

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Goudie*, 2026 NLCA 34
Date: October 13, 2026
Docket Number: 202501H0029

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BETWEEN:

JAMES SCOTT GOUDIE — APPELLANT

AND:

HIS MAJESTY THE KING — RESPONDENT

Coram: F.P. O'Brien, W.H. Goodridge and F.J. Knickle JJ.A.

Court Appealed From:	Provincial Court of Newfoundland and Labrador, Happy Valley-Goose Bay, 1721A00151
Appeal Heard:	May 14, 2026
Judgment Rendered:	October 13, 2026
Reasons for Judgment by:	F.J. Knickle J.A.
Counsel for the Appellant:	Taylor R. Starrett
Counsel for the Respondent:	Jeffrey A. Summers

Authorities Cited:

CASES CITED: *R. v. Morrissey*, 1995 CanLII 3498 (ON CA), [1995] O.J. No. 639, 22 O.R. (3d) 514; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. MacIsaac*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199; *R. v. Vokurka*, 2013 NLCA 51, 339 Nfld. & P.E.I.R. 248, aff'd 2014 SCC 22, [2014] 1 S.C.R. 498; *R. v. Dove*, 2022 NLCA 6; *R. v. S.S.*, 2025 NLCA 3; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *Schwartz v. Canada*, 1996 CanLII 217 (SCC), [1996] 1 S.C.R. 254; *Barendregt v. Grebliunas*, 2022 SCC 22, [2022] 1 S.C.R. 517; *R. v. M.G.T.*, 2017 ONCA 736; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

STATUTES CONSIDERED: *Criminal Code,* RSC, 1985, c. C-46, section 276.

F.J. Knickle J.A.:

INTRODUCTION

[1] This appeal addresses whether the trial judge committed errors in convicting Mr. Goudie of sexual assault.

[2] Mr. Goudie alleges that the trial judge misapprehended evidence and that this misapprehension caused him to erroneously conclude that the complainant was a credible and reliable witness. Mr. Goudie submits that these errors resulted in an unreasonable verdict and that the verdict of guilt cannot be supported by the evidence.

[3] Mr. Goudie also alleges that after being convicted of the offence, the trial judge erred in refusing to re-open the trial, ten months after the trial had concluded, and to admit fresh evidence. Mr. Goudie submits that, had the trial judge not erred in excluding this evidence, the evidence could have undermined the complainant's credibility and raised a reasonable doubt as to Mr. Goudie's guilt.

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

BACKGROUND

The circumstances of the offences

[5] On the evening of January 18, 2021, the complainant, an Indigenous woman, went to a local bar where she consumed alcohol and played the gambling machines. The bar was attached to a hotel. Mr. Goudie lived in a room at the hotel and was also at the bar that evening.

[6] The complainant and Mr. Goudie were known to one another. They spent time together at the bar while she played the video gambling machines. She bought him a drink. After she ran out of money he invited her back to his room. The complainant testified that Mr. Goudie stated that he wanted to "show me something". When they arrived at his room, the complainant asked to use his washroom.

[7] The complainant testified that while she was in the washroom and sitting on the toilet, Mr. Goudie came into the washroom. He started touching her privates and then pulled off her pants and underwear, put her on the floor and "made love" to her. When asked by Crown counsel what she meant by term "made love", the complainant stated that Mr. Goudie put his penis in her vagina. The complainant testified that she did not want him to do this and she told him to stop.

[8] The complainant testified that Mr. Goudie then stopped intercourse with her and told her to get on the bed in the room, where he, as she described, "made love" to her again. She described that he got on top of her and had "made love" with her until he ejaculated. The complainant again confirmed that this meant that he put his penis in her vagina. She testified that she told him that she did not want to go on the bed. She testified that she told him she wanted to go home, but he "got physical" and pushed her on the bed. She testified that this was how she ended up with bruises on her legs and shoulder. She testified that she repeatedly told him to stop.

[9] After he finished, she got dressed and left the room. She went to the front desk of the hotel and asked the clerk to call an ambulance to take her to the hospital where she disclosed what happened. She testified that she asked for an ambulance because her vagina hurt. She was very intoxicated and was admitted to hospital. The complainant testified that she had no recollection of speaking to the nurses or police officer at the hospital or having pictures taken.

[10] On cross-examination, the complainant agreed that she called an ambulance because she had nowhere to go, and was feeling suicidal.

[11] Photographs of the complainant were tendered showing some bruising, however, there was no evidence that the bruises shown were caused by Mr. Goudie.

[12] DNA evidence was tendered that established that vaginal intercourse occurred between the complainant and Mr. Goudie. Two police officers also testified about their observations of the complainant.

[13] The first officer, noted above, attended at the hospital that night but did not take a formal statement from the complainant because, in his opinion, she was too intoxicated. A second officer interviewed the complainant the following morning, and also had photographs taken of the bruising.

[14] The second officer also testified that the complainant's glasses were located in the hotel room. The complainant had stated to the officer that she thought she had left her glasses and her phone in Mr. Goudie's hotel room.

[15] Finally, several security videos from the hotel were tendered and at different points showed Mr. Goudie and the complainant together.

[16] Mr. Goudie did not dispute most of the evidence tendered by the Crown, except that he disputed the complainant did not consent to sexual intercourse. Mr. Goudie did not testify at trial as was his right.

The trial judge's decision

[17] The trial occurred over four days in June and July 2023, and the trial judge provided an oral decision on July 21, 2023. After finding Mr. Goudie guilty of the offence, the trial judge set the matter down for sentencing. The sentencing was postponed several times. It was eventually set for April 18, 2024. Two days before the sentencing hearing, on April 16, 2024, Mr. Goudie filed an application to admit fresh evidence with the trial judge. He stated that he wished to re-open the trial on the basis of the fresh evidence. The sentencing was postponed to allow the trial judge to hear the application for fresh evidence.

[18] The application for fresh evidence was heard in July 2024, over a year since the trial. The proposed fresh evidence consisted of the testimony of a witness, Mr.

Goudie's "best friend", who lived in the hotel around the same period that he did. Her proposed evidence was that one evening, she went to visit Mr. Goudie at his hotel room, and when she arrived she noticed that the door to his room was ajar. She stated that she opened the door to the hotel room and saw the complainant on top of Mr. Goudie on the bed in the room.

[19] The witness in her affidavit stated that the complainant was having "vigorous" sexual intercourse with Mr. Goudie, while he was asleep and snoring. She also recalled that she saw the complainant leave the hotel in an ambulance. The witness could not remember when this occurred, or the room in which Mr. Goudie resided at the time. She also confirmed that Mr. Goudie discussed the details of the complainant's trial testimony with her prior to her recounting her recollection in her affidavit.

[20] Mr. Goudie also testified at the hearing of the application and stated that although the witness was his best friend he had never discussed the charges or the proceedings with her until shortly before his sentencing hearing in April 2024. Mr. Goudie testified that the witness overheard him talking about the sentencing and told him she could help him.

[21] The trial judge rendered his decision in September 2024 regarding the application to re-open the trial and to admit the fresh evidence. The trial judge declined to admit the fresh evidence and declined to re-open the trial and the matter was re-scheduled for sentencing submissions. Sentencing submissions occurred in March 2025 and Mr. Goudie was sentenced in April 2025.

[22] Mr. Goudie now appeals to this Court to have the conviction set aside and an acquittal entered or, in the alternative, a new trial.

THE ISSUES

[23] Mr. Goudie raises two issues.

[24] First, he asserts that the trial judge misapprehended the evidence and that this misapprehension caused him to erroneously accept that the complainant was a reliable witness. Mr. Goudie asserts that if the judge had not misapprehended the evidence, he would have concluded that the complainant's testimony, even if credible, could not be relied upon to establish the *actus reus* of the offence beyond a reasonable doubt, in particular, whether the complainant did not consent to the

sexual contact between her and Mr. Goudie. Mr. Goudie asserts that this misapprehension of the evidence resulted in a verdict that was unreasonable and cannot be supported by the evidence.

[25] Second, Mr. Goudie asserts that the trial judge misapplied the principles regarding whether the fresh evidence should have been admitted, and because of this error, improperly excluded evidence that was relevant because it may have raised a reasonable doubt as to whether the complainant had not consented to the sexual activity.

DISCUSSION

ISSUE 1: Did the trial judge misapprehend the evidence in concluding the complainant was a credible and reliable witness?

[26] Mr. Goudie submits that the trial judge misapprehended the evidence at trial, and that this misapprehension caused the trial judge to erroneously conclude that the complainant's evidence was both credible and reliable.

[27] As stated in *R. v. Morrissey*, 1995 CanLII 3498 (ON CA), [1995] O.J. No. 639, 22 O.R. (3d) 514, at 538 (Ont. C.A.), a misapprehension of evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence." This characterization of a misapprehension of evidence was applied by the Supreme Court of Canada in *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732. (See also *R. v. MacIsaac*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199, at paras. 16-18, and *R. v. Vokurka*, 2013 NLCA 51, 339 Nfld. & P.E.I.R. 248, at para. 20, aff'd 2014 SCC 22, [2014] 1 S.C.R. 498, *R. v. Dove*, 2022 NLCA 6, *R. v. S.S.*, 2025 NLCA 3). In *Lohrer*, the Court described the requirements to establish a misapprehension of evidence as a "stringent" standard. The Court stated:

> *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[28] Unless it is established that the judge misapprehended the evidence, this Court will show deference to the trial judge's conclusions on the credibility or reliability of a witness's evidence.

[29] In my view, the arguments raised by Mr. Goudie do not support the conclusion that the trial judge misapprehended the evidence, but are disagreements with the trial judge's conclusions about the complainant's evidence.

[30] For example, Mr. Goudie asserts that the trial judge should not have found the complainant a reliable witness given that her memory about what happened on the evening in question was not strong. Mr. Goudie asserts that the complainant's memory of the incident, by her own admission, was poor, and she contradicted herself on the details she could or could not recall. Mr. Goudie points to several places in the transcript where the complainant could not provide details or respond to questions because she could not remember the details.

[31] The trial judge was aware of the deficiencies in the complainant's memory and he addressed these deficiencies in his decision. The trial judge explicitly noted the details that the complainant could not remember and the inconsistencies raised on cross-examination (Transcript, at pp. 188-189):

> In cross-examination, [the complainant] admitted to telling the police that, notwithstanding she told them she'd only met Mr. Goudie a few times, in fact this was incorrect, and she had known him quite a bit longer. She described how she went out drinking on that particular evening, but she did not consider herself, when asked, to be an alcoholic. She agreed, however, with the characterization that she was severely intoxicated that night. She couldn't recall if the police tried to take a statement that night. She couldn't recall how long she had been in Mr. Goudie's room. She couldn't recall what Mr. Goudie was wearing, and she couldn't recall Mr. Goudie's room number, but she does recall that Mr. Goudie's room was quite messy. She also denied when it was put to her that she had in fact run out of money, had no way to get back to [her home], and had asked to stay in Mr. Goudie's room for the night. She couldn't remember at that point how many times they had sex, or she had been assaulted, but denied that it was consensual.

[32] Despite the frailties in her evidence, the trial judge reasoned that the fact that her narrative of the night's events was corroborated on details leading up to but not including the offence, went "a long way to contributing to her credibility" (Transcript, at p. 192). The trial judge concluded:

> Put collectively, I find that [the complainant's] narrative was credible, reliable, and uncontradicted.

[33] In my view, this reasoning is not a misapprehension of evidence by the trial judge. There is no misapprehension of evidence merely because Mr. Goudie disagrees with the trial judge's conclusion that the complainant was a credible or reliable witness. It is the trial judge's role to decide whether or not he accepts testimony of a witness. A trial judge can accept some, none, or all of a witness's testimony. In these circumstances, the frailties of the complainant's memory did not dissuade the judge from accepting her testimony. This was his decision to make and the above arguments do not show a misapprehension of the evidence in reaching this conclusion.

[34] Having said that, Mr. Goudie asserts two misapprehensions of evidence that need to be addressed. Mr. Goudie suggests that the trial judge misapprehended the evidence by: 1) concluding that apparent inconsistencies in the complainant's testimony may have been due to the complainant not understanding some of the questioning because of a "language" issue; and 2) accepting that the complainant's testimony was credible and reliable because it was corroborated, when there was no evidence of corroboration that she did not consent to the sexual contact, the only issue at trial.

1) *Did the trial judge misapprehend the evidence in concluding that the complainant may have been inconsistent due to not having understood certain questions because of a language issue?*

[35] In finding the complainant a reliable witness, apart from the gaps in her memory, the trial judge also addressed what Mr. Goudie's counsel at trial had described as major inconsistencies in the complainant's evidence. It is helpful to reproduce the questions that were put to the complainant and her responses in order to understand the inconsistencies.

[36] On cross-examination, counsel for Mr. Goudie put to the complainant that she could not remember specific details about what happened between her and Mr. Goudie. The complainant agreed she could not remember certain details but disagreed that she did not remember other details. Counsel then suggested to the complainant that she could not say that she was "sexually assaulted". The complainant responded "I don't know. I don't remember" (Transcript, at p. 85).

[37] The Crown conducted re-direct examination, however, did not pursue questioning in relation to the above exchange.

[38] Mr. Goudie submits that her response "I don't know. I don't remember", to the suggestion that she could not say that she was sexually assaulted, undermines the reliability of her evidence.

[39] In submissions, the Crown suggested that the complainant's response "I don't know, I don't remember" may have been the consequence of not knowing what was meant by the term "sexual assault". The Crown pointed to the fact that the complainant referred to the unwanted sexual intercourse as Mr. Goudie having "made love" to her. She repeatedly referred to the term "made love" even though she testified that she did not want Mr. Goudie to have sex with her, and told him repeatedly to stop. The Crown submitted that her use of this kind of terminology illustrated that she may have had difficulty with understanding a legal term like "sexual assault". The Crown submitted that the complainant may not have known that the term "sexual assault" referred to the conduct she had described.

[40] The trial judge agreed. He was satisfied that notwithstanding that the complainant's responses to that particular question may appear inconsistent with her earlier testimony that she did not want to have sexual intercourse with Mr. Goudie, the responses did not detract from the complainant's overall reliability or credibility. The trial judge stated (Transcript, at p. 193):

> As pointed out by the Crown, the term sexual assault was never put into context or explained to an individual, [the complainant], who described her sexual assault or rape as being made love to. And there's clearly a language issue at play here, and I agree with [the Crown's] submissions in that regard.

[41] Mr. Goudie submitted before this Court that it was not open to the trial judge to conclude that the complainant's inconsistencies in her testimony could be explained because of her not understanding the language in the questions put to her. Mr. Goudie submits there was no evidence that the complainant did not understand English, such as the request for a translator, or preliminary questions by the Crown to illustrate that the complainant's English may not have been strong. Mr. Goudie submitted that if the Crown was of the view that the complainant may have had difficulty with English, and that this was why her responses in cross-examination were inconsistent with her evidence in direct examination, the Crown should have presented the necessary evidence. Mr. Goudie submitted, for example, that it was

open to the Crown to seek clarification from the complainant in re-direct examination.

[42] Mr. Goudie submits in the absence of explicit evidence that the complainant did not understand English, or the term "sexual assault", there was no basis in the evidence for the trial judge to rely on this as an explanation for the complainant's inconsistent responses and that to so do was a misapprehension of evidence.

[43] Upon review of the record, in my view, it was open to the trial judge to conclude that the complainant may have not understood the term "sexual assault" when counsel suggested to her that she could not "say you were sexually assaulted, can you". Contrary to Mr. Goudie's submissions, there was evidence before the trial judge that the complainant may not have had a good command of the English language.

[44] While no one explicitly raised with the trial judge that the complainant may not have understood the question at the time she responded, this does not mean that the trial judge was not entitled to consider whether the complainant understood the question in assessing the inconsistency of her response with her early testimony.

[45] The conduct that was alleged to have comprised the "sexual assault" was repeatedly referred to by the complainant as Mr. Goudie having "made love" to her. The term "made love" in common English parlance implies that sexual intercourse is consensual, yet the complainant was explicit and consistent on direct examination that she did not want Mr. Goudie to have sexual intercourse with her. When asked what she meant by the term "made love" she referred solely to the physical act of Mr. Goudie putting his penis in her vagina. Her use of the term "made love" meaning something different than the common English parlance of the term, was evidence that her understanding of English may not have been strong, particularly as it relates to describing sexual acts to which she was not consenting.

[46] When coupled with the trial judge's observation that the term "sexual assault" is a legal term with a very specific meaning in English, and covers a wide range of physical acts, including the conduct as described by the complainant, without consent, it was reasonable for the trial judge to conclude that the complainant may not have understood the question as framed when counsel suggested that she could not say she had been sexually assaulted.

[47] Upon review of the Transcript, other responses by the complainant are consistent with a witness whose command of the English language may not have been strong. For example, when told by the trial judge that she had "a choice" of either "taking an oath on the Bible or promising to tell the truth" and which she would prefer, the complainant replied with the phrase "tell the truth" even though the obligation to tell the truth would apply to both swearing the oath or affirming.

[48] When describing how she left her glasses in the room she referred to "he" as not having glasses when she left the room. The complainant stated (Transcript, at p. 73):

> I had glasses on when I was in his room, but I never – he never had no glasses when I left.

[49] That the complainant used simple, incomplete phrases to respond and sometimes incorrect grammar, is consistent with someone who may not have had a good command of the English language.

[50] While the trial judge did not refer to such aspects of her testimony in explaining why he was satisfied that there may be a language issue with the complainant, what he heard and observed from the complainant, including the above examples, may have informed his reasoning as to why he accepted that the complainant may have not understood what was meant by the legal term "sexual assault". The trial judge was also aware that the complainant was Indigenous. It should be noted that the trial judge was satisfied that there was not only an issue, but "clearly" an issue regarding her understanding of English. He was not equivocal about this conclusion.

[51] As is so often stated by the Supreme Court, trial judges are in a much better position to assess witnesses than an appeal court reading the cold words of a transcript. The trial judge watched and heard the complainant and it was within the entire trial context that he assessed her credibility and reliability. As was stated by the Supreme Court in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at paragraph 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of

> palpable and overriding error by the trial judge, his or her perceptions should be respected.

[52] The assessment of the credibility of a witness is a question of fact and is the purview of the trial judge. The trial judge is in the "unique" position to see and hear the witnesses (*Gagnon*, at paragraphs 10 and 12; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at paragraph 10). As stated in *Schwartz v. Canada*, 1996 CanLII 217 (SCC), [1996] 1 S.C.R. 254:

> [32] It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. …

[53] In the absence of a palpable or overriding error (of which none has been shown), the assessment of credibility of the witnesses, including the appellant, and findings of fact are entitled to deference by an appellate court.

[54] In reviewing the trial judge's assessment of the complainant's credibility, and his conclusion that she may have been inconsistent because she did not understand the questions, this Court must be careful to avoid parsing the reasons of the trial judge so closely that error can be found by taking his words out of context. His reasons must be read wholistically.

[55] Read wholistically, the trial judge reviewed the evidence and concluded that the complainant had been consistent that she did not want Mr. Goudie to have sexual intercourse with her notwithstanding that she referred to the incident as him having made love to her and could not say whether or not she had been sexually assaulted. I see no basis to conclude that this reasoning undermined the trial judge's acceptance of the complainant's overall narrative that Mr. Goudie had sex with her without her consent. In my view, the trial judge did not misapprehend this evidence, and I would defer to his conclusions respecting her credibility.

2) *Did the trial judge err in concluding that the complainant was credible because she was corroborated on facts other than the issue of consent?*

[56] The trial judge concluded that despite having difficulty remembering certain details, the complainant was a reliable witness because she did remember details that were corroborated by other evidence. The trial judge stated (Transcript, at p. 191):

> [The complainant's] original narrative in direct evidence was, in my view, cogent and consistent with much of the other evidence the Court heard and observed. [The complainant] was present at the [bar], drinking and playing slots. She admitted to drinking and being intoxicated, but nonetheless gave a consistent narrative.

[57] The trial judge noted that her testimony that sexual intercourse occurred was confirmed by DNA evidence. That she was at the hotel bar, and then went with Mr. Goudie to his room was confirmed in part by video surveillance. The trial judge noted that the complainant's evidence was also corroborated by the police officer who interviewed her the next morning regarding the complainant's assertion that her glasses had been left in Mr. Goudie's room. The policer officer located the glasses in the room after a search of the room. The trial judge also noted that although the complainant readily admitted to being intoxicated, she specifically remembered that she did not consent to sexual intercourse.

[58] Mr. Goudie submits that although the complainant was corroborated on these details, this corroboration was meaningless. Mr. Goudie submits that the only issue in the trial was whether the complainant consented and, on that issue, there was no corroboration. Mr. Goudie submits that the fact that there was corroboration on details not in dispute, could not enhance the complainant's credibility, and in relying on such evidence as corroborative of the complainant's testimony, the trial judge erred.

[59] I see no error in the trial judge's reasoning that the complainant was a reliable and credible witness in part because her narrative was corroborated. Much of the evidence that the trial judge found corroborative, while not in dispute, was relevant to whether the other elements of sexual assault were established, such as the presence of DNA having established that there was vaginal intercourse.

[60] The trial judge was careful to note that in finding that the complainant's evidence was corroborated, there was no corroboration of her evidence that she did not consent, but was either "up to" the point when she testified that she had not consented to sexual intercourse or the events following the sexual assault. For example, the complainant stated she left her glasses in the room, which were later found by police. She also stated that she went to the hospital in an ambulance . This was confirmed by other evidence.

[61] Further, in referring to the fact that the complainant was corroborated, the trial judge was explaining not just why he found the complainant's evidence reliable, but why she was credible and reliable notwithstanding that she admitted that there were

several details she could not remember and had been intoxicated that evening. I see no error in so reasoning.

[62] I would dismiss this ground of appeal.

ISSUE 2: Did the trial judge err in dismissing the application to exclude fresh evidence?

[63] The trial judge refused to admit the evidence of Mr. Goudie's best friend who would testify that she observed the complainant on top of Mr. Goudie having "vigorous" sex. This evidence came to light ten months after the presentation of the trial evidence.

[64] Mr. Goudie does not dispute that the trial judge correctly articulated the principles to be applied in determining whether the evidence should be admitted, but argued that the trial judge erred in his application of those principles.

[65] The test for the admission of fresh evidence, whether on appeal or in an application to re-open a trial prior to sentencing, as occurred here, is whether it is in the interests of justice to admit such evidence. This is the overarching concern for the admission of such evidence (*Barendregt v. Grebliunas*, 2022 SCC 22, [2022] 1 S.C.R. 517, at para. 3). As stated by Justice Karakatsanis, in *Barendregt*, at paragraph 32:

> The test strikes a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings. The first criterion seeks to preserve finality and order by excluding evidence that could have been considered by the court at first instance, had the party exercised due diligence. This protects certainty in the judicial process and fairness to the other party. The remaining criteria — that the evidence be relevant, credible and could have affected the outcome — are concerned with reaching a just result.

[66] The concern in finding the proper balance between finality and ensuring justice is done applies with the same force where the request is to re-open a trial after a verdict has been entered (*R. v. M.G.T.*, 2017 ONCA 736, at paras. 47, 55). In either situation, the evidence is being offered as "a foundation for reviewing" the trial decision (*United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at para. 45). Given the interest in the finality of proceedings, there must be compelling reasons that it is in the interests of justice to review a verdict on the basis of additional evidence.

[67] The proper balance between finality and avoiding a miscarriage of justice in deciding whether it is in the interests of justice to admit additional evidence after a verdict has been rendered, is generally governed by four considerations, as articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen.*
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

See also *Barendregt*, at paragraph 29.

[68] Whether a litigant was duly diligent in pursuing the new evidence addresses the public interest in finality of proceedings. Trials are not done piecemeal. The parties are expected to put their best foot forward by calling all relevant and admissible evidence during the trial.

[69] However, failures in due diligence cannot come at the expense of ensuring that the just result is reached. In the criminal context, failures in due diligence may have to give way to the other criteria in order to avoid a miscarriage of justice.

[70] That is to say, where an accused fails to be diligent in tendering evidence at trial, it may nonetheless be in the interests of justice to allow the evidence if it is credible and reliable and could impact the verdict. To refuse to admit such evidence could result in a miscarriage of justice because an accused might be convicted of an offence despite there being other evidence that could impact whether guilt is the just verdict.

[71] In these circumstances, there is no dispute that the trial judge properly articulated these principles. The issue is in his application of the principles,

particularly as it relates to the fourth consideration whether the evidence if believed could have been reasonably expected to have affected the result.

[72] In refusing to admit the evidence it is clear from the trial judge's reasons that he had concerns with all four considerations under the *Palmer* test.

[73] The trial judge was concerned that it had not been shown how the evidence was relevant, or credible, or reasonably capable of belief, because of its imprecision, and because of the timing of its emergence.

[74] The timing of the emergence of the evidence also caused him concern as to whether Mr. Goudie had established due diligence. The trial judge had trouble accepting why the evidence was only coming to light approximately ten months after the evidence of the trial had concluded and shortly prior to the day Mr. Goudie was to be sentenced. The trial judge stated (Transcript, at p. 302):

> The affiant and the defendant both claim to be good friends who nonetheless never discussed these charges. Mr. Goudie says he was too embarrassed to discuss the charges and the trial. That said, this is apparently exactly what he did the day of the sentencing hearing. Mr. Goudie claims that [the witness] questioned him about his glum demeanour, and he responded by explaining he was being sentenced in relation to a sexual assault conviction. Upon hearing the circumstances, [the witness] volunteered the potentially exculpatory evidence earlier described. If this explanation is believed, neither Mr. Goudie nor Defence counsel could have [adduce] [the witness's] evidence at trial.

[75] While the trial judge accepted that the evidence could be potentially relevant as exculpatory evidence if the witness was describing the same evening as the complainant, he was not satisfied that the evidence established that the witness was describing the same event as described by the complainant. The trial judge stated (Transcript, at p. 304):

> Number 2, it's unclear if [the witness] is talking about the same evening that contains the events for which Mr. Goudie was convicted. She doesn't know the date, although appeared to recall [the complainant's] departure in an ambulance. Since this apparently occurred more than once, the most we can say is that it's possible she's talking about the same evening. Given that she could be referring to a separate event, that the acceptance of this evidence might necessitate an application under section 276 of the *Criminal Code* in order to lead this evidence.

[76] This lack of cogency in the evidence greatly undermined its potential relevance. As explained by the trial judge, without knowing if these observations were made the same night that the complainant alleged she was sexually assaulted, the evidence fell squarely within the category of presumptively inadmissible evidence of other sexual activity. It would first need to be vetted under section 276 of the *Criminal Code* to determine whether it was admissible. Nothing was presented to the trial judge as to how, as evidence of other sexual activity, it could be relevant.

[77] With respect to his concerns, as to the credibility of the fresh evidence, the trial judge also noted that Mr. Goudie testified that he learned of the evidence from the witness shortly prior to sentencing, ten months after the trial had concluded and more than three years after the offence had occurred. The trial judge had trouble finding it credible that this witness, who was described as Mr. Goudie's "best" friend, had not discussed this matter with him until he was to be sentenced. The trial judge stated (Transcript, at p. 304):

> Number 3, the manner in which Mr. Goudie and Defence counsel became aware of [the witness's] potential exculpatory evidence relies on the acceptance of a sequence of events that involves Mr. Goudie's refusal to discuss the trial and charges due to his embarrassment and this state of affairs suddenly (unintelligible).

[78] The trial judge's concerns with the timing of the disclosure as it related not only to whether it was credible but whether, through due diligence, Mr. Goudie could not have obtained the evidence, provided a legitimate basis for excluding this evidence.

[79] For example, in *Palmer*, concerns as to the credibility of fresh evidence and whether it was reasonably capable of belief were the basis for its rejection. In that case, the appeal court rejected a jailhouse informant's change of heart about his previous testimony as it was evidence that was not reasonably capable of belief. In upholding the Court of Appeal's refusal to admit the evidence in *Palmer*, the Supreme Court of Canada stated, at page 777:

> It is evident that the Court of Appeal applied the test of credibility and found the evidence tendered as to the validity of Ford's trial evidence to be wholly unworthy of belief. It therefore refused the motion and in so doing made no error in law which would warrant interference by this Court. While it may not be necessary to do so in view of this conclusion, I express the view that the Court of Appeal was fully justified in reaching the conclusion it did upon a consideration of all the evidence adduced on the motion before it and the evidence appearing in the trial transcripts.

[80] Similarly, in the context of all of the evidence and the trial record, it was open to the trial judge to assess the credibility of the evidence given the timing of its emergence and the vagueness of its contents.

[81] The trial judge went further in his analysis and stated (Transcript, at p. 305):

> … *Assuming* that the sex on the bed was consensual, we are still left with [the complainant's] evidence that she was sexually assaulted in the bathroom. [The witness] doesn't claim to have witnessed this, and Mr. Goudie did not testify to either event, so we are left with [the complainant's] evidence alone.
>
> [Emphasis added.]

[82] The trial judge stated that even if it was "assumed" that the witness was describing the same event (of which he did not accept), the evidence could not be reasonably anticipated to have affected the result because such evidence could not be used to raise a reasonable doubt that the complainant consented to the events in the bathroom. In his view, such reasoning would invoke one of the prohibited twin myths, because the trier of fact would be asked to conclude that if the complainant may have consented to what happened on the bed, she was more likely to have consented to what happened in the bathroom.

[83] In light of the trial judge's conclusion that the evidence was too vague to be certain as to when the observations were made, it was unnecessary for the trial judge to consider its impact in this way.

[84] The trial judge's concerns that the evidence was not credible, too imprecise, and lacked cogency, was sufficient to be satisfied that the evidence was not reasonably capable of affecting the verdict.

[85] For this reason, the trial judge properly excluded the evidence. The credibility of the evidence was suspect, its imprecision made its potential relevance uncertain, resulting in the conclusion that its admission could not have been reasonably anticipated to have affected the verdict. When balanced against the interest in the finality of the proceedings, the trial judge was correct to conclude that it was not in the interests of justice to admit the evidence.

CONCLUSION AND DISPOSITION

[86] There is no basis to conclude that the trial judge misapprehended the evidence, and the trial judge made no legal errors in accepting the complainant's testimony as credible and reliable. This determination was the province of the trial judge to which this Court, in the absence of an error in principle, will show deference. The trial judge observed the complainant and was fully aware of her frailties.

[87] Nor did the trial judge err in refusing to admit the fresh evidence. Considering the criteria in *Palmer*, it was not in the interests of justice to admit the evidence.

[88] I would dismiss the appeal.

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F.J. Knickle J.A.

I concur : _____

F.P. O'Brien J.A.

I concur : _____

W.H. Goodridge J.A.