying. You -- you're arguing that, by extension it shouldn't -- it shouldn't be -- I-- I have to apply the spirits of 276. And I'm not sure that that's right because it is – it is very, very incursive legislation. It stops an accused from asking question which would otherwise be permissible because of contemporary thinking. MS. MOGRABEE: The whole point to section 276 is to give everyone an opportunity to know what kind of evidence we're dealing with so that the proceeding is protected, that the complainant is protected. If my friend wants to pursue this line of questioning, because we're arguing here in a vacuum because we don't know exactly what he's trying to get at, he has to bring an application. There's a notice requirement that he do so. He has to put evidence before the court. And he has to be clear about what evidence he's talking about. That's the whole point, so that you can make a ruling about whether this line of questioning can be - is permissible or not. THE COURT: Now, but you see, that -- that isn't right either, Ms. Mograbee, because (2) says -- talks about any other sexual activity. MS. MOGRABEE: Right. THE COURT: And he's not talking about other sexual activity. He's talking about the opposite of sexual activity. He's talking about her being able to say 'no' to sexual activity. MS. MOGRABEE: Well, it's still sexual activity -- THE COURT: No. MS. MOGRABEE: --whether she says 'no' or 'yes'. THE COURT: No, it's not. MS. MOGRABEE: Well, that's the -- THE COURT: By-- by definition it's not.	AR 63/3-37
5	Q But when -- when he was using -- when he was trying to insert his penis, your bottom was down in the basin. Or am I wrong? A My -- my vagina was not in the bowl of the basin when he was having intercourse with me. Q All right. Which then leads me to the question: Why not -- why didn't you just sink your bottom down into the basin so he couldn't penetrate you? A I was drunk. Q And when your ankles were held together by your jeans, your skinny jeans, why couldn't you just keep your knees together? A (NO VERBAL RESPONSE)	AR 119/5-16
6	THE COURT: Now, that's a -- that's a leading question. MR. FLYNN: Okay. THE COURT: It's going to enrage Ms. Mograbee.	AR 127/40-128/3
7	THE COURT: Miss, you're allowed to use the exact words. You don't have to be frightened.	AR 175/41-176/1
8	THE COURT: Mr. Flynn, I understand that. And I don't think anybody, least of all Ms. Mograbee, would -- would -- would argue that the rape shield law always worked fair -- fairly. But it exists.	AR 217/2-4
9	THE COURT: Well, I don't believe there's any talk of an attack really. There was -- MR. FLYNN: Well, he comes in --	AR 306/9-20

	THE COURT: --instance. MR. FLYNN: -- he comes in and he basically sexually assaults her is what she's saying. She's saying that against her will he then takes down her pants and while her pants are still on her legs starts to perform oral sex on her. And then -- and then at some point he -- he then puts her -- rearranges her on the -- on the -- on the sink counter and starts to have intercourse with her.	
10	MR. FLYNN: --Skylar's testimony ev -- with the adducement of the intent of the young lady to potentially have sex with my client, I think it's very relevant, Sir. And I think it is necessary. THE COURT: Well, it's relevant. Whether or not -- there's a lot of stuff -- MR. FLYNN: Oh, but -- but I think it's -- THE COURT: --excluded by the rape shield provision -- MR. FLYNN: --I -- I -- I think -- THE COURT: --that is relevant. MR. FLYNN: -- it's a very strong weight, Sir. I think the weight of that evidence -- THE COURT: Yes, but am I allowed to look at it is the question? MR. FLYNN: Yes, Sir. In my -- THE COURT: What? MR. FLYNN: The-- the evidence was -- and again, this is what -- the evidence of the witness Skylar is saying what somebody said to her. This isn't hearsay by any method, Sir. It's what was said to her for the purposes of laying the basis. THE COURT: Yeah, but it's -- it -- it has to do with sexual conduct, evidence of sexual conduct. MR. FLYNN: And again, Sir, there's a fine line, I think, between sexual contact -- or sexual contact and liking somebody and moving in that direction of a relationship. By this girl saying that she likes somebody, or wants to sleep with him, that doesn't necessarily mean they're going to have sex with the person. It just means that they like them, they're attracted to them, something could potentially arr -- derive from that.	AR 307/11-308/8
11	Never mind whether she abused the first opportunity to report. I understand that that is -- … --no longer contemporarily relevant.	AR 314/24-29
12	MS. MOGRABEE: Well, it's very strange that these individuals would have been in the same house together and had very little conversation and then ended up in the bathroom having sex together. THECOURT: But this happens all the time, I'm afraid. MS. MOGRABEE: Particularly when she says -- THE COURT: People get drunk. Young people's -- the morals today are different from Victorian times. Aren't you stuck with antiquated thinking, Ms. Mograbee.	AR 319/16-26
13	THE COURT: Do you -- do you regard the kissing as sexual contact? Then should he not have kissed her? MS. MOGRABEE: Kissing is sexual contact as well. THECOURT: So he shouldn't have kissed her? MS. MOGRABEE: She denies that that happened. She denies that -- THE COURT: Well, from his version, should he not have -- MS. MOGRABEE: --on – THE COURT: --kissed her? MS. MOGRABEE: Right, but you -- you -- he says that she – she and him mutually	320/19-321/35

	kissed each other. That was his evidence. THE COURT: Yeah. MS. MOGRABEE: She's saying that never happened. THE COURT: And is that -- is that improper? It happens all the time even for -- for youngsters who have known each other only for a few hours. At parties it happens all the time. Goodness, it happened in my days in the '60s. It's not unlikely. MS. MOGRABEE: Well, I wish we were dealing with just a case of kissing, but - THE COURT: No, I understand it, but -- MS. MOGRABEE: -- we go from kissing to him putting his penis in her vagina. THE COURT: I understand that, but a man is not going to get into trouble just for kissing a girl. On his version you say it's sexual -- it's -- it's -- is it sexually reprehensible to kiss a girl? MS. MOGRABEE: Well, the Crown would submit that the – the cases are pretty clear in saying that if you're kissing someone on the lips, and I took that to mean -- THE COURT: M-hm. MS. MOGRABEE: --that's what he meant -- THE COURT: Yeah, that's what I was talking about. MS. MOGRABEE: -- that could be construed as a sexual assault. But really the bigger is that whether or not he would have, you know, been able to go from that to performing oral sex on her and then penetrating her with his penis. And we get quite the progression there. THE COURT: Aren't-- aren't you getting -- making this too complicated? If I believe his version, or if I'm incapable of rejecting his version, then on his version it was consensual sex.	
14	Is it -- is it unreal for me to accept that a young man and a young woman -- young woman want to have sex, particularly if they're drunk?	AR 322/22-24
15	--why must I use -- why must I use in any way at all the fact that they hardly knew each other? What's sauce for the goose is sauce for the gander.	AR 323/35-37
16	MS. MOGRABEE: The other thing that I'll just add here at the end is that where you have a -- an individual -- and we're talking about, well, how can I accept -- you know, why shouldn't I accept that this is possible when, you know, there's other -- you know, other behaviour that makes sense as to how they would have ended up in the bathroom and did what they did. I would say not only do you have -- you have -- you have the fact that they didn't know each other. You also have a lot of drinking go on. By this accused's admission he was drunk. The complainant was drunk. He knew she had been drinking. The Crown submits that it's incumbent on him to take reasonable steps to ensure that consent is obtained. That's the other important argument the Crown will be making in this case. So it's not just that they knew each oth -- THE COURT: You're saying that it -- that it -- a drunk man has a higher standard, or the fact that he knew she was drunk places a higher standard on him? MS. MOGRABEE: He doesn't know her and she's drunk. THE COURT: So he had -- MS. MOGRABEE: Therefore, he must take reasonable steps. THE COURT: He must be doubly careful. MS. MOGRABEE: Pardon me?	AR 325/13-326/27

	THE COURT: He must be doubly careful? MS. MOGRABEE: Yes, he better be careful. THE COURT: She knew she was drunk? MS. MOGRABEE: Well, he said she did. THE COURT: She knew she was drunk. MS. MOGRABEE: He-- he -- THE COURT: Is not an onus on her to be more careful? MS. MOGRABEE: No, the onus is not on her. The onus is on him to ensure that she consents, not that she says she doesn't consent. THE COURT: No, but to make it clear that she's not consenting. Is there no -- MS. MOGRABEE: There's no obligation in the law. In fact, the cases -- THE COURT: There's-- there's no -- there's no higher on -- there's -- there's not an equal onus on a drunk woman as on a drunk man? MS. MOGRABEE: No, there is not. In fact, the onus is more on him.	
17	MR. FLYNN: Very good, Sir, I won't re-harp on it, Sir. I am saying again, Sir, we take it from three perspectives, Sir, I'm actually almost done. We take it from three perspectives, Sir, as I started off. We suggest that this was a consensual sex act between two young people. If the Court does not consider that I would suggest that there's a -- a true air of reality as to my client having a mistaken belief that this woman was giving consent, particularly given the conduct of the young lady. The conduct of the yong lady during the sex act itself, the -- THE COURT: Well, at one -- on one -- at one point she seems to have demurred and that was when she asked him whether he had a condom. MR. FLYNN: Yes, Sir. THE COURT: What-- what were her words? Do you have a condom? That seems to indicate con -- qualified consent.	AR 350/12-26
18	THE COURT: Yes. I'm interested in the moment in -- in what happened around the question of his having a condom. Because asking him whether he has a condom indicates to me that there's some kind of consent, if only qualified.	AR 351/21-23
19	What we have are four witnesses and they were all unsavoury witnesses, in my view. Mike perhaps the most savoury, the least unsavoury, but certainly the complainant and the accused are amoral people.	AR 353/29-31
20	And yet it seems to -- it -- it has a ring of truth it's something she -- it's the kind of thing that young women will talk about, particularly if they're both interested in the same man. … On the other hand, as I said, it's seductive for me to -- to give credence to it because it -- it just has the ring of truth.	AR 359/31-33, 360/40-41
21	Well, she doesn't have to do any of these things. She doesn't have to say don't lock the door. She can take her chances. Foolishly she could do that. If she sees the door being locked, she's not a complete idiot, she knows what's coming next. In our law she doesn't have to say unlock the door I'm getting out. She can take her chances, perhaps in the hope of getting him into trouble. Who knows what (INDISCERNIBLE) would be in those circumstances.	AR 375/27-34
22	MS. MOGRABEE: If you -- all right. So if I follow you correctly you're saying, if you find as a fact that there was flirting prior to the incident in the washroom, is --	AR 376/19-40

	THE COURT: Yeah. MS. MOGRABEE: --that your question? Can you use that? THE COURT: And flirting on the dance floor. MS. MOGRABEE: Can you use that -- THE COURT: As part of the -- MS. MOGRABEE: -- to find that she was likely to have consented when that door in the bathroom was closed, is that your question? THE COURT: And the fact that she didn't complain about the door being closed, the fact that she -- the other two people walked out, that she must have realized that something was coming down the track. Does that play into the final consent? Obviously she can change her mind, she can say -- or she can say this – she can show it was an incorrect signal. But those are signals, do I ignore them?	
23	MS. MOGRABEE: -- then consider it in its totality. But when you're looking at consent it doesn't follow that she was flirting, therefore she was likely to have consented in that washroom. THE COURT: And-- MS. MOGRABEE: Because that's what we're talking about here isn't it? I mean we're talking -- THE COURT: Well – MS. MOGRABEE: -- about that conduct prior to that moment in time when they were in the washroom. THE COURT: --it makes it less unlikely that she's -- that she would say, no.	AR 378/37-379/11
24	MS. MOGRABEE: They do match up in the sense that he says he -- there was a conversation about a condom, he's -- THE COURT: Doesn't it indicate that up until that point it was consensual? MS. MOGRABEE: No-- THE COURT: Why not? MS. MOGRABEE: --I don't concede -- THE COURT: How do I -- how do I -- MS. MOGRABEE: --I don't concede that it was -- THE COURT: -- how do I escape that conclusion, Ms. Mograbee? MS. MOGRABEE: Well because when that door closes she's very clear in saying to him, I'm not interested in you. She doesn't use those words. She said, I like you as a friend -- THE COURT: Well, that's what she says. MS. MOGRABEE: Yes. THE COURT: But her conduct even on her version doesn't endorse that version. She -- MS. MOGRABEE: How so? THE COURT: --well she allows him to kiss her. She -- MS. MOGRABEE: She-- she says that that never happened. THE COURT: Well, somehow or another it got to the point that he -- she says to him, you can do it, but you've got to have a condom. And I'm putting it the other way around. MS. MOGRABEE: Okay, but well -- THE COURT: Now, that indicates to me that she's willing to do it on certain conditions. MS. MOGRABEE: She said you can't without a condom.	AR 390/21-392/29

	THE COURT: Yeah, she's willing to do it though, if there's a condom. MS. MOGRABEE: I don't think that you can conclude that if she says you can't without a condom. THE COURT: How-- how do I -- how do I -- MS. MOGRABEE: Well, he didn't have a condom so -- THE COURT: If he -- let's assume he said I have a condom, then everything would have been all right. MS. MOGRABEE: I don't know what the evidence would have been and we can't speculate. THE COURT: All right. No, but you can, it's -- it's an either or situation. She's saying do you have a condom? That it's an inescapable conclusion is if you have one I'm happy to have sex with you. MS. MOGRABEE: Well, that's not what happened. You can only -- THE COURT: Yeah, well it is what happened. MS. MOGRABEE: --assess what happened and that -- THE COURT: What happened was she said, do you have a condom? That can I -- on what basis can I reach another conclusion that but that she would have had sex if he'd said, yes, I've got a condom, hold on, I'm going to tear the package open? MS. MOGRABEE: Well, with respect, Sir, I don't think that you can make that assessment when that's not the evidence. You have to ground any assessment -- THE COURT: Well-- MS. MOGRABEE: --in what the evidence is. THE COURT: -- what else would she -- if she had said, please, Ms. Mograbee, we're grown ups here. If -- if he had said, yes, I've got one or I'll go next door and fetch one, is it plausible, is there any prospect that she'd have said, well I've changed my mind in the last nano second?	
25	THE COURT: Well, the recent complaint doctrine was that you -- and it was followed by every civilized legal system in the world for thousands of years, was that as soon as you can you should complain to somebody in authority or somebody close to your family. It had its reasons. At the moment it's not the law. It does go so far -- the recent complainant, as I understand it, didn't include the proposition that -- that you -- that the complainant didn't have to indicate no in some way. Now that's a different rule. MS. MOGRABEE: That's a different rule. I'm just saying that, you know, it -- it follows that -- that antiquated way of thinking has been set by the wayside, for a reason. It's the same thinking – THE COURT: I hope you don't live too long, Ms. Mograbee.	AR 394/35-395/6
26	THE COURT: Well-- MS. MOGRABEE: There are many -- THE COURT: --do I -- do I test her fear? It's easy for her to say it, but are there any -- any reasons for it and are there -- did she show any signs of it? And did she do anything about it? Or do I look at those and say, listen, you say you're frightened but I just don't see -- see that it's true. If you were -- MS. MOGRABEE: Well, you can find -- THE COURT: --frightened you could have screamed.	AR 396/18-29
27	MS. MOGRABEE: Well, when she told through -- throughout her evidence that she felt horrible during the -- the sexual touching, that she was in pain. She was in pain because --	AR 407/24-30

	THE COURT: No, this pain, you know, but that sex and pain sometimes go together, that -- that's not necessarily a bad thing. I -- I'll grant you that -- that the implication from her was that she wasn't enjoying the pain, I'll grant you that.	
28	THE COURT: I know, Ms. Mograbee, you -- I -- I saw you concentrating on that. But that is very much the may -- the way of the maid and the white, to quote Houseman, men do react to challenges and women give challenges. The -- the there's nothing necessarily malign in that. MS. MOGRABEE: Well, it is when you -- THE COURT: Sex is very often a challenge. MS. MOGRABEE: It is when you're considering the context of what she says unfolded. It is all relevant to that assessment. If you accept his evidence on that point then you must consider how the sexual assault unfolds. THE COURT: Well, the challenge -- he can -- he can acquit himself of the challenge by force or by trump, sweet talking her. The -- the challenge doesn't necessarily lead to force.	AR 411/27-412/1
29	Is there not a possibility that a very unhappy thing happened here. Two young people made love, and somebody came afterwards and poisoned the girl's mind. And the young man would happily have continued with the relationship and the young woman wanted that. But in the way that these things do work, she was told that he had gone straight off and made love to somebody else and that he'd said ugly things about her and her mind was poisoned and what could have been a promising happy relationship, just never took place. Instead of which she reacted. Is there not a possibility that that happened?	AR 414/11-18
30	And I don't expect you to concentrate the whole time, but I want you to listen very carefully to what I'm saying right at the beginning. The law and the way that people approach sexual activity has changed in the last 30 years. I want you to tell your friends, your male friends, that they have to be far more gentle with women. They have to be far more patient. And they have to be very careful. To protect themselves, they have to be very careful. The law in Canada today is that you have to be very sure before you engage in any form of sexual activity with a woman. Not just sex, not just oral sex, not even just touching a personal part of a girl's body, but just touching at all. You've got to be very sure that the girl wants you to do it. Please tell your friends that so that they don't upset women and so that they don't get into trouble. We're far more protective of women -- young women and older women -- than we used to be and that's the way it should be. So after this, I'm going to be talking in more technical terms, but that's the message I want you to take away and tell your friends. And, of course, it's far more difficult if you're high or if you're drunk and if she's high and drunk. You've got to be really sure that she's saying yes. Her keeping quiet isn't enough. That's not necessarily a sign of saying yes. So remind yourself every time that you get involved with a girl from now on and tell your friends. Okay?	ARD F3/19-38
31	Certainly the complainant and the accused's morality, their sense of values, leaves a lot to be desired.	ARD F7/29-30
32	And this is now yet another version. I also pause to make the point that one version is that she's unequivocally against having sex. It can't live with the version that she doesn't want sex unless there's a condom involved. I understand that one	ARD F12/9-14

	can say, I don't want sex without a condom, and then, if the man insists, that is unwanted sex. My point is a different one. That her evidence sometimes is that she didn't want sex at all. And then it changes to she was prepared to have sex as long as there was a condom.	
33	I pause here to make the point that although the Crown established what was quite clear, that the accused is much bigger than the complainant, there's no talk of real force here. There's no talk of fear. That doesn't mean that there's consent. It just means that the accused (sic) hasn't explained why she allowed the sex to happen if she didn't want it. She certainly wasn't frightened, and as appears later in the evidence, she was quite capable of asserting herself with other men when they did things she didn't like.	ARD F13/6-11
34	Sounds like a very ineffectual attempt at a push.	ARD F19/36
35	I cannot discard the fact that she only really seemed to get angry when the brother humiliated her, and she seemed far more upset about that and reacted to that, whereas it doesn't seem that she reacted at all after the accused had had, on her version, unwanted sex with her.	ARD F27/8-11
36	Trial Judge's reference to the Complainant as "the accused"	AR 348/26-29, 360/6, 360/21, 380/2; ARD F8/5, F8/16, F9/20, F13/9, F18/41, F19/6, F22/41, F26/29, F27/34