In the Court of Appeal of Alberta

Citation: R v SAR, 2026 ABCA 359

Date: 20261110
Docket: 2501-0253A
Registry: Calgary

Between:

His Majesty the King

Respondent

- and -

SAR

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim or the witness must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Anne Kirker
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Justice M.H. Hollins
Convicted on the 5th day of March, 2025
(Docket: 231089723Q2)

Memorandum of Judgment

The Court:

I. Overview

[1] The appellant appeals his convictions on two historical sexual assaults. The first conviction, subject to the procedural clarification below, was that in August 2009, he sexually assaulted CP, his partner's sister, contrary to s 271 of the *Criminal Code*, RSC 1985, c C-46. The second conviction was that in August or September 2015, he sexually assaulted SR, his cousin, also contrary to s 271 of the *Code*.

[2] The appeals of these separate incidents have been addressed by both the appellant and the Crown together, following generally the order of trial evidence. It is convenient that we address these appeals separately, as they rest on separate facts, separate grounds of appeal, separate standards of review, and separate analyses. We address the CP August 2009 conviction first, and then the SR 2015 conviction.

[3] For the reasons below, the appeal on the CP August 2009 conviction is dismissed; the appeal on the SR 2015 conviction is dismissed.

II. Error in Counts

[4] The indictment on the alleged sexual assaults of SR and CP reads:

> (1) That he, between the 1st day of January, 2015, and the 31st day of December, 2015, both dates inclusive, at or near Calgary, Alberta, did unlawfully commit a sexual assault upon [SR], contrary to section 271 of the Criminal Code of Canada.
>
> (2) That he, between the 1st day of August, 2009, and the 31st day of August, 2009, both dates inclusive, at or near Calgary, Alberta, did unlawfully commit a sexual assault upon [CP], contrary to section 271 of the Criminal Code of Canada.
>
> (3) That he, between the 1st day of September, 2009, and the 1st day of September, 2010, both dates inclusive, at or near Calgary, Alberta, did unlawfully commit a sexual assault upon [CP], contrary to section 271 of the Criminal Code of Canada.

[5] The trial judge's reasons as a whole are clear that she found the CP August 2009 allegation proven beyond a reasonable doubt, and the CP September 2009 allegation not proven beyond a reasonable doubt. She also found the SR 2015 allegation proven beyond a reasonable doubt.

[6] However, in her opening comments, the trial judge confused the numbering of the counts:

> [SAR] is charged with three counts of sexual assault. The first two counts relate to C. P. … The first alleged assault occurred in August of 2009….
> The second count also involves C. P. but allegedly occurred some months later.
> The third count involves a different person, S. R. … in 2015.

[7] The trial judge's concluding convictions reflect this error in the counts: "[SAR], for the reasons given, I find you guilty on counts one [the SR 2015 allegation] and three [the CP September 2009 allegation] of the indictment and not guilty on count two [the CP August 2009 allegation] of the indictment." This would have been correct if the indictment had listed the counts in chronological order, but as set out above, it did not; rather, it listed the SR 2015 allegation first and then the two 2009 allegations.

[8] The parties agree this was a "slip" which counsel say caused no prejudice to the appellant nor was he in any way misled. This error is rectified by consent amendment to the indictment under ss 601(7) and 683(1)(g) of the *Code* such that the trial judge's convictions, which are on the SR 2015 and CP August 2009 counts, and the acquittal, which is on the CP September or later 2009 count, align with the indictment.

III. CP August 2009 incident

a) Decision of the Trial Judge

[9] The trial judge began her oral reasons for decision by setting out the elements of sexual assault and the test in ***R v W (D)***, [1991] 1 SCR 742, 758, 63 CCC (3d) 397, and ***R v Ryon***, 2019 ABCA 36, paras 29-32, 371 CCC (3d) 225.

[10] The trial judge found the appellant was in a common law relationship with CP's sister at the time of the allegation in August 2009. She also noted that some aspects of CP's testimony and the appellant's testimony were consistent. Both testified that on the weekend of the incident, CP was visiting for her grandmother's funeral and stayed with her sister and the appellant, sleeping on the couch. They both also testified that the sexual activity occurred early in the morning; CP was wearing a spaghetti strap tank top; and nothing was said about the sexual activity before or after it occurred.

[11] Summarizing CP's evidence, the trial judge noted CP said she was awakened by someone tugging on the strap of her tank top sometime between 4 and 6 am. She rolled over to see the appellant's erection, visible through his basketball shorts. He climbed on top of her and penetrated her vagina with his penis. She testified she put her fists in front of her face, and turned her head to the side. Nothing was said between the parties, and CP said the assault lasted about five minutes. She said she did not consent to this sexual activity.

[12] Additionally, CP said she remembered seeing a camera sitting on a chair facing her with a hand near the camera, although she could not see a person.

[13] With respect to the appellant's evidence, the trial judge noted that he testified he woke up at about 5:45 am to get ready for work. He said he was checking his computer in the living room, when he heard CP wake up and say, "Good morning". He said he turned around and saw her arms outstretched above her head, exposing one breast, while she smiled provocatively at him. The appellant took this as an invitation, crossed the room, grabbed her breast and kissed her neck. While he was doing this, the appellant said CP removed her pyjama bottoms, so he removed his clothes as well. He said the only discussion was briefly about whether CP was on birth control. They had "passionate, mutually consensual sex for approximately 20 to 30 minutes", and then he left for work. When questioned about sleeping with his partner's sister, the appellant indicated they had an open relationship, with no restrictions, "so it was fine".

[14] The trial judge found that after the August 2009 incident, CP began drinking heavily, smoked "a lot of pot", and about a month later moved in with the appellant and her sister as previously planned, living with them until 2012. Because of "complicated family dynamics", the trial judge found it "understandable that C.P. remained somewhat embedded in [the appellant's] family after her experience with the accused". CP first disclosed the sexual assault to the appellant's father in July 2022 and then reported the matter to police.

[15] The trial judge said the most significant issue with CP's evidence was her recollection of the camera and a hand near the camera. The trial judge said the only other person living in the house at the time was CP's sister. The trial judge found "her sister was not present in the room during the sexual activity", and therefore CP "believing that she had seen a hand in her peripheral vision that morning is implausible". The trial judge did not consider the observation of a camera itself to be so remarkable, particularly as the appellant had acknowledged that cameras "might have been laying out that week because of the grandmother's funeral".

[16] The trial judge found the appellant's description of what occurred did "not ring true", because the affirmative consent relied on by the appellant was CP lifting her hips and removing her bottoms and "nothing was said or admitted by C.P. in cross-examination to give any indication that, with no discussion and no warning, being awakened from sleep very early in the morning, she would immediately initiate sex with her effective brother-in-law". The trial judge noted that while the appellant characterized his open relationship with CP's sister as having "no restrictions", he also conceded that they "had never specifically discussed sexual activity with family members".

[17] The trial judge continued:

> [T]here is no evidence whatsoever that CP believed her sister – with whom she already had a fragile relationship – would be unbothered by her sister having sex with her spouse. It is simply not plausible that the two of them with no discussion of the possible implications, would spontaneously engage in consensual,

> passionate, and intimate sexual activity for 30 minutes, sit up and discuss pizza for dinner, and then never speak of this again, not even to revisit whether they should or should not repeat their passionate interaction.

She found the appellant's testimony "was inconsistent on the possible fall-out", as he said the interaction was "just sex" or "one-time fun", but also "expressed concern that C.P. might see it as something more, notwithstanding they never spoke of it" and "testified he was not going to do it again because it was 'his partner's sister'". The trial judge reasoned:

> Most implausibly, he never attempted to clarify any of this with C. P. Even if the sex had been consensual, his own concern about her interpretation of it sounds like it would have merited a conversation with C. P., given that she was the accused's 19-year-old effective sister-in-law.

[18] Finally, the trial judge found the appellant's testimony about how old CP's sister was when she moved in with him did "not make sense". The appellant said CP's sister was 16 at that time; he "was adamant that he would not have allowed her to move in until she was 16 because he thought that was the legal age". But the evidence of his friend and roommate was that CP's sister moved in in 2001, when she would only have been 14 years old. Likewise, CP "said that she visited their house when she was in grade 6 which makes it unlikely that her sister, only two years older, was 16." The trial judge concluded on this point:

> When cross-examined on these discrepancies, the accused was very defensive and seemed determine[d] to leave the impression that he was not the type of person that would have a relationship with a minor, even though that had nothing to do with any of these charges.

[19] The trial judge concluded the appellant had sex with CP in August 2009 without her consent.

b) Grounds of Appeal

[20] On the CP August 2009 incident, the appellant says the trial judge erred:

(a) in her application of the burden of proof and the presumption of innocence; and
(b) in finding his testimony in response to CP's allegations did not "ring true" and was "implausible", relying on assumed expectations about how consenting partners behave.

c) Standard of Review

[21] To evaluate an allegation that a trial judge erred in relying on a common-sense assumption, a reviewing court must first consider whether what is being impugned is in fact an assumption or

if it is actually a particular finding based on the evidence. If "the trial judge did, in fact, rely on an assumption that is beyond what common sense and the judicial function support", the appeal court must identify the applicable standard of review. If no recognized error of law is involved, the standard of review is palpable and overriding error. Ordinary assumptions or generalizations are of a different character than myths and stereotypes about sexual assault complainants and should be evaluated for palpable and overriding error. Erroneous reliance on an assumption is palpable if it is "plainly seen" or "obvious", and overriding if it is "shown to have affected the result" or "goes to the very core of the outcome of the case". If it cannot be shown that the error was palpable and overriding, a trial judge's assessment of credibility or reliability will be entitled to deference: ***R v Kruk***, 2024 SCC 7, paras 52, 93-98.

d) Analysis

[22] The appellant says the trial judge reversed the burden of proof and the presumption of innocence when she simply rejected his evidence that CP indicated her consent by kissing him, lifting her hips, and taking off her pyjama bottoms, even though CP testified she did not remember how they were removed. The trial judge simply said his version "did not happen". He says the trial judge conducted no analysis of CP's reliability and credibility, except when she found, contrary to CP's evidence, that it was implausible she had seen a hand on the camera in her peripheral vision.

[23] The appellant says his conviction rests on his failing to overcome an assumed narrative. He says this is a failure to engage with the second and third elements of ***W(D)***: if you reject the evidence of the accused, but you are left in reasonable doubt by it, you must acquit; and even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[24] The appellant also says the trial judge erred by relying on assumptions and generalizations about how consenting partners behave which were not grounded in the evidence. She did not find it believable that if CP was awakened from sleep early in the morning, she would initiate sex with the appellant. She said it was not plausible they would engage in consensual, passionate, and intimate sexual activity for 30 minutes and then "sit up, discuss pizza for dinner, and then never speak of this again". She said this "would have merited a conversation with CP" or "warranted some discussion before and afterwards".

[25] Additionally, the trial judge said there was an absence of evidence from CP that her sister "would be unbothered by her ... having sex with her spouse". She said it would have been reasonable for the appellant and CP to "revisit whether they should or should not repeat their passionate interaction".

[26] The appellant says that while trial judges may make common sense findings, they are not permitted to engage in such sweeping generalizations about human conduct or to apply stereotypes about how relationships unfold: ***R v PP***, 2025 ONCA 243, para 11.

[27] The Crown replies that to assess credibility "triers of fact may rely on reason and common sense, life experience and logic". And "reasoning about how people *generally tend* to behave and how things *tend* to happen, is not only permissible, it is often a necessary component of a complete testimonial assessment": ***Kruk***, paras 71-75; ***R v Delmas***, 2020 ABCA 152, para 31, 64 CR (7th) 71, aff'd 2020 SCC 39, para 1, [2020] 3 SCR 780; ***R v Abreha***, 2026 ABCA 169, para 56.

[28] The Crown says the trial judge did not reverse the burden of proof. It says she clearly disbelieved the appellant and, when considering all the evidence, found the Crown had proven its case beyond a reasonable doubt. The trial judge made necessary findings of fact and rejected the appellant's evidence about why he and CP never talked about the sexual encounter. It says her comments about the parties' behavior were grounded "in the very point of the appellant's testimony": ***R v Ramsey Morris***, 2026 BCCA 164, para 86.

[29] The Crown says the trial judge considered the frailties of CP's evidence as well, and explained why, except for the improbability of seeing a hand on the camera, she nonetheless accepted her evidence on the central issue, which was whether she consented to sexual intercourse with the appellant.

[30] The difference between a trial judge improperly relying on assumed expectations, myths or stereotypes not grounded in the evidence, or simply making common sense findings based on the evidence and reasonable life experience and knowledge about how people generally tend to behave was fully canvassed in ***Kruk***.

[31] The Court explicitly addressed, para 1, "the standard for appellate intervention with respect to a trial judge's credibility and reliability findings in a criminal trial and the appropriate role of common sense when assessing the evidence of witnesses". It specifically rejected, paras 2, 27, 28, 45, 48, 75, 79, 92, a general rule against ungrounded common-sense assumptions. Unless disclosing a recognized error of law, a trial judge's use of common sense will only be subject to appellate review for palpable and overriding error, paras 3, 67, 82, 90, 91.

[32] An appellate court should be deferential, resist "overly invasive appellate review", paras 70, 79, 86, 99, and should respect "the life experience a trial judge brings to their task, which, in turn, informs the common-sense inferences they draw from what they see before them", paras 71-74, 78. Such common-sense assumptions "reasonably underlie *all* credibility and reliability assumptions", the "most important judicial determination in a criminal trial" [emphasis in original], paras 81-84.

[33] Trial judges are required to make findings of credibility and reliability on an "evidence-based and context-specific assessment" of a witness's testimony, clearly articulate the basis for their assessments, and identify "a nexus to the facts of the case", para 85.

[34] As indicated, appellate courts are instructed to first consider "whether what is being impugned is, in fact, an assumption", determine the appropriate standard of review, and absent a

recognized error of law, determine whether an erroneous assumption is palpable, plain, and obvious, and overriding in that it clearly affected the result, paras 94-99.

[35] Here, the trial judge's comments above were founded in the evidence before her, and not on ungrounded assumptions. They were common-sense, context-specific assessments of the appellant's credibility and reliability. They do not reflect any errors of law, nor are they palpable and overriding errors. These inferences, based upon human understanding and behaviour, invite deference.

[36] Likewise, the trial judge did not, in coming to her conclusions, reverse the burden of proof and presumption of innocence, or misapply the elements of ***W(D)***.

[37] We do not find any reviewable error in the CP August 2009 conviction.

IV. SR 2015 Incident

a) Decision of the Trial Judge

[38] The trial judge's decisions on credibility and reliability in the SR 2015 incident turned largely on her acceptance of the evidence of the appellant's then-fiancée, MR, and the determination that there was no conflict between MR's evidence and the evidence of the other witness called by the defence, the appellant's friend and roommate. The trial judge found in August or September 2015, the appellant and MR went out to a nightclub on VIP passes given to them by the roommate. The appellant spent most of his evening with a transgender woman, from whom he received oral sex in a back room of the club while MR was present.

[39] The woman, the appellant, and MR all left the club together in a taxi. There was conflicting evidence about MR's feelings: the appellant said MR was very angry about the incident with the woman because she was transgender; MR said she was only mildly upset because, as MR said, "these had always been the rules" of her relationship with the appellant.

[40] The trial judge noted MR's evidence that when the appellant and MR arrived home, MR heard the roommate's CPAP machine operating in his room, and she assumed he was asleep. After smoking some marijuana in the garage, the appellant insisted they go downstairs to see if SR was awake. SR was not awake and the appellant sat on her bed, removed her bottoms, and performed oral sex on her. MR testified that the appellant then said: "and now it's your turn". MR protested but decided she did not have a choice and performed oral sex on SR for about a minute. She said the entire incident was only a few minutes long. SR remained asleep throughout.

[41] SR did not testify at the trial. The trial judge found MR's "memory and description of a sexual assault were clear and vivid, including SR's clothing, her body position, and her lack of conscious response". MR said she could see the sexual activity clearly and described it in detail.

[42] The appellant said when they arrived home, MR was still mad at him, and she just went to bed. He said he went upstairs to change, and the roommate was waiting for him. He said he and the roommate stayed up playing video games for a few hours.

[43] The roommate's evidence was that he was in his room when the appellant and MR arrived home, with a bedroom fan on, and he came out within a few minutes of their arrival. He said he was not focused on what the appellant and MR were doing as he was getting everything ready for video game playing, snacking, and leisure time. The roommate said he was "busy getting ice and drinks and snacks and setting up the video game". The trial judge found the roommate did recall seeing MR but was not focused on her. She said the roommate did remember seeing the appellant go upstairs to change at some time, but perhaps five minutes after the appellant and MR arrived and before he and the appellant began playing video games. The roommate said he did not know whether the appellant and MR went downstairs at any point, but admitted that was possible.

[44] The trial judge accepted that the alleged assault on SR took less than five minutes and that the roommate's evidence did not contradict SR's evidence that she and the appellant went downstairs first, and she went to bed thereafter.

[45] The trial judge found MR and the appellant broke up within a few months, called off their engagement, and MR moved out of the shared premises in December 2015. MR went to the police in 2016 but said nothing was done. She said after she saw CP's Facebook post in 2022, she returned to repeat her allegations.

[46] The trial judge found MR was a co-perpetrator of the sexual assault. The Crown drew an analogy to her evidence being a statement against interest and said MR's statement was more likely to be reliable since she had no reason to concoct or falsify a story that implicated her. The Crown also noted MR was charged for her part in the offence and had not been offered any promises in exchange for her testimony. The trial judge agreed this enhanced the credibility of her testimony. The charges against MR were stayed shortly after the appellant's trial.

b) Grounds of Appeal

[47] The appellant says the trial judge erred in law in:

(a) materially misapprehending the evidence, such that the verdict was unreasonable or arrived at through a miscarriage of justice; and
(b) characterizing MR's testimony as a statement against interest that enhanced her credibility.

c) Standard of Review

[48] An appellate court will only intervene if a misapprehension of evidence goes to the substance of the evidence and not a peripheral detail, it is material to the trial judge's reasoning,

and the error played an essential part in the reasoning process resulting in the conviction: ***R v Lohrer***, 2004 SCC 80, para 2, [2004] 3 SCR 732; ***R v Sinclair***, 2011 SCC 40, para 56, [2011] 3 SCR 3; ***R v Berg***, 2025 SKCA 85, para 21, aff'd 2026 SCC 21, para 1; ***R v Morrissey*** [1995], 97 CCC (3d) 193, 221, 22 OR (3d) 514.

[49] It is an error of law to make a finding of fact with no evidence: ***Schuldt v The Queen***, [1985] 2 SCR 592, 604, 24 DLR (4th) 453; ***R v JMH***, 2011 SCC 45, para 25, [2011] 3 SCR 197, ***Kruk***, para 96.

d) Analysis

[50] The appellant says the trial judge materially misapprehended the critical evidence of MR. MR said when she and the appellant got home, they walked through the house to the garage, where they "smoked a little bit of marihuana and the combination of [alcohol and marijuana] makes [her] very, very tired so [she] wanted to go upstairs to go to bed". She said that despite this, the appellant insisted they go downstairs together, where the sexual assault then occurred. The appellant says that contradicts the roommate's evidence as to the timing of events after the appellant and MR arrived home. The roommate said he was in his room when the appellant and MR arrived home, and he then left his room and started setting up the snacks and video games. The roommate said it was only about five minutes after the appellant arrived home that he saw the appellant go upstairs and then come back down to play video games with him.

[51] The trial judge found the roommate's evidence did not contradict MR's evidence. However, the appellant argues the trial judge misapprehended MR's evidence by failing to account for her statement that she and the appellant went to the garage immediately after arriving home. The appellant says that did not leave sufficient time for the alleged sexual assault to have occurred.

[52] There was no misapprehension of MR's evidence. The issue that arose from the appellant's evidence was whether MR "just went to bed" when they got home. It is evident the trial judge considered the roommate's evidence in deciding that was not the case. In deciding whether to accept MR's evidence about the sexual assault occurring before she went to bed, the trial judge considered and accepted what MR said about it taking only a few minutes. She also considered the roommate's evidence and found he was not focused on the actions of the appellant and MR after he came out of his room but was busy getting snacks and preparing to play video games. She found it was reasonable in the circumstances that he could not account for every minute of the appellant and MR's actions. She noted that when the roommate was asked if it was possible that the appellant and MR went downstairs at any point, he said "Yeah. No. I don't know," and admitted it was possible. It was important that the trial judge found the roommate was in his room when the appellant and MR first came home, as both MR and the roommate testified, not on the couch, as was the evidence of the appellant. Whether or not the roommate had his CPAP machine on, the fan that he used every night was loud and could be heard outside the room. It is not surprising that the trial judge did not mention MR's evidence about going to the garage before going downstairs as it was not raised in closing argument by either side and appears to have been considered a

peripheral detail by all present. This does not amount to a misapprehension of evidence on the part of the trial judge.

[53] The appellant says it was an error for the trial judge even to consider the issue of whether to treat the roommate's "evidence as suspicious" because of his past criminal convictions, even though the trial judge ultimately concluded there was no reason to treat the evidence as such. Similarly, the appellant criticizes the trial judge referring to MR's inadmissible testimony that SR asked her, "did last night really happen", to which MR said "yes. It won't happen again". But the trial judge noted those comments were hearsay, and there was "no discernible purpose for which this evidence could be used other than for the truth of its contents, other than perhaps as an additional confession by M.R. to her role".

[54] The appellant also says the trial judge was wrong in finding that MR's credibility was enhanced because the reporting of the sexual assault to the police "was a statement against interest". What the trial judge said was: "the Crown drew an analogy to a statement against interest". The trial judge further said "her reporting of this to the police and her testimony in this courtroom implicate her in a crime. In my opinion, this enhances the credibility of her testimony".

[55] The trial judge never found the roommate to be a *Vetrovec* witness: ***Vetrovec v The Queen***, [1982] 1 SCR 811, 67 CCC (2d) 1. In fact, she found specifically that he was not. Likewise, the trial judge did not rely on SR's hearsay statement and concluded: "all of this is to say that that evidence was of limited value in my opinion". The trial judge never said the statement was an evidentiary exception to the hearsay rule.

[56] Likewise, the trial judge did not find MR to be a *Vetrovec* witness since she had admitted committing the offence herself. The note that her statement was against interest was only reflecting an analogy that had been put to the trial judge by the Crown.

[57] The appellant says the trial judge was wrong to say that implicating herself in a crime "enhances the credibility of [MR's] testimony", but this aspect of the trial judge's reasoning was neither reliance on evidence of a prior consistent statement, nor "oath helping". It is simply one part of her evaluation of credibility. Even if it had been a prior consistent statement, it is an exception to the rule that a trial judge may use those statements to assess the credibility of a witness where there is an allegation of recent fabrication, as there was here: ***R v Stirling***, 2008 SCC 10, paras 5-7, 10-12, [2008] 1 SCR 272; ***R v TWS***, 2020 ABCA 157, paras 40-44; ***R v Dodgson***, 2024 ABCA 289, paras 45, 46.

[58] The decision of the trial judge on the SR 2015 incident was based fundamentally on her assessments of credibility and reliability. The trial judge made no errors of principle or law. This Court owes deference to her determinations on credibility and reliability and will not interfere with those determinations absent an error of law.

V. Conclusion

[59] The appeal on the CP August 2009 conviction is dismissed. The appeal on the SR 2015 conviction is dismissed.

Appeal heard on September 10, 2026

Memorandum filed at Calgary, Alberta
this 10th day of November, 2026

Feehan J.A.

Kirker J.A.

Grosse J.A.

Appearances:

I. Kuklicz
for the Respondent

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for the Appellant