WARNING

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

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

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and

the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. JC, 2021 ONCA 131

DATE: 20210303

DOCKET: C67587

Juriansz, Tulloch and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

JC

Appellant

Christopher Rudnicki, for the appellant

Lisa Joyal, for the respondent

Heard: January 15, 2021 by video conference

On appeal from the conviction entered by Justice Michael G. Quigley of the Superior Court of Justice on September 20, 2018, with reasons reported at 2018 ONSC 5547.

Paciocco J.A.:

OVERVIEW

[1] The appellant, JC, was acquitted after a trial by judge alone of sexual assault and voyeurism charges. Those charges arose from a sexually explicit video recording that JC made of the complainant, HD. The Crown theory was that at the time the video recording was made, HD was incapable of consenting either to the video recording or the sexual activity that occurred. The trial judge was left with a reasonable doubt about HD's incapacity, and acquitted JC of both these charges.

[2] However, the trial judge found JC guilty of sexual assault and extortion, based on his finding that after making the video recording, HD engaged in unwanted sex with JC on several occasions. He accepted HD's testimony that JC had threatened to post the video recording on the internet if she did not continue her sexual relationship with him. The trial judge found HD to be credible on these allegations and did not accept JC's testimony that he never made the threat that HD alleged. The extortion charge was stayed pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729.

[3] JC appeals his sexual assault conviction and the finding that he was guilty of extortion. He submits that the trial judge made two errors.

[4] The first alleged error is that the trial judge impermissibly used stereotype to reject JC's testimony about his practice of expressly seeking HD's consent before engaging in specific sexual acts with her. The trial judge said that JC's testimony about this was "too perfect, too mechanical, too rehearsed, and too politically correct to be believed".

[5] The second alleged error relates to the trial judge's rejection of JC's claim that HD concocted the allegations against JC to conceal her "cheating" with JC from her boyfriend. JC submits that the trial judge erred in finding that, in advancing this claim, JC was relying on a stereotype, when the inference that HD had a motive to mislead was in fact grounded in the evidence. JC also attacks other reasoning the trial judge relied upon to reject JC's suggestion that HD was motivated to make false sexual assault allegations against him in order to preserve her relationship with her boyfriend.

[6] The Crown does not actively resist JC's claim that the first error occurred. It argues, however, that when the trial judge's reasons are reviewed as a whole, any such error was not material, or was harmless and occasioned no miscarriage of

justice. The Crown denies that the second alleged error occurred and defends the trial judge's reasoning.

[7] I would allow JC's appeal. With respect to the first alleged error, the trial judge's improper reliance on stereotype had a material effect on his rejection of JC's evidence about securing HD's consent. This finding, in turn, played an important role in the trial judge's overall evaluation of JC's credibility. This error cannot be treated as harmless or as not occasioning a miscarriage of justice in what was a pure credibility case.

[8] I would also find that the trial judge committed the second alleged error by incorrectly characterizing JC's motive theory as based on stereotype, and by relying on stereotype and the willingness of HD to endure a criminal trial in rejecting JC's motive theory.

[9] Because of these errors, I would set aside the convictions and order a new trial.

THE MATERIAL EVIDENCE

[10] The appellant, JC, and the complainant, HD, met in 2014 when he was 28 and she was 19. They became friends. They would periodically get together at JC's apartment, discuss music, and smoke marijuana. Although neither JC nor HD considered themselves to be in a boyfriend/girlfriend relationship, it was common for them to have sex during these visits.

[11] In the fall of 2014, HD began a relationship with another man. The trial judge found that at this point, JC and HD ceased having casual sex, notwithstanding that JC wanted the sexual relationship with HD to continue. He also found that JC "persistently pursued her in his text messages".

[12] In late 2014, HD contacted JC. HD testified that she did not do so for the purpose of resuming their sexual relationship, but because she believed JC could help her to find work in the entertainment industry.

[13] HD, who testified that she has memory problems which she attributes to her mental health and partially to alcohol use and her addictions to cocaine and ketamine, was uncertain about when she reconnected with JC. As the following summary of her evidence shows, at times her evidence altered as it unfolded, and she often expressed uncertainty or a lack of memory.

[14] What is known is that on January 22, 2015, HD went to JC's apartment to hang out. At trial, she said this was after she had broken up with her boyfriend, but

she had told the police that she believed she was still with him at the time. During that visit, using a “GoPro” camera, JC video recorded HD, in what the Crown aptly referred to as “extreme close-ups”, naked from the waist down, lying in a bed. In this short, 51-second video, HD is actively masturbating. On several occasions, JC prompts HD what to do and she complies. At times, JC can be seen touching her intimately with his hand. The video recording ends suddenly. JC testified that the battery in the camera died. No sexual intercourse is depicted but JC testified that they subsequently had vaginal intercourse.

[15] The Crown theory was that HD was intoxicated into incapacity when this event occurred. The sole direct evidence that HD had consumed an intoxicant was her testimony that she had smoked marijuana, consistent with her daily habit, in an amount that would not cause her to become intoxicated. She may also have had alcohol but was not intoxicated by it. At trial, HD retracted her preliminary inquiry testimony that she and JC had been drinking at a party prior to this event, saying that she had confused two different occasions.

[16] HD testified that she was not feeling drunk or impaired when she arrived at JC’s apartment. She said that she and JC never discussed having sex. She said that JC gave her a glass of water. She testified that as the evening progressed, she began to feel fuzzy and nauseous. She said that the last thing she remembered was talking to JC, she believes on the couch, and then she blacked out. She said she remembered waking up dizzy and disoriented, wearing only a shirt.

[17] Later in her testimony, despite her earlier evidence that she had blacked out after a conversation on the couch and awoke not wearing pants, HD testified that she remembered JC holding the camera when he began filming her. She also testified that she was aware that she was being filmed. In cross-examination, she testified that although she had no memories of the filmed event when she made her statement to the police or when she testified at the preliminary inquiry, she subsequently recovered memories of the events captured in the video. She also walked back her testimony that JC had given her a glass of water, saying that she had no memory of him doing so and believed, but was not sure, that she poured herself a glass of water from the tap.

[18] HD testified that after she woke up, JC played her a video recording of him sexually assaulting her. She was upset and scared. She testified that JC told her that he would put the video recording on the internet if she did not continue to have sex with him. She was not sure whether this conversation took place on the day that the video recording was made, or a few days later. While she said it was possible it happened the same day, she stated that it was “probably a few days later”. She said she “probably” asked him to delete the video recording. She said,

“I can’t recall exactly, but I likely protested”. In cross-examination, she confirmed that she only remembers one occasion on which the video recording was discussed but said that she probably asked for it to be deleted once or twice.

[19] She also testified that during their conversation about the video recording, JC told her she could not prove that she had not consented because she had not said “no” while being video recorded.

[20] HD testified that she ultimately made a police complaint, in circumstances I recount in more detail below. She told the police that the video recording depicted her and JC having intercourse, which it does not.

[21] HD testified that after the video recording was made, she received calls and texts from JC. He would ask her to come over but never mentioned the alleged sexual assaults or the video recording. She did not produce any of these messages to the police and none were placed into evidence. HD testified that she deleted them because she did not want the reminder.

[22] HD testified that she agreed to go to JC’s house because of her fear that he would share the video recording online. She said that, on approximately six to eight occasions, after going to his apartment, she had non-consensual sex with JC. This included incidents after she reunited with her boyfriend in the spring of 2015.

[23] In her evidence-in-chief, HD testified that she never initiated contact with JC after the video recording incident. However, in cross-examination, she agreed that sometimes she would reach out to him for marijuana, and that sex would then occur. She said she never wanted to have sex with him after the video recording was made. She testified that she also went out with him on a few occasions when sex did not occur, because she did not feel that she could refuse.

[24] HD testified that she did not recall whether she had ever tried to tell JC “no” when he asked her for sex after the video recording incident. During cross-examination, she said she believes she would have said “stop”, “no”, or that she did not want to have sex. When confronted with her evidence-in-chief, in which she had said that she had no memory of ever saying “no”, she said, “I was speaking about the incident with the video”. When asked again whether she ever said “no” or “stop”, she replied, “I didn’t say those things specifically, but I did protest after the creation of the video that I did not want to have sex with him”.

[25] HD also said in her evidence-in-chief that on a few separate occasions, JC arranged for her to have sex with his friends. She could remember only one occasion on which she had sex with one of his friends, but believed there were more such incidents. Although she did not recall what JC said to her, her

understanding was that if she declined these requests, the video would be posted online. In cross-examination, when asked if JC told her to have sex with his friends, she said, “He didn’t use those exact words, I don’t believe. … I don’t think it would have been that direct.” When it was put to her that JC had no idea that she was sleeping with his friends she replied, “I don’t think that is true”.

[26] HD testified that she last saw JC in June or July of 2015, she could not be sure. On July 30, 2015, she went to the police station and complained. She said this was approximately three weeks after she disclosed events with JC to her boyfriend. She explained, “I ended up telling my boyfriend sort of accidentally.” She described the circumstances. She was high on ketamine, she and her boyfriend were discussing issues in their relationship, and she was upset. There was a disagreement, but she testified that it was not a fight. She said she told him she had been assaulted. Defence counsel suggested that this led to an argument, but HD denied that it did. She said that it was “really unlikely” that they were arguing about this but given that she could not remember the entirety of the discussion, she said it was possible. During her testimony, she said her boyfriend “freaked out” and “was very upset and obviously distraught because of the situation.” She said, “He was upset with me and upset for himself, and sad” and “angry at the situation.” He wanted her to call the police and she did so several weeks later. She denied defence counsel’s suggestion, made in cross-examination, that she lied about events because she was afraid her boyfriend would leave her if he found out she was cheating on him.

[27] JC, who gave evidence on his own behalf, was the only other witness to testify. He described his friendship with HD, which he said was an ongoing sexual, but not exclusively sexual, relationship. He said that although he was not interested in a monogamous relationship, he had genuine and sincere feelings for HD. He testified to his belief that he felt much more strongly about her than she did about him. JC said that once HD started seeing her boyfriend in October 2014, they stopped seeing each other. He said that he reached out to her and was “a bit persistent” at first, sending her a few messages over a couple of weeks, but then stopped until she contacted him about employment in the end of November or early December.

[28] Although he agreed that there were points when “it just stopped, when it was not happening”, he did not think his relationship with HD was ever at an end, “there was just never consistency.” He described the period from October to November or December 2014 as “a break”. That break did bother him because he felt that he was entitled to closure if she was going to end their relationship, and communication had ended abruptly. He was not angry, but it affected him emotionally, leaving him sad.

[29] He testified that after she contacted him and asked about employment, HD brought a resume, and they smoked marijuana. He told her he missed her and made an advance and “she reciprocated” and they had sex. Contrary to HD’s recollection that her relationship with her boyfriend had ended by this point, he said she was still with her boyfriend at the time.

[30] JC said he had no contact with HD for another month after this incident, until mid-January 2015, when the video recording was made. He believes he would have invited her to his apartment to smoke marijuana. She agreed and arrived at the apartment sober, not showing any indicia of impairment. He denied putting anything in HD’s drink. JC said that after an hour or so of chatting and smoking marijuana they began consensual sexual activity. He was asked during his examination-in-chief if they had discussed sex or whether it just happened. JC said:

> Typically when I engage her, I’ll kiss her, and if she reciprocates and then, as we proceed, you know, I’ll ask her, you know, do you want foreplay or would you like to have sex type of thing.

[31] During cross-examination, JC was asked about the testimony he had given about what he “normally” does to secure consent from HD. He was not challenged on the routine he claimed, but he was asked how he knows what he did on this occasion. JC responded:

> Because I have consensual sex with my partners, and it’s very similar. Normally is a bad word. I guess I shouldn’t have used it, but what I meant is that when I engage someone, I’ll kiss them. If they reciprocate, and this isn’t someone, like I wouldn’t kiss someone I haven’t been with before, you know, to engage them. The first time that I sleep with someone, same with [HD], its something that we spoke about first.

[32] He said that he remembered the video recording event. After they kissed, he asked her if she wanted oral sex. She said “yes”, took her own pants off, and sat on his bed. He was performing oral sex on HD and he thought of his new camera. He asked her if he could turn it on, and she agreed. He said this had not been planned. He began filming with the camera, which he held in his hand using a “selfie stick”. The battery soon died. He threw the camera on the couch, and they continued their sexual activity. She ultimately put on her clothes and went home. He said there was no indication that she was intoxicated or inebriated.

[33] JC testified that he did not show her the video recording, and that it was not discussed. He said it would not have been possible to show her the video recording

until the battery in the camera was charged. He testified that he eventually transferred the video to a laptop that he had use of, owned by his friend, PY. JC said he used the laptop during his "gigs" as a "DJ". He labelled the file "[H]" and when he put it on the computer it was placed in a folder titled "[PY]".

[34] JC said that their casual consensual sexual relationship continued after the video recording was made. He testified that he never played the video for HD, but "probably a few weeks" after it was taken, he did comment that she "looked cute on camera". This prompted HD to ask JC to delete the video, because she was in a relationship. He told her "[he] was keeping it for [himself]" as it was "something essential" that he had "never done with somebody". He said, "I didn't refuse to delete it. I think I just explained why I wanted to keep it, and then it was left at that." He said in cross-examination that he kept it and watched it a few times.

[35] JC testified that the video recording was never mentioned again. He denied that he ever used the video recording to extort HD into having sex with him. He agreed with the Crown's suggestion, in cross-examination, that HD would have been embarrassed and ashamed if the video recording was put on the internet. He said it was wrong for him not to have deleted it.

[36] He said that for a short time in late April or early May 2015, HD was no longer with her boyfriend, and he and HD went out together and saw each other more frequently.

[37] When asked about their relationship, JC said that he respected HD and had genuine romantic feelings for her. He said she had similar feelings about him, although not at the same level. He found her attractive. He did not encourage her to have sex with others, as he wanted more of a commitment, although not a monogamous relationship. He said he had not been aware of HD having sex with his friends.

[38] In terms of the nature of their sexual relationship, JC testified that HD was always a responsive partner and never said "no" or "stop". When asked about HD's willingness to engage in sex after the creation of the video recording, he again relied on his usual practice to support his response:

> I believe it was consensual, for one, because before we proceed I generally ask her what she wants to do, and if she says she wants to you, have foreplay or have sex, I take that as consent. When I engage, I initiate, it's never, you know, straight to it, it's I would kiss her, engage in that way and if she reciprocates, you know, then we kind of start making out and then we go from there. Right? If she didn't reciprocate from the very beginning, then I wouldn't

> proceed, but there was never an instance where, you know, I went to kiss her and she never reciprocated.

[39] In cross-examination, JC was challenged about HD's consent on the occasions that sex occurred after the video recording was made. He said he was positive she consented "because she said so every time I asked her".

[40] JC testified that he subsequently learned that HD was living with her boyfriend. In June 2015, she abruptly stopped messaging him. He said he may have messaged her a couple of times – perhaps three to five times during the summer – but did not pursue things. He suggested that he was hurt that she had suddenly stopped communicating with him, saying that he felt she should have given him closure.

THE TRIAL JUDGE'S REASONS

[41] The trial judge provided extensive written reasons for the verdicts he rendered.

[42] On the two charges relating to January 22, 2015 – the voyeurism charge and the accompanying sexual assault charge – the Crown theory was that HD had been incapable of consenting. The trial judge acquitted JC of both offences because he was not satisfied beyond a reasonable doubt that HD had been incapable of consenting. He also noted, on the voyeurism charge, that the Crown had failed to prove that the video recording was made surreptitiously or that JC intended to make the video recording surreptitiously.

[43] With respect to the central issue of incapacity to consent, the trial judge said that while he did not reject HD's evidence about the events of January 22, 2015, or doubt her sincerity, he was "unable to reconcile and accept that particular evidence as reliable in the context of the evidence as a whole, and in particular, the appearance of active and willing participation in the sex acts depicted on the 51 second video recording".

[44] JC's evidence relating to the video recording incident also left him with a reasonable doubt. He said, "I do not accept or believe all of JC's evidence, as I will discuss later in these reasons, but I do accept that his evidence on these counts *could* reasonably be true" (emphasis in the original).

[45] The trial judge found JC guilty of the "extortion-related counts" – extortion and sexual assault relating to the sexual contact that occurred after the video recording – finding that HD's testimony about these counts was entirely credible and reliable.

[46] He found that HD was “trying her best to be a careful, precise and honest witness” and noted that she acknowledged her memory loss. He said that although there were some inconsistencies, relating “mainly to timing and dates, and what happened at what point”, she was “never inconsistent with respect to the core allegations”, and much of what she said was corroborated by JC. He found HD to be “consistent throughout her evidence that after the relationship started with the new boyfriend in late October 2014, she always told JC that she never wanted to have sex with him”. He said that the inconsistencies that did occur were not surprising given the lapse of time. He accepted her evidence about her recovered memory and said, “It is unrealistic to think, given her acknowledged memory issues, that she would remember everything in her initial statement to the police”.

[47] JC claimed that HD’s allegations that their sexual relationship was non-consensual may have been motivated by her fear that her boyfriend might end their relationship if he learned she had been cheating on him. The trial judge addressed this. He began:

> Finally, relative to an alleged motive to fabricate, there is absolutely no evidence to support the existence of such a motive. The suggestion that the mere fact that HD has a boyfriend is founded on stereotypical assumption. It is stereotypical reasoning that is often applied to victims of sexual assaults. The argument is that since HD had a boyfriend, therefore, she fabricated this chronology in order to “get out of hot water” with him, as the Crown put it, and continue their relationship. However, there was no evidentiary basis to support that contention, despite HD having been cross-examined about it extensively.

[48] The trial judge went on to find that the fact that HD told her boyfriend about the relationship, “albeit while she was under the influence of ketamine”, “adds to the veracity of her disclosure”. He did not believe that she would fabricate this entire complex circumstance while impaired, leaving the motive theory, “completely speculative and illogical”. He also noted that HD had “denied that her boyfriend had been abusive to her or threatened her, or that they had an argument”. He said that when HD and her boyfriend had broken up, she had made no attempt to hide that she was with JC. The trial judge also said: “JC agreed that the boyfriend did not contact him, or threaten him, so there is no evidence of a need to fabricate to appease the boyfriend.” The trial judge then concluded his rejection of JC’s motive theory, saying:

> It also makes no sense that HD was sufficiently willing to fabricate that she would sit through a trial where she was cross-examined extensively about personal issues and again required to watch the

> explicit personal video, along with strangers – the participants in this trial.

[49] In contrast, the trial judge did not believe the evidence of JC and found that JC's testimony relating to the extortion-related counts did not leave him in a reasonable doubt. In coming to this decision, he relied on his belief in HD's evidence, on aspects of JC's own evidence that he found supported the extortion-related allegations, and on his evaluation of JC's credibility.

[50] The trial judge's first observation about JC's credibility related to JC's testimony about his practice in securing consent from HD. The trial judge said:

> I found JC's evidence suspect that on *each* and *every* occasion when he and HD had sexual activity, that he very carefully put the question of consent to her, and in all instances only proceeded after he specifically requested consent "*at each progressive stage of the sexual encounters*". Defence counsel contended that there was no reason not to believe that, especially in respect of the first alleged assault. However, I did not believe JC's evidence on that issue, and I found that declaration to be too perfect, too mechanical, too rehearsed, and too politically correct to be believed. [Emphasis in the original.]

[51] The trial judge continued:

> JC wanted me to accept that at *each* and *every* stage of *each* and *every* sexual encounter, he *continuously* asked HD if he could go further, but this simply is not in accord with common sense and experience about how sexual encounters unfold. It seemed excessively rehearsed and staged, as he specifically turned to give this answer directly to me. [Emphasis in the original.]

[52] When the trial judge returned to the evaluation of JC's evidence in the context of the extortion-related charges, he said that he found JC's evidence to be "contrived" and that it "simply does not make sense in the context of the evidence as a whole". In explaining those conclusions, the trial judge returned to JC's testimony about his practice in securing consent:

> It was repeatedly said that JC always engaged in appropriate behaviour with respect to consent at all times, as a normal practice, but I did not believe this aspect of his evidence, or his evidence relating to the post-January 22, 2015 events. I find that his evidence about carefully staged and sequential inquiries into

> consent defies actual human behaviour, and is contrived. His evidence was challenged by the entirety of HD's evidence on these matters, whether it related to post-January conduct in the first apartment at the entertainment district, or the second apartment off the Danforth.

[53] After making this comment, the trial judge returned to the evaluation of JC's evidence. The trial judge noted that JC's evidence was not shaken in cross-examination, but said this "requires this analysis to be more nuanced", noting:

> JC did say some other things in this case which are, perhaps, again, not major inconsistencies, because there was no prior statement to compare it against in the way that the complainant's evidence has been analyzed surgically….

[54] Overall, he found JC's evidence to be "self-serving and designed to explain what I find inexplicable, at least as it relates to the latter two counts". He said there were some things that did not make sense about his evidence. Specifically, he noted that though JC claimed to respect HD, his conduct after January 22, 2015, "did demonstrate a pattern of callous disregard for HD's wishes in an attempt to control her". He then returned to JC's evidence about his practices in ensuring HD's consent, saying:

> The notion that he asked for her consent on every occasion and at every stage of their increasing intimacy, and ensured he had her full-fledged consent, does not jive with the external circumstances of his conduct.

[55] The trial judge also identified aspects of JC's own evidence that he concluded could only support the inference that JC extorted sex from HD. Most centrally, the trial judge relied heavily on JC's refusal to delete the video. He found that JC's continuing possession of this compromising video of HD – a person nine years his junior – created a power imbalance that enabled JC to "command sexual favours from her". He noted that JC admitted that he was not happy that the relationship had ended and wanted to continue a romantic relationship. The trial judge found that JC's persistence in attempting to contact HD when she was not responding, and his decision to keep the video recording for his own gratification as "a piece of third party pornography" in spite of HD's wishes, showed a pattern of callous disregard for HD's wishes. Simply put, the trial judge reasoned that JC's motive, opportunity and mindset supported his conviction on these charges.

ISSUES

[56] The issues in this appeal centre on the trial judge's use of "stereotype" in his reasoning. JC argues that the trial judge erred by impermissibly relying on stereotype to reject his evidence relating to securing HD's consent, and also erred in finding that JC's theory regarding HD's motive was based on stereotype. The Crown does not defend the trial judge's use of stereotype in evaluating JC's testimony about securing HD's consent, but submits that any such error is immaterial or harmless, and that no miscarriage of justice occurred. The Crown disputes that the trial judge relied on stereotype to reject JC's motive theory and defends the trial judge's reasoning in rejecting the motive theory that JC advanced. The issues can be stated, and approached conveniently, in the following order:

1. Did the trial judge err by relying on stereotype or in his reasoning in rejecting JC's theory about HD's motive to mislead?

2. Did the trial judge err by relying on stereotype to reject JC's testimony about the steps he took in securing HD's consent, and, if so, was the error immaterial or harmless, or an error that did not occasion a miscarriage of justice?

ANALYSIS

A. THE LAW

[57] There are two relevant legal rules that identify impermissible reasoning relating to the plausibility of human behaviour. These rules overlap in the sense that both may be breached at the same time.

(1) The Rule Against Ungrounded Common-Sense Assumptions

[58] The first such rule is that judges must avoid speculative reasoning that invokes "common-sense" assumptions that are not grounded in the evidence or appropriately supported by judicial notice: *R. v. Roth*, 2020 BCCA 240, at para. 65; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286, at paras. 19-27; *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289, at paras. 35-36. For clarity, I will call this "the rule against ungrounded common-sense assumptions".

[59] To be clear, there is no bar on relying upon common-sense or human experience to identify inferences that arise from the evidence. Were that the case, circumstantial evidence would not be admissible since, by definition, the relevance of circumstantial evidence depends upon using human experience as a bridge between the evidence and the inference drawn.

[60] Nor is there any absolute bar on using human experience of human behaviour to draw inferences from the evidence. If there was, after-the-fact

conduct evidence about things such as flight or the destruction of evidence would not be allowed. Such evidence is relevant because human experience tells us that these behaviours, flight and destroying evidence after a criminal act, are generally undertaken to hide guilt. An absolute bar on using human experience of human behaviour to draw inferences would also mean that evidence that an accused drove a protesting sexual assault complainant to a secluded location could not be used as proof of his intention or her lack of consent. The inferences to be drawn from that evidence depend on common-sense conclusions about what a person acting in a particular manner is likely to be thinking.

[61] Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour.

[62] It was therefore an error in *R. v. J.L.*, 2018 ONCA 756, 143 O.R. (3d) 170, at paras. 46-47, for the trial judge to infer that a complainant would not have consented to sex outside on the dirt, gravel and wet grass where the sexual act occurred, in mid-December. This conclusion was not a permissible logical inference drawn from the evidence. It was, instead, an additional factor for consideration introduced impermissibly into the deliberation process based on an untethered generalization about human behaviour. Had there been evidence from the complainant that she was careful or concerned about her appearance, her clothing, or her physical comfort, the impugned inference would have been grounded in evidence and would have been permissible.

(2) The Rule Against Stereotypical Inferences

[63] The second relevant, overlapping rule is that factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour. I will call this "the rule against stereotypical inferences". Pursuant to this rule, it is an error of law to rely on stereotypes or erroneous common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility: *Roth*, at para. 129; *R v. A.B.A.*, 2019 ONCA 124, 145 O.R. (3d) 634, at para. 5; *Cepic*, at para. 14. It is equally wrong to draw inferences from stereotypes about the way accused persons are expected to act*: R. v. Quartey*, 2018 ABCA 12, 430 D.L.R. (4th) 381, at para. 21, aff'd 2018 SCC 59, [2018] 3 S.C.R. 687; and see *Cepic*, at para. 24.

[64] Two points are critical in understanding this rule and ensuring that it does not impede proper judicial reasoning.

[65] First, like the rule against ungrounded common-sense assumptions, the rule against stereotypical inferences does not bar all inferences relating to behaviour that are based on human experience. It only prohibits inferences that are based on stereotype or "prejudicial generalizations": *R. v. A.R.D.*, 2017 ABCA 237, 422 D.L.R. (4th) 471, at paras. 6-7, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218.

[66] For example, it is a myth or stereotype that a complainant would avoid their assailant or change their behaviour towards their assailant after being sexually assaulted, and it is an error to employ such reasoning*: A.R.D.*, at paras. 57-58; *A.B.A.*, at paras. 6, 8-10; *R. v. Caesar*, 2015 NWTCA 4, 588 A.R. 392, at para. 6. Similarly, it is a stereotype that women would not behave in a sexually aggressive manner, or that men would be interested in sex. Reasoning that is based on such inferences is not permitted: *Cepic*, at paras. 14-16; *Quartey*, at para. 21.

[67] By contrast, no stereotype or prejudicial generalization is offended by inferring, where a man drives a resisting woman to a secluded location before touching her sexually, that she did not consent and that he intended to touch her without her consent. Hence, such inferences are appropriate.

[68] The second critical point in understanding the rule against stereotypical inferences is that this rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence. Professor Lisa Dufraimont makes this point admirably in "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 Queen's L. J. 316, at pp. 345-46, 350; and it is reinforced in *A.R.D.*, at paras. 6-8, 62; and *Roth*, at para. 73.

[69] For this reason, it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype: *Roth*, at paras. 130-38. For example, in *R. v. Kiss*, 2018 ONCA 184, at paras. 101-2, evidence that the complainant did not scream for help was admitted, not to support the impermissible stereotypical inference that her failure to do so undermined the credibility of her claim that she was not consenting, but for the permissible purpose of contradicting her testimony that she had screamed to attract attention.

[70] By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead, based on the evidence. For example, although it is a stereotype that men are interested in sex, it was not an error to infer that the accused male was interested in sex at the time of the alleged assault where that inference was based on evidence: *Quartey*, at para. 21. Similarly, in *R. v. F.B.P.*, 2019 ONCA 157, the trial judge was found not to have erred in finding it

implausible that the complainant would consent to spontaneous sex on a balcony, potentially in full view of others, because that inference did not rest in stereotypes about the sexual behaviour of women. The inference was based on evidence about the ongoing sexual disinterest the complainant had shown in the accused, and the ready availability of a private bedroom.

(3) The Effect of Reasoning Errors Related to the Plausibility of Human Behaviour

[71] Does a reversible error occur whenever a trial judge violates the rule against unfounded common-sense assumptions, or the rule against stereotypical inferences? As a matter of principle, such errors are reversible only when they "ground" the relevant inference by playing a material or important role in the impugned conclusion. Put otherwise, it is not *per se* a reversible legal error to draw impermissible inferences that do not matter, but it is a reversible legal error to reach a material factual conclusion based on such reasoning.

[72] Some passages could be taken as limiting the effect of these rules to cases where the impugned factual finding is based solely on impermissible reasoning. For example, the phrase "sole reason" was used by the majority in *A.R.D.*, at para. 31, and, on further appeal, Wagner C.J. described the trial judge as erring by relying "solely" on impermissible stereotypical reasoning: *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 18, at para. 2. However, I do not take these decisions as holding that no error will occur so long as additional, permissible lines of reasoning are also offered. In *A.R.D.*, the only reason provided by the trial judge for doubting the complainant's testimony was the stereotype that she had not altered her behaviour towards the accused after the alleged assault. In my view, when these courts referred to the impermissible stereotypical reasoning as the sole reasoning, they were not defining a precondition to error but were referring to the particular facts of that case. It is instructive that in *A.R.D.*, at paras. 5-6, the majority described the error as "relying on an impermissible stereotype", or "on prejudicial generalizations" (emphasis added). The majority also quoted, at para. 45, from *R. v. R.G.B.,* 2012 MBCA 5, 275 Man. R. (2d) 119, at para. 59: "A judge would err in law if there is a sound basis to conclude, on appellate review, that a credibility finding was not based on a proper evidentiary foundation, but rather on inappropriate judicial stereotyping" (emphasis added).

[73] As a matter of principle, an error is "based" on a stereotype or improper inference when that stereotype or improper inference played a material or important role in explaining the impugned conclusion. Where it did so, even if the trial judge offered other reasons for the impugned conclusion, it cannot safely be said that the trial judge would have reached the same conclusion without the error. Where the erroneous reasoning does not play a material or important role in

reaching the impugned conclusion, and was only incidental, the accused will not have been prejudiced by it and no reversible error occurs.

[74] One final point. In argument before us, the Crown emphasized the importance of deferring to credibility determinations made by trial judges. I acknowledge this important practice, but where a trial judge contravenes the rules I have just described, resulting in a material effect on the impugned finding, an error of law has occurred: *A.B.A.*, at paras. 4-5; *A.R.D.*, at para. 28. The error will be reversible, unless the curative proviso in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii), is successfully invoked by the Crown.

B. THE TRIAL JUDGE'S REJECTION OF JC'S MOTIVE THEORY

[75] Just as it is an error for a trial judge to rely on a stereotypical inference in assessing credibility, it is an error for a trial judge to exclude an inference as based on stereotype, when it is not based on stereotype. JC claims that the trial judge committed this error in rejecting the inference that HD may have been motivated to falsely claim that their sexual relationship was not consensual, in order to protect her relationship with her boyfriend. JC contends that this inference was based on the evidence, and not on stereotype as the trial judge erroneously concluded. JC also challenges other reasoning the trial judge relied upon to reject the motive theory JC advanced at trial.

[76] This is the impugned passage where the trial judge invoked stereotype:

> Finally, relative to an alleged motive to fabricate, there is absolutely no evidence to support the existence of such a motive. The suggestion that the mere fact that HD has a boyfriend is founded on stereotypical assumption. It is stereotypical reasoning that is often applied to victims of sexual assaults. The argument is that since HD had a boyfriend, therefore, she fabricated this chronology in order to "get out of hot water" with him, as the Crown put it, and continue their relationship. However, there was no evidentiary basis to support that contention, despite HD having been cross-examined about it extensively.

[77] Did the trial judge err by relying on stereotype or in his reasoning in rejecting JC's theory about the complainant's motive to mislead? I conclude that he did.

[78] The trial judge was incorrect in concluding that there was "absolutely no evidence to support the existence of [JC's] motive" theory. There was an evidentiary basis on which the trial judge could have inferred that HD may have been motivated to deny that her sexual relationship with JC was consensual, and

that this motive could account for the police complaint. Specifically, there was evidence that, at the time HD told her boyfriend about her sexual contact with JC, HD and her boyfriend were having relationship difficulties and were discussing those difficulties in the hope of opening up greater lines of communication; that HD was upset during this conversation; that her boyfriend "freaked out" and was "upset with" her and "angry at the situation" when she told him about JC; and that, after the conversation, including when she was no longer intoxicated by ketamine, HD's boyfriend encouraged her to contact the police.

[79] During argument, defence counsel made this submission to the trial judge:

> [HD's boyfriend] became aware that there was interaction between [JC] and [HD], and in my respectful submission, that's, that's all that's needed to give rise to a motive to fabricate.

[80] The Crown submits that when the trial judge characterized JC's argument as founded on a stereotypical assumption, he was not dismissing the entire submission as based on stereotype but was addressing only this specific submission, which does invoke the general stereotype that women with boyfriends are motivated to fabricate sexual assault allegations.

[81] I do not agree with the Crown that the trial judge's reference to stereotypical reasoning was so confined. I am satisfied that the trial judge treated JC's entire motive theory as resting on stereotype. This is evident in the way the trial judge characterized JC's motive argument. He said, "[t]he argument is that since HD had a boyfriend, therefore, she fabricated this chronology in order to 'get out of hot water' with him, as the Crown put it, and continue their relationship." In fact, JC relied on much more to support this motive theory than the fact that HD had a boyfriend. JC's position was that the manner of HD's disclosure to her boyfriend and her boyfriend's reaction to this disclosure support the inference that HD may have been motivated to lie to protect her relationship with her boyfriend. JC's motive theory was therefore linked to fact-specific evidence. It was an error, in these circumstances, for the trial judge to find that the motive theory was founded on a stereotypical assumption.

[82] The Crown also urges that since the trial judge addressed JC's motive theory more broadly on its merits, he did not ultimately rely on stereotype in rejecting that motive theory. I do not accept this.

[83] First, a proper finding that JC's motive theory was founded on a stereotypical assumption would have been fatal to JC's motive submission. Any additional reasons offered for rejecting the motive theory would have been secondary. Simply put, the gravity of the trial judge's finding that JC's motive theory

was based on stereotype overwhelms the supplementary reasoning the trial judge engaged in. Without question, the trial judge relied on his "stereotype" characterization in rejecting JC's motive submission.

[84] Second, there are problems with some of the additional reasons the trial judge offered in rejecting JC's motive theory. I will address two such problems.

[85] In rejecting the motive theory, the trial judge said: "JC agreed that the boyfriend did not contact him, or threaten him, so there is no evidence of a need to fabricate to appease the boyfriend." This represents a misconception of JC's motive theory. JC's theory was not that HD may have lied to prevent her boyfriend from confronting JC. As the trial judge appears to have recognized earlier in his reasons, JC's motive theory was that HD may have lied to preserve her relationship with her boyfriend. In linking the viability of the motive theory to evidence that the boyfriend acted aggressively towards JC, the trial judge allowed himself to become distracted from the real inquiry of whether HD had reason to seek to placate her boyfriend, who had "freaked out" when HD accidentally told him she had sexual relations with JC.

[86] This mischaracterization by the trial judge of JC's motive theory raises an additional, more serious concern. The trial judge's reasoning that the motive theory was not viable without evidence that HD's boyfriend confronted JC rests itself upon the stereotype of the aggressive, jealous boyfriend.

[87] The other problematic reason the trial judge offered for rejecting JC's motive theory arose when the trial judge said:

> It also makes no sense that HD was sufficiently willing to fabricate that she would sit through a trial where she was cross-examined extensively about personal issues and again required to watch the explicit personal video, along with strangers – the participants in this trial.

[88] It is dangerous for a trial judge to find relevance in the fact that a complainant has exposed herself to the unpleasant rigours of a criminal trial. As this court said in *R. v. G.R.A* (1994), 35 C.R. (4th) 340 (Ont. C.A.), "the fact that a complainant pursues a complaint cannot be a piece of evidence bolstering her credibility. Otherwise it could have the effect of reversing the onus of proof". Of interest, in *R. v. K.(V.)* (1991), 68 C.C.C. (3d) 18 (B.C.C.A.), at p. 35, Wood J.A. disapproved of such reasoning because it would itself rest in "gender-related stereotypical thinking" that sexual offence complainants are believable. Such reasoning would be a stereotype because it is a prejudicial generalization that would be available in every case.

[89] The primary concern with using a complainant's readiness to advance a criminal prosecution is that doing so cannot be reconciled with the presumption of innocence. The trial is to begin on the rebuttable premise that the accused is not guilty, not on the basis that the mere making of a criminal sexual assault allegation favours a finding of guilt: *R. v. Stewart* (1994), 90 C.C.C. (3d) 242 (Ont. C.A.), at p. 252, leave to appeal refused, [1994] S.C.C.A. No. 290; *R. v. Nyznik*, 2017 ONSC 4392, 350 C.C.C. (3d) 335, at para. 17.

[90] Having said this, there is a passage from this court, in *R. v. Batte* (2000), 145 C.C.C. (3d) 449 (Ont. C.A.), at para. 123, in which it was found to have been open to the trial judge to instruct the jury that, if they found that the complainants did not have a motive to fabricate, they could consider why the complainants in that case would "make the allegation and expose themselves to the rigors of cross-examination on very personal matters". In *R. v. L.L.*, 2009 ONCA 413, 96 O.R. (3d) 412, at paras. 49-50, Simmons J.A. interpreted this comment in *Batte* narrowly, as having been made in response to an "isolated" comment by the trial judge in a case where the overall effect of the trial judge's instruction would not have led the jury astray.

[91] I would note further that the passage in *Batte* was conditioned on the jury making an affirmative finding that the complainant had no motive to fabricate. Here, the trial judge used the fact that the complainant was willing to endure the trial as a reason for rejecting her motive to fabricate. This was erroneous.

[92] I would therefore allow this ground of appeal.

C. THE TRIAL JUDGE'S REJECTION OF JC'S CONSENT TESTIMONY

[93] Did the trial judge err by relying on stereotype to reject JC's testimony about the steps he took in securing HD's consent, and, if so, was the error immaterial or harmless, or an error that did not occasion a miscarriage of justice? I am persuaded that the trial judge did err in rejecting JC's testimony about the steps he took in securing HD's consent, and that the trial judge's erroneous reasoning was material, not harmless. I am also of the view that it cannot be found not to have occasioned a miscarriage of justice. I would therefore allow this ground of appeal.

[94] During oral argument on this ground of appeal, JC took issue with the way the trial judge interpreted his evidence relating to consent. The trial judge characterized JC's testimony as claiming that he specifically requested consent "*at each progressive stage of the sexual encounters*" with HD, and that "at *each* and *every* stage of *each* and *every* sexual encounter, he *continuously* asked HD if he could go further" (emphasis in the original). JC argues that this is not a fair reflection of his testimony, which was that he begins a

sexual encounter by kissing, and if the kissing is reciprocated, he takes it from there, including by seeking consent before engaging in oral sex or intercourse.

[95] I need not resolve whether the trial judge interpreted JC's testimony fairly. Whether he did so or not, the trial judge's reasoning, in rejecting JC's testimony on obtaining consent, contravenes both the rule against ungrounded common-sense assumptions, and the rule against stereotypical inferences.

[96] The trial judge committed the first error – invoking an ungrounded common-sense assumption – by concluding that JC's testimony is "not in accord with common sense and experience about how sexual encounters unfold." This is a bald generalization about how people behave. It is not derived from anything particular to the case, or any evidence before the trial judge on how all sexual encounters unfold.

[97] The trial judge committed the second error of relying on stereotypical reasoning when he rejected JC's claimed conduct as "too perfect, too mechanical, too rehearsed, and too politically correct." The trial judge was invoking a stereotype that people engaged in sexual activity simply do not achieve the "politically correct" ideal of expressly discussing consent to progressive sexual acts. This is a generalization because it purports to be a universal truth and it is prejudicial because it presupposes that no-one would be this careful about consent.

[98] In fact, the behaviour the trial judge rejected as "too perfect", "too mechanical", and "too politically correct" to be believed is encouraged by the law, and certainly prudent. The *Criminal Code* specifies, in s. 273.1(1), that consent means "the voluntary agreement of the complainant to engage in the sexual activity in question". Consent must therefore attach to each progressive form of sexual touching. Meanwhile, an accused cannot legally act solely on a belief in consent; he must honestly believe that his sexual partner has communicated consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 46-49; *R. v. Barton*, 2019 SCC 33, 435 D.L.R. (4th) 191, at para. 121. Simply put, the behaviour the trial judge rejected as too perfect to be true is to be encouraged, not disbelieved *ab initio*.

[99] The Crown did not advance specific arguments disputing these errors. Instead, the Crown contended that any error was not material, or was harmless, and, in any event, did not occasion a miscarriage of justice. If I understood the Crown, it used the two terms "material" or "harmless" interchangeably. Although both terms address whether impugned reasoning mattered, these terms describe distinguishable inquiries.

[100] As indicated, it is not *per se* a reversible legal error for a trial judge to draw impermissible inferences that do not matter, but it is a reversible legal error to reach

a material factual conclusion based on such reasoning. In order to demonstrate a reversible error where a trial judge has drawn an ungrounded common-sense assumption or invoked stereotypical inferences, the burden is therefore on the appellant to show that such reasoning mattered in arriving at the impugned factual finding. I would reserve the term "material" to describe this inquiry. So, in this case the question is whether JC has shown that the trial judge's reliance on an ungrounded common-sense assumption or stereotype was material to his finding that JC never asked about HD's consent to progressive acts of sexual contact.

[101] In contrast, a "harmless error" inquiry is initiated by the Crown pursuant to the curative proviso in the *Criminal Code*, s. 686(1)(b)(iii), after a legal error has been found. Where the Crown invokes the proviso and argues that the error is harmless, the burden is on the Crown to show that the error is minor or has not prejudiced the accused, and therefore had no effect on the verdict: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 29-30. Although, in substance, a "harmless error" inquiry under the curative proviso is also about the materiality of an error, clarity is best achieved by maintaining a distinction between the inquiries that form part of the rules an appellant is relying upon on appeal, and the application of the proviso at the behest of the Crown. I will use the term "material" to describe the former, and "harmless error" to describe the latter.

[102] I will begin with the Crown's claim that the impugned reasoning by the trial judge was not material, and therefore not a reversible error of law. I reject this submission. I am satisfied that the errors I have identified played a material and important role in causing the trial judge to reject JC's testimony relating to consent.

[103] In arguing to the contrary, the Crown relied heavily on the additional, non-erroneous reasons that the trial judge gave for rejecting JC's testimony about consent. Specifically, the trial judge commented on JC's demeanour when he was testifying about his approach to securing HD's consent. The trial judge said: "It seemed excessively rehearsed and staged, as he specifically turned to give this answer directly to me." The trial judge also said that JC's evidence on these matters was challenged on the entirety of HD's evidence. And he said this evidence "does not jive with the external circumstances of his conduct", presumably the trial judge's conclusion relating to JC's pattern of disregarding HD's wishes.

[104] I acknowledge those additional explanations for the trial judge's rejection of JC's testimony about consent, but they do little, in my view, to reduce the impact of the errors the trial judge made. The impermissible reasoning played the central role in the trial judge's rejection of JC's testimony. Four points reinforce this.

[105] First, defence counsel challenged the trial judge, arguing that there was no basis for rejecting JC's testimony. The trial judge answered that challenge directly. The sole rejoinder he gave was that JC's evidence was "too perfect, too mechanical, too rehearsed, and too politically correct to be believed."

[106] Second, this reasoning was also the first reason the trial judge gave for rejecting JC's testimony about consent.

[107] Third, the trial judge returned to this reasoning repeatedly during his analysis, making the point three times in the judgment.

[108] Fourth, this reasoning was devastating. The trial judge relied upon it to find that JC's testimony about how he secured consent was "contrived", in other words, a deliberate lie. In the circumstances, such a finding could not have been anything other than material or important to the ultimate rejection of JC's testimony about consent. This reasoning simply overwhelms the additional considerations mentioned by the trial judge.

[109] Nor are the permissible factors that the trial judge relied upon compelling enough, when taken together, to overcome the material role that the trial judge's reasoning errors played in his rejection of JC's testimony about consent. It can be assumed that the trial judge would have hearkened to the admonition not to place undue weight on demeanour evidence*: R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362, at para. 85. Further, the trial judge's assessment of HD's evidence and his conclusions about JC's regard for HD's wishes are conclusions to be made on the evidence as a whole, including JC's testimony. Had the trial judge not greeted JC's testimony with the distorting influence of the errors of reasoning I have identified, he may well have come to a different conclusion.

[110] JC has therefore satisfied me that the errors were material or important to the trial judge in rejecting JC's testimony about how he secured HD's consent.

[111] To support its claim that the errors were not material, the Crown invited us to consider the trial judge's reasoning as a whole, arguing that the trial judge gave many reasons for rejecting JC's testimony and for finding him guilty of the charges under appeal. In short, the Crown argues that JC would have been convicted even if these errors had not occurred. I would make two points in response.

[112] First, as I have explained, the materiality of the reasoning errors is to be judged by examining their impact on the specific conclusion they support, not by examining the strength of the entire case. As I have also explained, it is an error of law to make a finding that rests materially on an ungrounded common-sense assumption or a stereotype. As Cartwright J. said in *Colpits v. The Queen*, [1965]

S.C.R. 739, at p. 744, “once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred”. Therefore, the Crown’s opportunity to rely on the whole of the case arises where the curative proviso is invoked, and not as part of the materiality inquiry. Even then, the examination is not of other reasons offered by the trial judge. In considering the curative proviso in s. 686(1)(b)(iii), the question is not whether this trial judge would have convicted: “The appropriate inquiry… is whether there is any possibility that a trial judge would have a reasonable doubt on the admissible evidence”: *R. v. S.(P.L.)*, [1991] 1 S.C.R. 909, at p. 919 (emphasis added).

[113] Second, even if I was to engage in the exercise the Crown invites, I would still find the errors to have been material. This inquiry would necessarily invite a full examination of the reasons offered by the trial judge, which impels me to say that some of the other reasons the trial judge gave to support his decision, although not appealed, are problematic. For example, in addressing HD’s memory issues, he excused her inability to “remember everything in her initial statement to the police” when the matter of concern was her ability to remember what happened. He considered the disclosure that HD made to her boyfriend as adding to the veracity of that disclosure, an inference that was arguably a misuse of a prior consistent statement. And he discounted the fact that JC stood up to cross-examination on the basis that, unlike HD, there was no prior statement to compare his testimony to. It is contrary to the right to silence to consider the absence of a prior statement by the accused in assessing their credibility, and the trial judge’s reasoning presupposes unfairly that JC’s testimony may not have stood up to cross-examination had a prior statement been provided. I do not make these points to express gratuitous criticism of the trial judge’s credibility evaluation, but to illustrate the difficulties in relying on his other reasons as a palliative for the errors under appeal.

[114] It must also be emphasized that the errors under appeal relate to the trial judge’s evaluation of JC’s exculpatory testimony, a source of evidence that, in law, can raise a reasonable doubt even if not affirmatively believed. The trial judge gave few reasons for rejecting JC’s evidence that did not depend on his finding that JC’s testimony about consent was self-serving and contrived. I appreciate that he invoked *R. v. J.J.R.D.*, 215 C.C.C. (3d) 252 (Ont. C.A.), leave to appeal refused, [2007] S.C.C.A. No. 69, a case that permits, at para. 53, a trial judge to rely on the “considered and reasoned acceptance” of Crown evidence to reject conflicting, exculpatory evidence beyond a reasonable doubt, but the trial judge said this was only “partially” such a case.

[115] In my view, even approaching things as the Crown would have us do, the trial judge's errors in evaluating JC's evidence about consent were material, even to the outcome of the case.

[116] What then of the curative proviso? In *R. v. R.V.*, 2019 SCC 41, 436 D.L.R. (4th) 265, at para. 85, Karakatsanis J. summarized the long-standing principles that guide its application:

> The curative proviso set out in s. 686(1)(b)(iii) may be applied where there is no "reasonable possibility that the verdict would have been different had the error … not been made." Applying the curative proviso is appropriate in two circumstances: (i) where the error is harmless or trivial; or (ii) where the evidence is so overwhelming that the trier of fact would inevitably convict. [Citations omitted.]

[117] As the decision in *R. v. Paulos*, 2018 ABCA 433, 79 Alta. L.R. (6th) 33, at paras. 39, 47, leave to appeal refused, [2018] S.C.C.A. No. 336, shows, it is possible for the proviso to be applied where the trial judge has erred by relying on stereotype. But not, in my view, in this case.

[118] As I have described, a "harmless error" is a minor error or an error that has not prejudiced the accused and therefore had no effect on the verdict. For the reasons I have just provided, the errors cannot be said to have been minor or non-prejudicial. The Crown has certainly not shown that they had no effect on the verdict.

[119] Even a serious error will not be reversible where the Crown can show that "it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible": *Khan*, at para. 31 (citations omitted). The Crown cannot meet that burden. This was a credibility case in which there were material weaknesses in the complainant's evidence. I will not canvass those weaknesses again. The most important of them are identified in the summary of the material evidence. I am far from persuaded that, on this evidence, any verdict other than a conviction would be impossible. The curative proviso cannot be applied.

CONCLUSION

[120] I would allow the appeal, set aside the sexual assault conviction and the finding of guilt on the extortion charge and order a new trial.

Released: March 3, 2021 "R.G.J."

“David M. Paciocco J.A.”

“I agree. R.G. Juriansz J.A.”

“I agree. M. Tulloch J.A.”