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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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
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> (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
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> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. A.S., 2020 ONCA 229
DATE: 20200319
DOCKET: C65565

Roberts, Paciocco and Harvison Young JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

A.S.

Appellant

D. Lea Scardicchio and Efstathios Christos Stephen Balopoulos, for the appellant

Erin Nicole Elizabeth Rivers, for the respondent

Heard: January 6, 2020

On appeal from the conviction entered on May 11, 2018 and the sentence imposed on September 18, 2018 by Justice Peter Tetley of the Ontario Court of Justice, sitting without a jury.

Paciocco J.A.:

OVERVIEW

[1] A.S. was convicted in a judge-alone trial of sexually assaulting his wife, the complainant. He appeals this conviction and seeks leave to appeal his sentence, alleging numerous errors. I need not address all his grounds of appeal. This is one of those uncommon cases where the trial judge misapprehended evidence that

was critical to his decision to convict. Faced with testimony from a complainant with credibility problems, he looked for "corroboration" of her testimony and found it in evidence that did not exist. His misapprehension of evidence was crucial to his reason for convicting A.S. There was, therefore, a miscarriage of justice.

[2] I would allow the appeal and order a new trial.

MATERIAL FACTS

[3] On January 1, 2016, the date of the alleged offence, A.S. and the complainant were in a period of significant marital discord. Although their relationship had been erratic, the complainant was open about an intimate relationship she was having with another man. A.S. had been sleeping on the couch for at least a month. The parties were discussing separation and divorce, but discussions were also ongoing about whether they would remain together.

[4] On the morning of January 1, 2016, A.S. insisted on resolving the uncertainty, telling his wife to commit to the marriage or move out and leave him with the children. A.S. audio recorded part of the conversation. He claimed that this was accidental, the result of his unfamiliarity with his new smart watch. This recording, which the trial judge admitted into evidence, records the complainant initially responding to the ultimatum by saying that she did not know what to do, but then telling A.S. that she did know what she had decided and would tell him when she was ready. She also told A.S. that she was going to "get rid" of him,

which he indicated he interpreted as a death threat. The recording ends with A.S. accusing the complainant of making a death threat and her response that she was joking. When A.S. replied that he was not joking, she said, "Oh my God".

[5] That evening, after the couple returned home from a dinner at the complainant's grandmother's home, the alleged sexual assault occurred. In her testimony, the complainant described a protracted, violent, and humiliating sexual assault. The complainant alleges that during the assault A.S. pried her legs apart, violently inserted his hand into her vagina, and after unsuccessfully attempting to have intercourse with her, ultimately masturbated himself to ejaculation on her shirt and stomach. During the assault, she says she reached for her phone in order to call 9-1-1 but was unable to dial the number. She did, however, manage to unlock her phone and open and activate an audio-recording app, which recorded approximately nine minutes of the event. The recording captured the sounds of an apparently distraught complainant repeatedly telling A.S. to get away from her, not to touch her, to stop and to get off her.[1]

[6] The next day the complainant told an acquaintance, J.R., about the alleged sexual assault. J.R. assisted the complainant in contacting the police. After the complainant was directed to the proper police station by the police the alleged

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[1] All references to the audio recording that follow are to this recording and not to the recording made by A.S. earlier in the day.

sexual assault was reported. At that time the complainant also reported an earlier, common assault from December 5, 2015, in which she described A.S. as grabbing her arm so forcefully that it left bruises that lasted for months.

[7] After reporting the alleged assaults, the complainant attended a health centre where she met with a sexual assault nurse examiner. The nurse examiner recorded small bruises to the backs of each of the complainant's legs, above her knees, as well as redness to her labia majora and labia minora. No photos were taken, and the notes the nurse made were not extensive.

[8] A.S. was charged and tried with two offences against the complainant: the January 1, 2016 sexual assault, contrary to *Criminal Code*, R.S.C., 1985, c. C-46, s. 271, and the December 5, 2015 common assault, contrary to *Criminal Code*, s. 266. His trial began on November 15, 2017. It ran for six days, including closing submissions, spread out over close to four months. The length of time it took to complete six days of trial no doubt contributed to some of the difficulties described below.

[9] At trial, the complainant's testimony was not uneventful. Evidence she gave about the nature of the relationship, both before and after the alleged sexual assault, was challenged effectively with inconsistent emails and text messages.

[10] Aspects of her narrative were also contradicted by objective evidence, including her claim that she was not on the computer the day of the sexual assault,

because it was not working. Evidence showed that she had, in fact, been using the computer around the time of the assault. I make particular mention of this contradiction only because it is material to A.S.'s version of events. A.S.'s narrative of the event was that she lured him to her while at the computer by asking him to give her assistance. Proof that she had, in fact, been using the computer was consistent with his narrative, but not hers.

[11] The trial judge ultimately found that the complainant was not forthright about aspects of her relationship with A.S. However, the trial judge did not remark about other difficulties with her evidence, including the evidence confirming the contradiction about the functioning of the computer, post-offence messages that contradicted the complainant's denial that after the event she was trying to reconcile with A.S., or the apparent threat she made on the morning of January 1, 2016.

[12] During her testimony, the Crown began to play the recording of the alleged sexual assault. When the court was provided with an English translation of the Italian spoken on the recording, defence counsel agreed that the translation was an accurate reflection of what was on the recording. When the recording was played during the examination-in-chief of the complainant, she became upset. The Crown suggested that, given the concession defence counsel had made about the accuracy of the transcription, it might not be necessary to have the witness hear and adopt the recording. Defence counsel initially raised objection to this

suggestion, since the defence position was that the recording was incomplete and had been edited to remove material helpful to A.S. After further discussion defence counsel agreed with the trial judge's suggestion that the recording could be filed as evidence of the "recording according to [the complainant's] testimony", but that its weight could be challenged.

[13] J.R. testified. She described receiving a call from a friend who advised her that the complainant needed help. She picked the complainant up in her car at a nearby public transit station. The complainant was upset and crying. She brought the complainant to her apartment. There the complainant told her about being assaulted, played a few seconds of the recording of the alleged event, and showed her a bruise or bruises on her arm or arms near the bicep area. J.R. could not recall the size or colour of the bruises.

[14] The examining nurse also testified. She had little if any independent memory of meeting with the complainant, and there was much that she had not noted and could not recall. Using markings that she had made on a body map when examining the complainant, the examining nurse described seeing two small bruises on the back of the complainant's legs, above her knees. She also confirmed based on her notes the redness to the complainant's genitals but noted no other marks. She agreed with the defence suggestion that had she observed other marks she would have recorded them.

[15] A.S testified in his defence. He denied the common assault on December 5, 2015 and gave detailed testimony about the alleged sexual assault. He described the complainant calling him to the computer wearing only a T-Shirt and underwear and seducing him. After heavy kissing she excused herself momentarily and went to her phone. He claims that when she returned, they resumed the sexual activity, but she began to say no and protest while at the same time manipulating his exposed penis. He said he was confused by this but that, as the more active participant in the sexual touching, the complainant was clearly consenting, including on the occasions when he did touch her. He said that he stopped a few times and asked her what she was doing, but these parts of the exchange were not reflected in the recording. He ultimately climaxed. He described the complainant going to the bathroom with her phone and that he could hear voices from the bathroom. It was his position that the recorded event was staged by the complainant, and that the recording had been edited by the complainant to support a false allegation of sexual assault.

[16] A.S. called an expert witness who identified two anomalies on the audio recording that the expert witness said were consistent with editing. First, at approximately 8 minutes and 30 seconds into the recording, a "handling noise" can be heard, followed by a brief disturbance in the sound described as a "bump", as though the recording device had been moved to a different location than before. Second, the audio was recorded at an unusual frequency, which could be

indicative of it being re-recorded. These observations raised the possibility that the recording was edited, but there were also alternative, innocent explanations consistent with the recording being genuine. The expert was hampered in his analysis by the fact that the cellphone that had been used to make the original recording had never been disclosed.

[17] In its submissions on March 6, 2018, the Crown asked the trial judge to enter not guilty findings with respect to the common assault allegation, based on a lack of evidence. The trial judge agreed and did so. Argument was made on the sexual assault charge, and the trial judge reserved judgment.

[18] On May 11, 2018, the trial judge released the decision. Rather than read the 16-page written decision in its entirety, he summarized the decision orally, and handed out copies of the written decision.

[19] On May 11, 2018, the trial judge purported to convict A.S. of both the sexual assault and the common assault charges. He was subsequently reminded that he had already found A.S. not guilty of the common assault charge. The trial judge issued an addendum on May 30, 2018, acquitting A.S. of that offence.

[20] On September 18, 2018, A.S. was sentenced to 20 months in prison followed by two years of probation.

ISSUES

[21] A.S. appeals his conviction. He raises numerous, often overlapping grounds of appeal. Since I would allow the appeal, I need not address all the grounds advanced. I will discuss only three of those grounds, even though I would allow the appeal on only one of them. Discussion of the remaining two grounds of appeal assists in explaining the ground of appeal I would allow, namely ground of appeal B. The three grounds of appeal I will consider are:

A. Did the trial judge err in admitting the audio recording evidence?

B. Did the trial judge cause a miscarriage of justice by misapprehending material evidence?

C. Did the trial judge give adequate reasons for conviction?

A. DID THE TRIAL JUDGE ERR IN ADMITTING THE AUDIO RECORDING EVIDENCE?

[22] I am persuaded that the trial judge did not admit the audio recording as original evidence of what transpired while the audio recording was being made. Instead, he admitted it on the more restricted basis that the recording was an authentic record of what it records, however complete or continuous that recording may be. On that basis, and that basis alone, I would find that the trial judge did not err in admitting the audio recording evidence.

[23] The complainant testified that she managed to make the recording by turning on her cellphone after the alleged assault was underway. The recording was, therefore, presented by the Crown as an incomplete but accurate reproduction of what occurred while the cellphone was recording.

[24] When the recording was being played in the presence of the complainant in court in order to authenticate it, she became emotional. The Crown sought an admission from A.S. that would spare the complainant from having to listen to the entire recording. Defence counsel acknowledged that what was recorded was from the event, and accurate so far as it went, but objected to the admission of the recording, claiming that it had been edited by removing exculpatory things that were said while the recorder was activated. In other words, the recording was not a fair and accurate representation of what happened because it was not complete and continuous. Defence counsel's objection and the trial judge's response is reflected in the exchange that ensued, reproduced in part below:

> THE COURT: ... I appreciate that I had been alerted to the fact but there's some suggestion that it may – the recording – that it was submitted to the police, may not represent the entirety of what transpired. But if it's acknowledged that there is this recording, that this is an accurate transcription of the recording such as it is, it might alleviate the necessity of the Crown having the witness adopt it, not going to preclude the defence from playing the recording. But it might allow for its reception into evidence without the complainant having to hear the entirety of the recording. So, ...

> MR. SAHULKA: ... It will become more evident as we go along is that the complainant has manufactured these events ... The position of the defence is that for an individual who we suggest [h]as manufactured this evidence, it should not be upsetting for them to hear it at this stage. I understand my friend's concerns ...
>
> ...
>
> THE COURT: I'm just making a suggestion that you can cross-examine at will. We're talking about the admissibility of this evidence. You're talking about weight. So, - ...
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> MR. SAHULKA: Yes.
>
> THE COURT: ... and whether it's reliable. The witness has asserted that she recorded at least in part the assault that she's described.
>
> MR. SAHULKA: Yes.
>
> THE COURT: And that the defence is prepared to acknowledge that this is that recording according to her testimony. She could confirm presumably that she gave the recording to the police and that you could acknowledge that this is the recording. I'm just proposing that might alleviate her having to listen to the whole recording now. You're at liberty certainly to cross-examine. I appreciate your position may be that this is contrived, may not be difficult for her to listen to but it certainly appears to be. So, I'm just talking about the filing of the recording. That's all.
>
> MR. SAHULKA: I'm, I'm fine with that. I'm prepared to, to do that, Your Honour.

[25] As is shown in the passage reproduced above, the trial judge suggested to defence counsel that his concerns about editing were really matters of weight. The

trial judge then suggested that the audio recording could be filed as the "recording according to [the complainant's] testimony", or as "at least in part the assault that she's described". On that basis, defence counsel agreed.

[26] I recognize that the way in which the admissibility of the recording was handled represented a commendable attempt by all parties to be solicitous of the complainant's welfare. Unfortunately, the basis for admission was left somewhat unclear. The record and the Reasons for Judgment require interpretation to understand the trial judge's admissibility ruling.

[27] The outcome of that interpretation matters, for as the Alberta Court of Appeal pointed out in *R. v. Bulldog*, 2015 ABCA 251, 22 Alta. L.R. (6th) 27, what "authentication" requires for the purposes of admissibility "depends upon the claim(s) which the tendering party is making about the evidence": at para. 32. In this context, the correctness of the trial judge's admission of the recording turns upon his basis for admitting it.

[28] If the trial judge admitted the recording for the purpose the Crown intended, as an accurate continuous reproduction of what occurred while the cellphone was recording, then the trial judge would have erred by treating the editing issue as a matter of weight. Given the use the Crown wished to make of the recording, the trial judge would have been obliged to conduct an inquiry into whether the Crown had shown, to the appropriate standard of proof, that the recording was a

"substantially accurate and fair representation" of those events: *R. v. Bulldog*, at para. 33.[2] Yet the trial judge did not conduct any such inquiry before admitting the recording.

[29] But if the trial judge admitted the recording solely for the more restricted purpose expressed, namely, as a "recording according to [the complainant's] testimony", or as "at least in part the assault that she's described", then the trial judge did not err in admitting the recording. If the trial judge was not going to rely upon the recording as proof of all that happened while the event was being recorded, there would be need for him to require authentication of the recording as a "substantially accurate and fair recording" of actual events.

[30] Of course, having admitted the recording for this restricted purpose, it would then be unfair for the trial judge to use it as more than illustrative of the complainant's version of events. It could not, for example, be used to corroborate the complainant's evidence that the tape recorded the entire event, and that no words indicative of consent had been spoken.

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[2] *Bulldog* dealt with a video recording, but the principles expressed apply to all reproductions – audio recordings, video recordings and, in my view, photographs: *Bulldog*, at para. 32. *Bulldog* did not settle the question of whether the accuracy and fairness of the representation had to be established on the balance of probabilities, or on the lesser authentication standard, requiring only evidence upon which a reasonable trier of fact could conclude that the item is that which it is purported to be. The audiotape in this case was an "electronic document" within the meaning of the *Canada Evidence Act*, R.S., c. E-10, s. 31.8, and therefore arguably subject to the lesser authentication standard, as expressed in s. 31.1. This standard has the virtue of leaving the ultimate decision about authenticity to the trier of fact. Since the trial judge did not examine the accuracy and fairness of the audiotape as part of the admissibility inquiry, we need not resolve this question. Nor were the "best evidence" pre-requisites to admissibility contained in ss. 31.2 -31.7 brought into issue before us.

[31] In my view, when the transcripts and judgment are read as a whole the only reasonable conclusion is that the trial judge admitted the recording solely for this latter, illustrative purpose, and not as original evidence. I am also persuaded that the trial judge confined his use of the recording to this limited purpose. He therefore avoided the error claimed in this ground of appeal. I come to this conclusion on four bases.

[32] First, the trial judge is presumed to know the law, and had he admitted the recording for the former purpose as original evidence, he would have erred.

[33] Second, I do not know what else to make of the language "recording according to [the complainant's] testimony", or as "at least in part the assault that she's described". Those words draw a fast link between the use that would be made of the recording, and the complainant's testimony. That language cannot accurately describe a decision by the trial judge to admit the recording as authenticated, original evidence of what, in fact, transpired while the events were being recorded.

[34] Third, if the trial judge intended to admit the recording as original evidence of what transpired, that ruling would have been unfair to the defence. The recording was admitted on consent, and there is no basis for concluding that A.S. was consenting to the admission of the recording as an authenticated, complete record of events while the recording was operating.

[35] Fourth, the trial judge never relied upon the recording as original evidence corroborating the sexual assault in his Reasons for Judgment. This is consistent with his having admitted it solely as illustrative of the complainant's testimony.

[36] More specifically, the only use the trial judge described making of the recording in his Reasons for Judgment was his observation that the recording "accurately reflects the complainant's active verbalization of an absence of consent". This is consistent with his use of the recording as a "recording according to [the complainant's] testimony," since the recording does reflect the complainant's testimony that she was saying no and protesting during the alleged assault. At no point in the Reasons for Judgment does the trial judge purport to rely on the recording as evidence capable of resolving the point in contest, which was whether the complainant was herself engaged in consensual sexual activity with A.S. while actively verbalizing an absence of consent.

[37] In coming to this conclusion, I have considered two factors that may appear, on their face, to support an intention by the trial judge to admit the recording as original evidence of the event while the recording was recording.

[38] First, the trial judge's ruling that the editing of the recording is a matter of weight may indicate that the trial judge was reserving the right to rely on the recording as an unedited recording of the event, if the editing claim proved to have no weight. On the other hand, he may simply have been intending to give the

recording the weight he was going to assign to the complainant's testimony about what occurred. Only this latter option is consistent with what else the trial judge said when admitting the recording, and with his ultimate, restricted use of the recording.

[39] Second, the trial judge did ultimately find that the recording had not been edited, but this, too, is equivocal. The trial judge had to evaluate whether the recording was edited in order to determine whether A.S.'s testimony raised a reasonable doubt.

[40] On balance, I am persuaded that the trial judge admitted the recording for the limited purpose, namely, as illustrative of the complainant's testimony, and not as original evidence.

[41] On this premise – that the recording was admitted solely as illustrative of the complainant's testimony – the trial judge did not err in admitting the recording without assessing its accuracy and fairness. If I had found that he admitted the recording as original evidence of the event, I would have found him to have erred by admitting the recording without inquiring into whether it was a fair and accurate representation of what happened.

B. DID THE TRIAL JUDGE CAUSE A MISCARRIAGE OF JUSTICE BY MISAPPREHENDING MATERIAL EVIDENCE?

[42] A.S. contends that the trial judge misapprehended the evidence, including:

- The examining nurse's evidence about the location of bruises on the complainant's leg; and
- J.R.'s evidence about the bruises she observed.

[43] I will begin by setting out the material law. I will then approach these alleged misapprehensions of evidence in turn, explaining why I would not find that the trial judge misapprehended the examining nurse's evidence about the location of bruises on the complainant's leg. I will then explain why I would find that the trial judge misapprehended J.R.'s evidence relating to leg bruises and why this constitutes reversible error.

(1) The Material Law

[44] A misapprehension of evidence will be a reversible error only if it causes a miscarriage of justice. Such a miscarriage of justice will occur where the misapprehension of the evidence is material and not merely peripheral, and where the misapprehension plays an "essential part not just in the narrative of the judgment but 'in the reasoning process resulting in the conviction'": *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2 (emphasis added), citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 221. As these emphasized words make clear, the focus in applying this stringent standard is on the trial judge's reasoning, not on whether the verdict can be supported by other evidence: *Lohrer*, at para. 2. As Doherty J.A. noted in *R. v. Morrissey*, at p. 221:

> If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[45] In effect, where the trial judge's conviction depends on information not in evidence, the trial is rendered unfair since appropriate convictions are based solely on the evidence.

(2) The trial judge did not misapprehend the nurse's evidence

[46] The complainant testified that, during the sexual assault, A.S. pried her legs apart against her resistance. She testified that he left two bruises with his thumbs on the inside of her calves, "where it's more fleshy".

[47] The examining nurse did not note any bruises on the complainant's calves but did record a small bruise on the back of each leg, above the complainant's knees. A.S. argued that the nurse's evidence contradicted the complainant, since there was no bruising where the complainant claimed. Instead, the trial judge said:

> Corroboration for the complainant's accounts of events is concluded to be manifest in the bruising to her legs. I am not persuaded that the evidence of the examining nurse is determinative of that issue or serves to undermine the reliability of the complainant's account. The previously referenced lack of detail in that examination, the absence of any related photographic or digital imagery and the profound absence of any independent recollection by the reviewing nurse, serves to largely undermine the reliability of the evidence offered by that witness.

> I accept that bruising occurred to the calves of the complainant as she described. That circumstance was verified by the testimony of J.R. and is reflected in the subsequent account of events offered during the complainant's police interview of January 4, 2016.

[48] A.S. apparently interprets this passage as a finding by the trial judge that the examining nurse's observations corroborate the bruising to the complainant's calves. I do not read the trial judge's decision this way. In the above passage, which contains the relevant reasoning, the trial judge sets aside the examining nurse's evidence because her reliability was undermined. I see no basis for concluding that the trial judge misapprehended the examining nurse's evidence and relied upon it as corroborating the complainant.

(3) The trial judge committed reversible error by finding that J.R. observed leg bruises

[49] A.S. is correct, however, in pointing out that the trial judge misapprehended the evidence of J.R. The complainant testified that she had bruises on her calves. The trial judge's finding to that effect is recorded in the passage quoted above. However, J.R. offered no evidence corroborating the bruises on the complainant's legs. J.R. testified only about arm bruises.[3] J.R.'s testimony was, therefore,

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[3] The trial judge also found that J.R.'s testimony corroborated bruising on the complainant's wrist or forearm. J.R. did not testify about bruises on the complainant's writs or forearm. Both the complainant and J.R. testified that the complainant had showed J.R. bruising on her upper arm, near the bicep. The trial judge's finding on this point related only to the common assault charge, for which an acquittal was subsequently entered, not the sexual assault charge. It is, therefore, unnecessary to address this further.

incapable of verifying the complainant's testimony about calf bruises, yet the trial judge found that it did. In doing so, he misapprehended her evidence.

[50] I would find that this misapprehension caused a miscarriage of justice. The trial judge's corroboration finding, recounted in the passage quoted above, was central to his reasoning. In turn, the misapprehension was essential to his corroboration finding. I will begin with this latter point.

[51] The trial judge identified two sources of corroboration for the calf bruises the complainant claimed: the evidence of J.R., and "the subsequent account of events offered during the complainant's the police interview on January 4, 2016."

[52] As a matter of law, a corroboration finding cannot properly be sustained based on the second of these sources, "the subsequent account of events offered during the complainant's police interview of January 4, 2016." This is because the complainant's account of events during the police interview is a prior statement by the complainant that is consistent with her testimony, and it is a legal error for a trial judge to rely on a witness's prior consistent statement as corroborating that witness's testimony: see *R. v. D.K.*, 2020 ONCA 79, at paras. 34-35; *R. v. Dinardo*, 2008 SCC 24, [2004] S.C.R. 788 at paras. 36-40. A prior consistent statement comes from the same source that supplies the testimony and therefore lacks the independence that corroboration requires. To treat a prior consistent statement as corroborative therefore involves circular reasoning: at bottom the flawed reasoning

is that we can trust what the complainant is saying about her calf bruising because the complainant has said before that she had calf bruising.

[53] As A.S. points out, the circular reasoning was aggravated in this case because no police officers testified to confirm the complainant's prior consistent statement, nor were any exhibits entered into evidence at trial that could do so. The trial judge relied on the complainant's testimony that she made a prior consistent statement to the police to prove her own prior consistent statement, and then used this self-verified prior consistent statement as confirmation of the truth of the complainant's own testimony about the location of her bruises. There was double self-verification. Since the trial judge's corroboration finding cannot properly be upheld on this basis, the corroboration finding is left dependent on the misapprehension of J.R.'s testimony regarding the calf bruises.

[54] Given that the corroboration finding depends on the misapprehension of evidence, the remaining question is whether the corroboration finding itself was essential to the trial judge's reasoning? In my view, it had to have been. As I have discussed above, the trial judge did not rely on the recording as proof of non-consent. For the trial judge, whether the Crown had proved non-consent beyond a reasonable doubt depended ultimately on the testimony of the complainant.

[55] Yet the trial judge began by noting that the complainant had credibility problems. He found that there were "a number of circumstances where the

complainant has been demonstrated to be less than forthcoming in recounting various aspects of her relationship with the defendant". After addressing issues in A.S.'s testimony,[4] he then made three points relating to the complainant's credibility: the first relating to the recording; the second to whether A.S. had established that the complainant had a motive to mislead, and the third relating to the corroboration of the bruising on the complainant's legs. Only one of these points – the misapprehended corroboration of the bruising on her legs – is capable of supporting the complainant's otherwise troubled testimony relating to the contested issue at trial – whether the Crown had proved the absence of consent. I will elaborate by examining each credibility consideration, in turn.

a) The Recording

[56] First, as already explained, the trial judge concluded that "the recording accurately reflects the complainant's active verbalization of an absence of consent in relation to any form of sexual contact with the defendant that evening" (emphasis added). Notably, the trial judge did not say that he was using the recording as independent proof of consent, or to corroborate the complainant's claim that she did not consent. Using the recording solely as reflecting the complainant's active

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[4] The trial judge offered a reason for not believing the accused's competing version – that his account was implausible given the state of the relationship between him and the complainant – but this can be of no use in explaining why the trial judge affirmatively believed the complainant. As counselled in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, rejection of defence evidence cannot be treated as affirmative proof of Crown evidence.

verbalization of the absence of consent is consistent with the restricted basis upon which the recording was admitted. On a fair reading of the decision, including the trial judge's admissibility ruling relating to the recording, the trial judge cannot be taken as having used the recording as proof independent from the complainant's own testimony that she had not consented.

b) The Motive to Mislead

[57] Second, the trial judge rejected the motive to mislead that A.S. had ascribed to the complainant, namely, that the complainant set up A.S. in order to achieve custody and access in their marital dispute. To understand the significance of this finding, it is necessary to understand the distinction between an unproved motive to mislead, and a proved absence of motive to mislead.

[58] Where, as here, a suggested motive to mislead is disproved, the testimony is preserved from being impugned by such motive. When that suggested motive is disproved, it is as though the suggested motive is knocked off of the scales.

[59] However, affirmative weight cannot properly be added to the scales in favour of the testimony of a witness unless there is a proved absence of motive on the part of that witness: see, generally, *R. v. Bartholomew*, 2019 ONCA 377, 375 C.C.C. (3d) 534, at paras. 22-23; *R. v. M.B.,* 2011 ONCA 76, 267 C.C.C. (3d) 72, at paras. 30-32; *R. v. L.L.*, 2009 ONCA 413, 96 O.R. (3d) 412, at paras. 16, 44.

Disproving a single suggested motive to mislead – such as a desire to win custody and access – does not prove the absence of any and all motives to mislead.

[60] Accordingly, the trial judge's rejection of the sole motive considered for the complainant's testimony cannot add affirmative weight supporting the complainant's claim that she was not consenting. It is not capable in law of being a makeweight affirmatively supporting her testimony.

c) The Leg Bruising

[61] Third, the trial judge relied on his mistaken conclusion that the complainant's account was corroborated by the bruising to the complainant's calves. If such corroboration existed this would be compelling evidence since it would provide physical confirmation of the sexual assault complaint. It would confirm the specific force the complainant had described that is entirely consistent with a sexual assault while contradicting A.S.'s denial that force was used. Such corroboration, if it existed, could be decisive, notwithstanding the other difficulties noted with the complainant's evidence.

[62] Hence, on a fair reading of his decision, only one of the three reasons identified by the trial judge relating to the complainant's credibility can be taken as affirmative, material support for the trial judge's acceptance of the complainant's denial of consent, namely, his mistaken corroboration finding regarding the bruises on her calves. This alone shows how central that misapprehension must have

been to the trial judge's reasoning. So, too, does the weight that a proper corroboration finding relating to the calf bruises would carry. And so, too, does the manner in which the trial judge addressed this "corroboration" in his reasoning. In a case where he began by noting credibility problems with the complainant, he described the "corroboration" as "manifest". This was the last point the trial judge made before moving on to the portion of his decision dealing with the physical assault charge.

[63] To be clear, I am not suggesting that, as a matter of law, the trial judge required corroboration to accept the complainant's evidence. Of course, corroboration is not required to sustain a conviction in a sexual assault case. I am simply saying that the heart of the trial judge's own decision to believe the complainant, who he noted had credibility issues, was the corroboration he mistakenly found.

[64] Nor am I suggesting that the evidence presented at trial was incapable of supporting a finding of guilt, even allowing for the credibility problems with the complainant's testimony. But that is not determinative. What is determinative is that the trial judge's reasoning turned on a misapprehension of the evidence. The misapprehension of evidence thereby amounted to a miscarriage of justice requiring the conviction to be reversed.

C. DID THE TRIAL JUDGE GIVE ADEQUATE REASONS FOR CONVICTION?

[65] A.S. argued that the trial judge failed to give adequate reasons for conviction. The sufficiency of reasons is tested functionally. The question is whether the reasons explain or offer a pathway to the court's disposition such that those reasons facilitate appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 24-25.

[66] As I have just described, the trial judge did offer the pathway to conviction, albeit a pathway that on appellate review proves to have been undertaken in error. Specifically, he reasoned that despite its other difficulties, the complainant's account was corroborated by the leg bruising evidence warranting a finding of guilt. On this basis, the trial judge did not err by providing inadequate reasons for decision.

[67] I do agree with A.S. that there is no other pathway to conviction that is supported or apparent in his reasons. I have already explained that the conviction cannot be explained based on the recording, given the restricted basis for its admission. Moreover, the trial judge failed to address a number of the difficulties with the complainant's evidence, and said little about why he disbelieved the testimony of A.S. Therefore this is not a case where the conviction can be explained through the conventional application of the principles of *R. v. W.(D.)*.

[68] Ultimately, the trial judge's finding of guilt can only be explained on the footing that he considered the misapprehended corroboration to be powerful enough to demonstrate A.S.'s guilt beyond a reasonable doubt, without the need to offer further explanation about the credibility of the complainant and the accused.

[69] To be sure, this explanation gives rise to its own error, but the fact it exists requires that the ground of appeal based on the insufficiency of reasons must be dismissed.

CONCLUSION

[70] I would allow the appeal based on the misapprehension of evidence relating to corroboration, and the accompanying legal error in using a prior consistent statement as corroboration. I would set aside the verdict of guilt and order a new trial. In the circumstances, it is unnecessary to address A.S.'s request for leave to appeal sentence.

Released: MAR 19 2020

J.A.

I agree. L.B. Roberts JA

I agree. Harrison Young J.A