Court File No.: SCA#69/16

SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTIONS APPEAL
(Toronto Region)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

MUSTAFA URURYAR

Appellant

APPELLANT'S FACTUM

PART I

STATEMENT OF THE CASE

1. The Appellant, Mustafa Ururyar, was charged with one count of sexual assault. His trial proceeded in the Ontario Court of Justice before the Honourable Justice Zuker. The Crown's case consisted of the evidence of the complainant, Mandi Gray – who alleged that the Appellant sexually assaulted her after a night of drinking at a couple of local bars. The Appellant testified and denied that the sexual contact was non-consensual. The defence also called the Appellant's current girlfriend, Alison Moore, and the Appellant's roommate, Philip So, who partially corroborated his testimony. Following a four-day trial the Appellant was convicted in a 179-page written judgment, which relied heavily on untested academic literature that was not presented to the parties for submissions.

2. After conviction, the Crown brought an application to revoke the Appellant's release and have him ordered detained pending sentencing. Throughout the proceedings, the Appellant was released on a promise to appear and undertaking with minimal conditions. The Crown's application was argued on July 25, 2016 at which point the Appellant was

ordered detained, despite the fact that a conditional sentence was an available disposition. Shortly thereafter, the Appellant brought an application for pre-sentence bail pending appeal in the Superior Court of Justice. He was ordered released by the Honourable Justice Quigley on August 2, 2016 on the basis that there were: "at least two grounds of appeal that appear…to be strongly arguable if not decisive, involving errors of law that go to trial fairness, both of which manifest a strong likelihood that appellate intervention will result."[1] The Appellant's bail pending appeal was continued after the sentence was imposed.

3. The Appellant's sentencing proceeded on September 14, 2016. Immediately following the submissions, and without reviewing the defence materials, Justice Zuker released a 55-page *pre-written* judgment. In the sentencing judgment, he commented on the grounds of appeal raised in the bail decision and reported in the media.[2] He sentenced the Appellant to the maximum carceral term – 18 months jail – followed by the maximum probationary period of three years. He also ordered $8,000 as freestanding restitution to compensate the complainant's legal fees incurred in preparing to testify at the trial. The Appellant raises the following grounds of appeal:

i. The trial judge displayed a reasonable apprehension of bias in favour of the complainant;

ii. The trial judge improperly took judicial notice and relied on untested academic commentary that was not put to the parties for submissions;

iii. The trial judge applied different standards of scrutiny to the evidence;

iv. The verdict is unreasonable because the trial judge's reasoning process is irrational and, at times, impossible to follow;

v. The trial judge misapprehended the evidence related to the text messages and the public displays of affection;

vi. The trial judge erred in his assessment of the issue of consent; and,

vii. The trial judge erred in imposing restitution for the complainant's legal fees.[3]

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[1] *R. v. Ururyar*, 2016 ONSC 5056 at ¶91.

[2] See, for example, National Post article: *York PhD student convicted of sexual assault has strong 'if not decisive' grounds of appeal, Ontario judge says*, reported at http://news.nationalpost.com/toronto/york-phd-student-convicted-of-sexual-assault-has-strong-if-not-decisive-grounds-of-appeal-ontario-judge-says on August 10, 2016 7:37 PM ET, *published five weeks before the sentencing*.

[3] The concerns about the restitution order will be addressed as a sub-heading of the bias ground, rather than as a stand-alone ground of appeal. However, the Appellant submits that this Order is unlawful as it is contrary to s. 738(1) of the *Criminal Code*.

PART II

STATEMENT OF THE FACTS

I. The Allegations

4. The complainant was a graduate student at York University. She met the Appellant around January 16, 2015. The Appellant was also a graduate PhD student in the Political Science Department. Both were involved in CUPE and on the night of the incident, their CUPE office had just won a strike vote. To celebrate, the complainant and several other students went to the Victory Café – which is a small bar near Bathurst and Bloor in Toronto. The complainant said that she texted the Appellant and asked him to "come to the bar." He initially said he was feeling ill, but then agreed to join her later that evening. The Appellant had a girlfriend at the time, Alison Moore, who lived in Montreal. The Appellant testified that they had an open relationship and had relationships, including sexual relationships, with other people while they lived in separate cities. Ms. Moore testified and confirmed the nature of their relationship.

Evidence of M. Gray, Transcript, February 1, 2016, pp. 67 -74
Evidence of M. Gray, Transcript, February 2, 2016, pp. 42 - 44
Evidence of the Appellant, Transcript, May 3, 2016, pp. 4 - 7
Evidence of A. Moore, Transcript, May 3, 2016, pp. 130 - 132

5. The Appellant saw the complainant for a couple of weeks before the night of the incident – January 30 and into the morning of January 31, 2015. The complainant said that she did not expect him to come to the bar. During the examination-in-chief, she testified that she "texted him and asked him if he wanted to come out…" but she deleted those text messages. When confronted with the text messages in cross-examination, it was clear that she texted him: *"I'm at Victory Café. Come drink and then we can have hot sex."* She claimed to be "surprised" that he attended the bar and stating: "I didn't even expect him to show up…". It was clear from the text message exchange that he told her: "I'm going to come in a bit." Further, the complainant acknowledged saying "miss me that much…". The complainant did not mention the "hot sex" text to the police in her statement and maintained that she deleted the entire conversation the morning after the incident. She also texted her friend the morning following and said: "it just happened we were at the same bar."

Evidence of M. Gray, Transcript, February 1, 2016, pp. 68 – 82
Evidence of M. Gray, Transcript, February 2, 2016, pp. 50 – 62
Exhibit 1(c) – Text Messages 22 pages to Mandi G, Appeal Book, p. 267

6. The complainant said that the Appellant arrived between nine and 10pm. She maintained that when he arrived, they did not talk that much and sat at other tables.[4] When they did talk, out of the blue, the Appellant told her "not to…touch him in public." She denied that this was in response to her rubbing his leg. She also maintained that before that night he was "touchy… in public"[5] but now it seemed like he "didn't want his girlfriend to find out" about their relationship, despite it never being an issue before. They stayed at Victory Café for a few hours before leaving to go to another bar called Pauper's. The complainant said she consumed about three or four beers at Victory Café before they left – between seven or eight and just after 10pm. The complainant was "tipsy" but not falling down drunk. The group that left the Victory Café for Pauper's consisted of the complainant, the Appellant, and the complainant's friend, Lacey.[6]

Evidence of M. Gray, Transcript, February 1, 2016, pp. 75 – 79
Evidence of M. Gray, Transcript, February 2, 2016, pp. 8 – 9; 62

7. According to the complainant, at Pauper's, she continued to drink beer and socialize with some people that she had recently met through the union. She consumed another $40 worth of alcohol, but was not sure exactly what she drank. She did not talk much with Lacey or the Appellant. She stayed until the "lights came on" – close to 2:30am. Because she was drinking a lot, she asked the Appellant if she could spend the night at his apartment. He told her he was not feeling well and she could stay the night but "he wouldn't have sex with [her]…", which she felt was a "totally weird thing to say." She wanted to stay the night anyway because she "just wanted somewhere safe to sleep." The Appellant's apartment was within walking distance.

Evidence of M. Gray, Transcript, February 1, 2016, pp. 79 – 80
Evidence of M. Gray, Transcript, February 2, 2016, pp. 8 – 9; 147 - 148

8. The complainant testified that towards the end of the night, the Appellant kept asking Lacey to come back to his apartment and continue drinking with them. She thought this was

[4] This evidence also has to be considered and contrasted with the text messages – where the complainant indicated she was bored at the bar and wanted the Appellant to attend.
[5] Alison Moore also testified that the Appellant did not like public displays of affection.
[6] The Crown did not call Lacey as a witness.

strange because she did not see him drink the entire night[7] and he said he was sick. She felt Lacey was uncomfortable with his requests. Ultimately, Lacey caught a taxi home.

Evidence of M. Gray, Transcript, February 1, 2016, pp. 80 – 81

9. According to the complainant, at this point the Appellant's tone and mannerism completely changed. He was angry. He told her that she did not meet his sexual needs and that he wanted to have three-way sex with her and Lacey. He then told her that she was "needy" and an "embarrassing drunk." She felt he was tearing away her sense of self-esteem. They started to walk towards the Appellant's apartment. En route his anger "kept escalating." He was harsher. More blunt. He made her feel like she did something wrong. She had never encountered this side of him before. The Appellant did most of the talking but it was not much of a dialogue. He called her "a slut" and other derogatory terms.

Evidence of M. Gray, Transcript, February 1, 2016, p. 82
Evidence of M. Gray, Transcript, February 2, 2016, pp. 3 - 7

10. When they arrived at the Appellant's apartment, the complainant described herself as "no longer present." She just wanted to sleep. She testified that she was not completely drunk but "a little dizzy, a little tipsy"; however, in text messages she later told her friend she was "blackout drunk." When confronted with the text messages she agreed: "it was not the proper terminology to use." She felt the alcohol numbed her to the Appellant's berating. Once inside the Appellant's small, shared apartment, she said his verbal aggression escalated again – to the point where she had "never seen that kind of anger." She denied that the Appellant was "yelling," which was contrary to her February 2, 2015 police statement. She felt at risk for physical violence. She could not recall how long this went on for, but it was a continually berating. The last thing she remembered was the Appellant saying: "this is the last time I'm ever going to fuck you and you're going to like it."

Evidence of M. Gray, Transcript, February 2, 2016, pp. 7 – 10
Evidence of M. Gray, Transcript, February 3, 2016, pp. 16 - 17

11. The next thing the complainant remembered was sitting on the corner edge of the bed. She did not recall the Appellant removing his clothes. He grabbed the back of her head and pushed his penis into her mouth. She said based on the risk of violence and her fear, she

[7] She later said: "I vaguely remember him having a beer in his hand but, aside from that that's about all – that's the only time I remember seeing him drinking" (Evidence of M. Gray, Transcript, February 2, 2016, p. 151).

stopped caring and engaged in oral sex. She maintained that she did not consent nor did she help the Appellant get undressed. She did not remember how long the oral sex continued but the Appellant did not ejaculate. She thought at this point, the Appellant pushed her onto the bed. He started to have sex with her. She just lay there and did not resist. He was not wearing a condom. He continued having sex on top of her until he ejaculated. She did not recall how long it went on for.

Evidence of M. Gray, Transcript, February 2, 2016, pp. 11 – 13

12. After the intercourse, the complainant said she crawled into the fetal position and started crying. The Appellant told her to be quiet. She fell asleep. The Appellant's roommate, Philip So, who stayed in the room adjacent to the Appellant's, which shared a common wall, testified that he heard nothing unusual in the early morning of January 31st. There was no mention of Mr. So's evidence in the reasons for judgment.

Evidence of M. Gray, Transcript, February 2, 2016, pp. 11 – 13
Evidence of P. So, Transcript, May 3, 2016, pp. 144 - 160

13. According to the complainant, when she woke up, she found the Appellant masturbating. She got very mad. The Appellant again tried to get her to perform oral sex. She told him: "I'm not doing this." She dressed and left his apartment. She caught the streetcar home, slept and then texted him when she woke up stating: "last night was really fucked up." He responded, "ok." That was the last communication they had. That same morning the complainant texted her friend and said:

> "Last night, Mustafa fucked me and I didn't want to… I don't know what it is. I didn't consent – but I didn't not consent…"

Evidence of M. Gray, Transcript, February 2, 2016, pp. 14 – 16
Evidence of M. Gray, Transcript, February 3, 2016, p. 9
Exhibit #1c – Text messages 22 page to Mandi G, Appeal Book, p. 268

14. That same day, the complainant talked to a number of her friends. She felt like she misunderstood something. She was upset about the Appellant's insensitive text message and lack of apology. She was depressed. The following day, February 1st, her friends were encouraging her to report the incident. She remained indecisive. She went to the Women's College Hospital to get forensic tests done – in case she later decided to report the incident. They were closed. She then took a taxi to Mount Sinai with her friend, Lydia. She did a sexual assault kit at the hospital. The following day she talked to her graduate program

director and the CUPE representative. She felt they did not help her. Her only option was to report the incident to the police. She called the non-emergency police number and two officers came to her home. She later provided a video statement.

Evidence of M. Gray, Transcript, February 2, 2016, pp. 17 – 22

II. The Appellant's Evidence

15. The Appellant agreed that he and the complainant had intercourse. However, he said it was consensual. He also agreed that he met the complainant at the Victory Café after she sent him a few text messages. He was feeling a bit under the weather but ultimately decided to go to the bar. This was based on the complainant's text messages; he thought that they might have sex that night. He said he had a beer at home and then another when he arrived at the Café. He sat with the complainant; they talked. Flirted. At this point, she put her hand on his leg, rubbing him. He was not comfortable with public displays of affection and he was with his work friends and colleagues. He told her he did not think it was appropriate. She stopped. At this point, a small group left and went to Pauper's – maybe five or six people, including the complainant and her friend, Lacey. They continued to drink and flirt. Again, the complainant started to grab the Appellant's leg and groin area under the table and he told her to stop. He agreed that they stayed until closing time – between 2:30 and 2:45am.

Evidence of the Appellant, Transcript, May 3, 2016, pp. 4 – 10

16. After leaving the bar, the Appellant invited Lacey to come back with them to drink at his apartment. She thought about it, but declined and got a taxi. He said that there was no conversation between him and Lacey about a threesome, but earlier in the night another friend of the complainant's – Gazem – had told him that the complainant was planning to have a threesome. That same friend asked him a few days later "how the threesome was" and he told her that did not happen.

Evidence of the Appellant, Transcript, May 3, 2016, pp. 11 – 12; 52 - 55

17. The Appellant's version of events radically departed from the complainant's after they left Pauper's and Lacey caught the cab. He told the complainant that he was disappointed that Lacey had not joined them and the complainant asked him: "am I not enough for you." He said she was. They walked down the street. He put his arm around her waist. They made small talk – the weather, the upcoming strike, etc. The complainant flirted and said she

was looking forward to staying the night and having sex. He said he was still not feeling 100%. There was no arguing. No berating. No raised voices. He was not angry. He thought she was "buzzed" but not drunk. His apartment was shared accommodations with two roommates. He had a bedroom. There was a common area, but no real living room. They went into the bedroom, got undressed and into bed. They started talking and she tried to kiss him. He moved away. He had been thinking about her behaviour at the bar and whether they were compatible. He had an open relationship with his current girlfriend, but she was moving to Toronto soon. He decided to end his relationship with the complainant.

Evidence of the Appellant, Transcript, May 3, 2016, pp. 13 – 19; 61 - 62

18. When the Appellant told the complainant about his feelings, she became upset and started to cry. He consoled her. He apologized for making such a big deal about the touching at the bar. They kissed. He told her: "this should be the last time we sleep together." She got on top of him, pulled down his pants and started to perform oral sex. He touched her arms and breasts. After a point, he thought he asked her if she wanted him inside her and she said: "yes." They proceeded to have intercourse. He did not use a condom. He ejaculated. They cuddled and fell asleep. The complainant did not cry nor did she appear to be upset at any time during the sexual interaction. Everything was consensual.

Evidence of the Appellant, Transcript, May 3, 2016, pp. 19 - 22

19. The following day, when the Appellant woke, the complainant was in a bad mood – upset and angry. He believed she felt used because he broke up with her and they still had sex. He denied masturbating or attempting to force her head onto his penis. He agreed that she texted him later that day saying: "last night was really fucked up." He thought she referred to the whole chain of events – being upset over the public affection, the breaking up and then ultimately having sex. All he could do was acknowledged it by saying – "ok." He later sent her a text message where he apologized for overreacting.

Evidence of the Appellant, Transcript, May 3, 2016, pp. 23 – 25
Exhibit 1c – Text messages 22 page to Mandi G, Appeal Book, p. 268

20. The Appellant did not have any further contact with the complainant until he learned on February 15, 2015 that that police were looking for him. He called the police back. He was in shock when he learned of the allegations and surrendered himself at the police station.

Evidence of the Appellant, Transcript, May 3, 2016, pp. 25 - 27

PART III

ISSUES AND THE LAW

I. The Trial Judge displayed a reasonable apprehension of bias in favour of the complainant

(a) Relevant Procedural Overview

i. Submissions of the Parties

21. Submissions were made on May 24, 2016. The trial judge reserved his decision until July 21, 2016. The defence theory was that the complainant – who had worked with survivors of sexual assault, had studied criminal justice and was familiar with the justice system – had fabricated the allegations because she was upset with the way the Appellant had treated her. The motive and animus arose from him breaking up and still having sex with her that night. The defence took the position that she felt used, spurned and upset. The Crown took the position that the complainant was credible and her evidence should be preferred over the Appellant.

Submissions of Ms. Bristow, Transcript, May 24, 2016, pp. 3 – 38; 119 - 134
Submissions of Ms. Loft, Transcript, May 24, 2016, pp. 39 - 119

22. Neither party placed any great reliance on jurisprudence. The issue was credibility and the application of the burden of proof. While the Crown argued that the complainant's story was internally consistent and cautioned the trial judge against applying stereotypes about how sexual assault complainants' might react, neither party placed any authority before the trial judge on these issues. The Crown did not rely on academic literature or secondary sources. There were no submissions on these specific issues by the Crown nor did the defence have any opportunity to respond.

Submissions of Ms. Bristow, Transcript, May 24, 2016, pp. 3 – 38; 119 - 134
Submissions of Ms. Loft, Transcript, May 24, 2016, pp. 39 – 119

ii. The Reasons for Judgment

23. The trial judge released a *179-page decision* convicting the Appellant on July 21, 2016. For ease of reference, the structure of the judgment breaks down as follows:

- **Pgs. 1 to 129:**[8] a review of the facts and a near verbatim recitation of the evidence that was led at trial (the trial judge essentially replicates – at times in question and answer format – the entire transcript), with little effort to distil the pertinent divergences in the evidence. There is little reference to the evidence of Ms. Moore or Mr. So, evidence called in support of the defence position.

- **Pgs. 129 to 141:** the trial judge reviewed various aspects of the jurisprudence that is relevant to sexual assault cases – including credibility, consent, identity, mistaken belief in consent (and whether there is an air of reality), exculpatory statements, etc.

- **Pgs. 141 to 153:** the trial judge reviewed the parties' submissions – again almost verbatim from the transcripts.

- **Pgs. 153 to 155:** the trial judge has a heading titled "History" – which it is assumed refers to prior sexual history / s. 276 issues. Under this heading, the trial judge reviewed the law surrounding s. 276 and the "hot sex" text message – to which he found: "falls short of making anything apparent."

- **Pgs. 155 to 163:** under the heading "credibility" the trial judge reviewed the law on credibility generally, delayed disclosure in sexual assault cases, judicial notice, expert evidence (of which none was called) and consent. It was also at this juncture, that the trial judge began to segue into a number of academic articles concerning sexuality and gender-based violence. These articles, none of which were raised by the parties or put to them for submissions, include:

  - Lundy Bundy, *Why Does He do that? Inside the Minds of Angry and Controlling Men* (2003);
  - Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1993);
  - Susan Estrich, *Real Rape* (1998);
  - Rebecca Campell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual Abuse on Women's Mental Health,* 10 Trauma, Violence & Abuse 225 (2009);
  - Matt J. Gary & Thomas W. Lombardo, *Complexities of Trauma Narratives as an Index of Fragmented Memory in PTST: A Critical Analysis,* 15 Appl. Cognit. Psychol. S171-S186 (2001);
  - Ellen Pence and Micheal Paymar's training manual, *Power and Control: Tactics of Men Who Batter* (1986);
  - Antonia Abbey, et al., *The Relationship Between the Quantity of Alcohol Consumed and the Severity of Sexual Assault Committed by College Men*, 18(7) J. of Interpersonal Violence 813 (July 2003); and,
  - Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive* (National District Attorney's Association, 2007).

When the trial judge turned to his ultimate findings at **pages 163 – 175**, he again relied heavily on a number of secondary sources that were not raised or put to the parties for submissions to explain away some of the arguments made that the complainant's evidence was not credible:

  - Sarah Ben-David & Ofra Schneider, *Rape Preceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance,* 53 Sex Roles 385 (2005);
  - Barbara E. Johnson, Douglas L. Kuch & Patricia R. Schander, *Myth Acceptance and Sociodemographic Characteristics: A Multidimensional Analysis,* 36 Sex Roles 693 (1997);

[8] The page numbers set out in this section correspond to the pagination in the trial judge's reasons for judgment not the appeal book.

- Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention,* 1992 – 2000, Bureau of Justice Stat., U.S. State Department of Justice (2002);
- Kimberly Lonsway, Joanne Archmbault & David Lisak, *False Reports: Moving Beyond the Issue to Sucessful Investigative and Prosecute Non-Stranger Sexual Assault,* 3 The Voice, National District Attonrey's Association Newsletter, 8 (2009); and,
- Dr. Walker, *The Battered Woman* (New York: Harper Colophon Books, 1979)

- **Pgs. 163 to 175:** The trial judge addressed his "Findings" under a heading of the same name. Nearly this entire portion of his judgment is a review of the Appellant's evidence. There is only one-generic paragraph that dealt with the inconsistencies in the complainant's evidence:

  > I have assessed the significance of any inconsistencies in Ms. Gray's testimony. I believe Ms. Gray, notwithstanding any inconsistencies which I find are minor, and of no consequence in this court's accepting her evidence… The mere existence of internal inconsistencies in the testimony of a witness or inconsistencies between witnesses is not itself determinative of credibility of the witness or the accuracy or reliability of their testimony…(citations omitted).

- **Pgs. 176 to 179:** the trial judge reviewed the complainant's police statement, under the heading **"I know why the Caged Bird Sings"**[9] – referring at times to Maya Angelou and Virginia Woolf's metaphor of **"looking glass shame"**, before ultimately finding the Appellant guilty.

iii. Crown Application to Order the Appellant Detained Pending Sentence

24. Four days after the reasons were released, on July 25, 2016, the Crown brought an application for an order to detain the Appellant pending sentence. At the time the Appellant was released on a promise to appear. He did not have any prior criminal record nor had he breached any of the terms of his release. The Crown argued that the Appellant ought to be detained on the basis that the Appellant was now convicted, he had financial assets, was not presently residing in the province, and the Crown was seeking an upper reformatory sentence.

Submissions of Ms. Loft, Transcript, July 25, 2016, pp. 3 – 4; 57 - 62

25. The defence opposed the application. A new release plan was proposed. A recognizance with sureties – the Appellant's mother and girlfriend, Ms. Moore. The defence submitted that the Appellant's detention was not necessary to satisfy any of the factors listed in s. 515 of the *Criminal Code*. Counsel also indicated that they planned to ask for a conditional sentence. The trial judge interjected to comment on the propriety of a conditional sentence for *any intercourse related sexual assault*, his specific concerns for the complainant and rhetorical commentary about the Appellant. For instance, the trial judge remarked:

[9] A reference to Maya Angelou's (renowned poet and author) work of the same name – that deals with racism and childhood rape and being female in a male-dominated society, among other things. Which may also be a reference to the complainant, who has a tattoo of a caged bird on her arm.

- "I am not aware of any rape cases in this country, and hope I won't find any, that a person convicted of rape or sexual assault that is a rape, hasn't gone to jail."

- After counsel had advised that Justice Rutherford had recently imposed a conditional sentence in similar circumstances, Justice Zuker stated: "…And you're submitting that, well, you would be seeking a conditional sentence, which I would suggest may well be ridiculous and with great respect to Justice, I don't know Justice Rutherford. All I know is that this man raped Mandi Gray on January 31st, 2015. That's what I found period. If another court says that I am wrong, then let them say that I'm wrong."

- "So what is, what is the significance of a rape if a person doesn't go to jail? What is the significance of raping an individual."

- "If we gave him, as you're submitting, the same kind of courtesy and respect that he gave – that he should have given to Ms. Gray, we wouldn't be here today. We're accommodating him. Did he accommodate Ms. Gray? I don't think so."

- "We'll let him arrange…his affairs, let him get his affairs in order because he's such a nice guy you know, he hasn't done anything very bad in terms of society's standards, except that he has no respect period. And that's what I found, quite frankly. And we should let him – we're worrying about him. We're worrying about him. There is nothing to worry about him. He's not the victim here."

- "The confidence, in your submission, the confidence in the administration of justice would be easily maintained by releasing this man who has been convicted of rape for the next three months pending sentence? This will not impact on the administration of justice? It will not impact on women who may be raped and we'll let him out for three months? He's got his scholarship at York University for doing nothing. It's great. Just write him a cheque, twenty-two thousand dollars for doing nothing. I wish I could be so lucky."

- "… it's life as usual for Mr. Ururyar. It's been life as usual for Mr. Ururyar. But again we forget about the complainant. We forget about the victims. Do you think it's life as usual for Ms. Gray? I'm not so sure."

- "My issue is quite frankly the seriousness of the offence that people don't take seriously enough and arguably, for whatever that word means makes a mockery out of what this man has been convicted of. That's all I'm saying. He could have six sureties. It's not about – you know I appreciated that Ms. Bristow is going to argue for a conditional sentence. I mean, I can't understand it."

- "The impact of January 31st, 2015, and I'm prepared to take judicial notice, will affect as the Supreme Court of Canada has said on numerous occasions in terms of sexual assault, will affect Ms. Gray for the rest of her life. Period. I'll take judicial notice of it. I'm prepared to swear it."

Colloquy, Transcript, July 25, 2016, pp. 43 – 49, 59

26. While the trial judge did not have any problems with the proposed sureties he ultimately allowed the Crown's application and ordered the Appellant detained pending sentencing, which was scheduled for September 14, 2016. While the trial judge referenced the

factors under s. 515 of the *Criminal Code*, the reasons for detention are devoid of any analysis of those considerations and center on the trial judge's concerns about the seriousness of sexual assault cases.

Reasons for Detention Order, Transcript, July 25, 2016, pp. 63 - 67

iv. The Sentencing

27. The Appellant's sentencing proceeded on September 14, 2016. By this time the Appellant had already been released on bail pending appeal. At the hearing it became apparent that Justice Zuker *only had the Crown's materials* and not the defence casebook, which was previously served and filed with the Court. The Crown submitted that the appropriate sentence was 18 months custody followed by a probationary term and $10,735 restitution to cover the complainant's legal fees for retaining counsel to assist her in the trial process. The defence submitted that the appropriate sentence was at the very low-end, a conditional discharge, and, at the high-end, an 18-month conditional sentence. The defence argued that legal fees were not appropriate restitution and requested a breakdown of the legal fees, if the Court was inclined to order restitution.

Colloquy, Transcript, September 14, 2016, pp. 3 – 4
Submissions of Ms. Loft, Transcript, September 14, 2016, pp. 5 – 38; 70 - 77
Submissions of Ms. Bristow, Transcript, September 14, 2016, pp. 39 – 70

28. Immediately following the completion of the submissions Justice Zuker provided the parties with a *55-page written decision*, sentencing the Appellant to 18 months custody, followed by a probationary term of three years. He ordered restitution of $8000 for the complainant's legal fees. Again for ease of reference the structure of the sentencing judgment is broken down as follows:

- **Pgs. 1 to 6:**[10] summary of the facts, the bulk of which is transcript excerpts of the complainant's testimony.
- **Pgs. 7 to 34:** review of the law on sentencing, the availability of conditional sentences and the use of victim impact statements and pre-sentence reports.
- **Pgs. 34 to 35:** under the heading **"Beyond the Record"** the trial judge addresses his reliance on academic authorities, a ground of appeal raised by the Appellant at the pre-sentence bail pending appeal hearing, referred to by Justice Quigley in his reported decision when he released the Appellant on bail pending appeal and in various media articles covering this

[10] Again, the page references refer to the pagination of the reasons for sentence, rather than the appeal book numbering.

matter.[11]

- **Pgs. 36 to 37:** continued review of the law related to probation orders and other ancillary orders.

- **Pgs. 37 – 39:** under the heading "Observations" Justice Zuker comments about the myths associated with sexual assault cases and societal misconceptions related to victims of such offences.

- **Pgs. 39 to 52:** under the heading "Findings" the trial judge continues with his commentary on the harm occasioned by sexual offences and, like in his reasons, cites academic commentary that was not put before the parties (for example, Statistics Canada, *Criminal Victimization in Canada*, 2014, Samuel Perreault, Catalogue No. 85-002-X). He reviews more cases on general sentencing principles, before addressing the "rape shield" provisions. At this point, the headnote from the Supreme Court of Canada's decision in *R. v. Seaboyer* is excerpted in part, followed by a three and a half page list of the academic commentary relied on in that decision, as well as an approximately three page excerpt of Justice L'Heureux-Dube's dissent. The trial judge then rejects a conditional sentence on the basis that it would be: "incompatible with the welfare of our society and would so deprecate the seriousness of the crime as to fundamentally undermine respect for the law."

- **Pgs 52 to 55:** under the section entitled "One is too many" the trial judge further comments on the harms of sexual assault offences and the ultimate sentence is imposed.

(b) The Test for a Reasonable Apprehension of Bias

29. The Supreme Court set out the law respecting reasonable apprehension of bias in the in *R. v. R.D.S.*:

> The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades… De Grandpré J. stated, at pp. 394-95:
>
> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> … Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed

[11] *R. v. Ururyar*, 2016 ONSC 5056 at ¶¶68 – 74.

> to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances… The presumption of impartiality carries considerable weight, for the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect…
>
> Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias – "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification"

The Court further noted in *R.D.S.*: "the respect and confidence of its society … fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer." Similarly, the Quebec Court of Appeal in *R. v. Roy* noted that lack of bias requires a "…standard of fairness… that a court hold its hearings in a serene manner, without bias or appearance of bias, allowing each party the opportunity to fully and adequately present his or her case." (emphasis added)

R. v. R.D.S., [1997] 3 S.C.R. 484 at ¶¶31 – 33 & 91
R. v. Roy (2008), 167 C.C.C. (3d) 203 (Que. C.A.) at p. 208

30. An apprehension of bias does not necessarily require a finding of *actual bias*. The impugned conduct must be assessed in light of the whole trial proceedings and all other portions of the judgment. Comments made in the reasons for judgment and during sentencing or even during later proceedings, can all be relied on to assess the claim of an apprehension of bias. As noted by the Court of Appeal for Ontario in *R. v. Brown*, this analysis does not necessarily involve "reasoning back."

R. v. A.G. (1998), 130 C.C.C. (3d) 30, aff'd [2000] 1 S.C.R. 439, at ¶42
R. v. Griffin, 2016 ONSC 2448, at paras 98 - 127
R. v. Brown (2003), 64 O.R. (3d) 161, (C.A.) at ¶¶91, 94 and 98

(c) The Error

31. The issue of bias is not raised lightly. However, given the manner in which the case proceeded – involving the trial judge's commentary and personal research relied upon in the reasons for judgment; his ultimate revocation of the Appellant's bail prior to sentencing; and the release of a *pre-written sentencing judgment* immediately following counsels' submissions, which included commentary in response to one of the Appellant's proposed grounds of appeal – it is the Appellant's position that the trial judge's conduct in this trial displayed a

reasonable apprehension of bias. At trial the issues were whether or not the Crown had proven a lack of consent beyond a reasonable doubt and the trial judge's proper application of the *R. v. W.D*. framework to assess credibility. The parties made little reference to the jurisprudence nor did they make any reference to secondary sources or ask the court to draw judicial notice of various power-imbalances or "rape" stereotypes. The judgment, particularly the analysis from pgs. 155 – 179, is replete with references in the language of "rape"; misogyny and battered women syndrome, and various academic articles that the trial judge either relied on or took judicial notice of. There was no opportunity provided to the parties to address these articles – which the trial judge appears to have researched and relied on by his own research.

32. The trial judge then used many of the concepts in these articles to rebut the arguments made by the defence as to why the complainant's version of events had problems and should not be accepted. The manner in which the trial judge looked at these issues, in particular the tone and the headings he used, would suggest to a reasonable observer that he allowed these social science sources to cloud his objective assessment of the evidence and the issues of credibility, which was the issue that court had to decide. The breath and emersion in these topics, of the trial judge's own accord, may also have developed sympathy for the complainant and sexual assault victims generally. It is a sad-state of affairs if sexual assault is as underreported and unsuccessfully prosecuted as many statistics indicate; however, this is not the fault of the Appellant nor does it alleviate the trial judge's responsibility to properly review and evaluate the evidence.

33. Similarly, while judge's are permitted to comment on public policy and the law needs to evolve on a case-by-case basis, a reasonable observer would conclude that this case was more about commenting on social policy and the perceived inequities that face sexual assault complainants in the criminal justice system, as opposed to fairly reviewing the evidence. The trial judge has but a few brief references to the problems with the complainant's evidence – even though parts of her narrative were completely contradicted by the text messages (the "hot sex" text and her surprise at seeing him at the Victory Café) and she initially told the police and her friend *via* text message, that she was not sure that she did not consent.

34. Furthermore, the trial judge's conduct following the Appellant's conviction significant exacerbates the appearance of bias.

35. First, the trial judge's comments during the revocation (his outright rejection of a conditional sentence before reviewing any case law and his personal comments on the Appellant's character) are troubling. In fact, contrary to the trial judge's view, there are several reported cases, including cases affirmed by the Court of Appeal, where a conditional sentence has been imposed for a sexual assault involving intercourse.[12]

36. Second, the trial judge's reasons for post-conviction detention are devoid of any real analysis of the relevant factors (see s. 515 of the *Criminal Code*) or the Appellant's conduct pending trial. The focus was entirely on the seriousness of the offence. This runs completely contrary to the jurisprudence and highlights concerns that the Appellant was treated unfairly. For instance, Justice Ducharme in *R. v. Green* held:

> In assessing cause, it must be kept in mind that the convicted offender has already been deemed worthy of judicial interim release. Presumably, an offender in this position has complied with the terms of his or her release; otherwise, the Crown would have previously sought to revoke the bail under s. 524 of the *Criminal Code*. **Thus, post-conviction revocation of bail will most commonly occur where, during the course of the trial, new facts emerge about: (i) the circumstances surrounding the commission of the index offence; (ii) other criminal acts engaged in by the offender; or (iii) the offender's failure to comply with the terms of his or her release.**
>
> In considering an application under s. 523(2)(a) of the *Criminal Code*, the trial judge should also keep in mind that the **revocation of bail can have a significantly detrimental impact on the offender's ability to prepare for sentencing**. If the offender is in custody, contact with his or her counsel will be more onerous; it will complicate the gathering of materials, such as letters of reference and the like, which are routinely relied upon by the courts at the time of sentencing; and it will preclude the offender from getting his or her affairs in order before being incarcerated. **Thus, the trial judge hearing an application for revocation of bail should first consider, where the Crown has legitimate concerns, whether these could be met by varying the terms of the release. Of course, any doubt about whether or not the offender will receive a custodial sentence would be another important factor militating against the revocation of bail.**
>
> Finally, **neither public safety nor maintaining public confidence in the administration of justice requires that bail be routinely revoked following conviction**. Parliament has sought to ensure public safety in two ways: first, by providing that, for the most serious offences, those enumerated in s. 469, bail will automatically be revoked following conviction; and second, by providing for the revocation of bail under s. 524 where the accused has not

[12] See for example: *R. v. Ogunsakin*, 2006 O.J. No. 1458 (C.J.); *R. v. Ozurus*, 2004 O.J. No. 351 (C.J.); *R. v. Pecoskie*, 2000 O.J. No. 1421(S.C.J.); *R. v. Killam*, 1999 O.J. No. 4289 (C.A.); *R. v. Nikkanen*, 1999 O.J. No. 3822 (C.A.)

> complied with the terms of the judicial interim release order. The important question of public confidence in the administration of justice must be assessed from the perspective of a public that is both informed about our system of bail and the facts of the particular case. This includes an appreciation of the fact that the offender, although convicted, has already been granted judicial interim release and has complied with the terms of that release, usually for a considerable period of time. **It is difficult to understand how public confidence in the administration of justice will be undermined by the continued release of an offender who has demonstrated that he or she is not a threat to public safety and does not pose a risk of flight nor interference with the administration of justice. This is particularly true given that the time between conviction and sentencing rarely exceeds two months.** (emphasis added)
>
> *R. v. Green*, 2006 O.J. No. 3240 (S.C.J.) at ¶¶12 - 14

37. Third, the trial judge's conduct at the sentencing hearing, *standing alone*, could amount to an appearance of bias. Justice Zuker predetermined the sentence – **and imposed the maximum sentence** – before even hearing the party's submissions or reviewing the defence materials. No other conclusion can be drawn from his attendance at the sentencing hearing with a 55-page judgment already written and decided. This in itself is sufficient establish an apprehension of bias. Justice Nordheimer's findings in *R. v. Chue* are directly on point:

> Further, **the manner in which the trial judge delivered his reasons on the application also exhibits a lack of awareness of the impression he would create in the eyes of Mr. Chue or any reasonable observer.** I do not intend to engage in or resolve the dispute over whether the trial judge had written his reasons in advance or whether he wrote them as the submissions were being made. I decline to do so both because the conflict between defence counsel's impressions and the trial judge's explanation leads to a somewhat unseemly, and certainly unfortunate, dispute and because I view it to be of little consequence to the issue I have to determine. I do not consider there to be anything wrong with a trial judge sketching out draft reasons either in advance of hearing counsel's submissions or as those submissions are being offered. Given the time pressures on trial judges, that are even more acute in the Ontario Court of Justice, such will often be a necessary course - driven by the need for expedition in the result. As long as the trial judge remains receptive to persuasion by counsel's submissions, no harm is created by the practice and some practical benefit may be gained for the process as a whole. Nonetheless, if that practice is to be adopted, a judge must do so with considerable care for, and appreciation of, the impression it may create if it is not undertaken in an appropriate manner. **Of preeminent importance is that a judge must always keep an open mind, both in reality and in appearance**. I do not say that the trial judge here did not have that open mind in fact but, unfortunately, it was not evident in appearance. **Some measure of time should always be taken to reflect on counsel's submissions and to ensure that any sketched out or draft reasons have taken them into account. As well, the taking of some time, however limited, to reflect on the matters raised, and on the certainty of the result, is never wasted. The time so spent may also assist in terms of the optics of the situation so that the appearance of a fair and open mind is matched to the reality of it.** (emphasis added)
>
> *R. v. Chue*, 2011 O.J. No. 4149 (S.C.J.) at ¶ 19

38. Unlike *Chue,* where there was some dispute as to whether the trial judge had pre-

written his reasons, in this case it is abundantly clear that a 55-page written sentencing judgment had been pre-written and pre-decided. No break was taken after submissions. Moreover, and not surprisingly, the ruling is not responsive to counsel's submissions. The reasons do not address the submissions on the appropriate sentence nor the Appellant's character letters, among other things. With all due respect to the trial judge, there is no substantive analysis to explain *why* the maximum custodial period of 18-months followed by the maximum probationary period of three years was fit, beyond the continued rhetoric regarding the harm caused to victims of sexual assault. While that is a valid consideration, it is not the *only* consideration. The tone of the reasons for sentence, and the trial judge's continued reliance on academic material not put before the parties, echoes and reinforces the appearance of bias contained in the reasons for judgment.

39. Finally, the fact that the trial judge specifically addressed the propriety of his reliance on the academic literature in his reasons – an issue raised and yet to be decided by a reviewing court as part of an on-going appeal – creates a further perception of unfairness.

R. v. Arnaout, 2015 ONCA 655 at ¶¶27 – 30; 44 - 45

40. One other issue warrants mention. While not included in the written ruling, the trial judge's ordering of $8000 restitution to compensate the complainant's legal fees raises further concerns about the appearance of partiality. No explanation or analysis was undertaken on his jurisdiction to impose such an order or the appropriateness of the order. There was no reference to s. 738 of the *Criminal Code* or any of the relevant jurisprudence. Section s. 738 appears to contain a *closed list* of when restitution can be ordered. It contains no residual clause. There is nothing contained in ss. 738(1)(a) to (e) that address a complainant's legal fees, incurred at her own discretion. This issue properly falls under the purview of the civil courts. Even if there was jurisdiction, the $8000 quantum is completely arbitrary. The trial judge provided no explanation as to how he arrived at that figure; nor did he inquire or address the offender's ability to pay, which is required in ordering restitution. Moreover, the order was issued without any consideration for counsel's request for a more detailed accounting of how the total legal fees were calculated.

R. v. Devgan, [1999] O.J. No. 1825 (C.A.)
R. v. Zelensky, [1978] 2 S.C.R. 940
R. v. Castro, [2010] O.J. No. 4573 (C.A.) at ¶¶21 – 27

II. The Trial Judge erred in relying on a wide breath of academic commentary that was untested, not put to the parties for submissions and that he took judicial notice of

41. While trial judges are entitled to conduct their own research to ensure they apply *the law* correctly, the confines of that ability is markedly narrowed when it comes to *adjudicative issues and factual findings*. Absent evidence on an issue, the trial judge cannot assume the role of advocate or investigator, nor can he or she raise their own issues without proper notice to the parties. Justice Doherty, writing unanimously for the Ontario Court of Appeal in *R. v. Hamilton*, dealt directly with this issue in the context of a sentencing hearing, finding:

> (b) Did the trial judge go too far?
>
> I will first address the respondents' argument that this court should not reach the merits of this ground of appeal. The respondents contend that the Crown's allegation comes down to one of a reasonable apprehension of bias flowing from the trial judge's conduct of the proceedings. I think this is a fair description of at least part of the submissions made by the Crown in support of this ground of appeal…
>
> The Crown's argument does not however rest entirely on the reasonable apprehension of bias claim. Crown counsel contends that the trial judge, in overstepping his role, fundamentally altered the nature of the proceedings. Counsel contends that the trial judge turned the proceedings from one designed to determine a fit sentence for individual offenders, to one designed to enquire into a variety of societal problems which the trial judge, through his experience, had come to associate with the sentencing of black women who courier drugs into Canada from Jamaica. Crown counsel contends that this fundamental alteration of the essential purpose of the proceeding in and of itself invalidates the result.
>
> I would not accept the Crown's bias argument, however I think there is merit to the second component of the Crown's submission. The nature of the proceedings was fundamentally changed and this change contributed to the errors in principle reflected in the sentences imposed.
>
> Having read and reread the transcripts, I must conclude that the trial judge does appear to have assumed the combined role of advocate, witness and judge. No doubt, the trial judge's extensive experience in sentencing cocaine couriers had left him with genuine and legitimate concerns about the effectiveness and fairness of sentencing practices as applied to single poor black women who couriered cocaine into Canada for relatively little gain. The trial judge unilaterally decided to use these proceedings to raise, explore and address various issues which he believed negatively impacted on the effectiveness and fairness of current sentencing practices as they related to some cocaine importers. Through his personal experience and personal research, the trial judge became the prime source of information in respect of those issues. The trial judge also became the driving force pursuing those issues during the proceedings.
>
> No one suggests that a trial judge is obliged to remain passive during the sentencing phase of the criminal process. Trial judges can, and sometimes must, assume an active role in the course of a sentencing proceeding…

Recognition that a trial judge can go beyond the issues and evidence produced by the parties on sentencing where necessary to ensure the imposition of a fit sentence does not mean that the trial judge's power is without limits or that it will be routinely exercised. In considering both the limits of the power and the limits of the exercise of the power, it is wise to bear in mind that the criminal process, including the sentencing phase, is basically adversarial. Usually, the parties are the active participants in the process and the judge serves as a neutral, passive arbiter. Generally speaking, it is left to the parties to choose the issues, stake out their positions and decide what evidence to present in support of those positions. The trial judge's role is to listen, clarify where necessary and, ultimately, evaluate the merits of the competing cases presented by the parties.

The trial judge's role as the arbiter of the respective merits of competing positions developed and put before the trial judge by the parties best ensures judicial impartiality and the appearance of judicial impartiality. Human nature is such that it is always easier to objectively assess the merits of someone else's argument. The relatively passive role assigned to the trial judge also recognizes that judges, by virtue of their very neutrality, are not in a position to make informed decisions as to which issues should be raised, or the evidence that should be led. Judicial intrusion into counsel's role can cause unwarranted delay and bring unnecessary prolixity to the proceedings.

…Where an issue may or may not be germane to the determination of the appropriate sentence, the trial judge should not inject that issue into the proceedings without first determining from counsel their positions as to the relevance of that issue. If counsel takes the position that the issue is relevant, then it should be left to counsel to produce whatever evidence or material he or she deems appropriate, although the trial judge may certainly make counsel aware of materials known to the trial judge which are germane to the issue. If counsel takes the position that the issue raised by the trial judge is not relevant on sentencing, it will be a rare case where the trial judge will pursue that issue.

It is also important that the trial judge limit the scope of his or her intervention into the role traditionally left to counsel. The trial judge should frame any issue that he or she introduces as precisely as possible and relate it to the case before the court…

The manner in which the proceedings were conducted created at least four problems. First, by assuming the multi-faceted role of advocate, witness and judge, the trial judge put the appearance of impartiality at risk, if not actually compromising that appearance. For example, the trial judge introduced the issues of race and gender bias into the proceedings, and then, through the material he produced and the questions he addressed to Crown counsel, the trial judge appeared to drive the inquiry into those matters towards certain results. Those results are reflected in his reasons. Looking at the entirety of the proceedings, there is a risk that a reasonable observer could conclude that the trial judge's findings as to the significance of race and gender bias in fixing the appropriate sentences had been made before he directed an inquiry into those issues. At the very least, the conduct of the proceedings produced a dynamic in which the trial judge became the Crown's adversary on the issues introduced by the trial judge.

Although the appearance of impartiality was put at risk by the conduct of these proceedings, the trial judge did take steps to try and preserve the appearance of fairness. He gave counsel clear indications of his concerns and any tentative opinions he had formed. He also provided the material to counsel to which he planned to refer in considering the issues he had raised. This procedure was much fairer to the parties and much more likely to produce an accurate

result than had the trial judge simply referred to the material without giving counsel any notice… Much of the material produced by the trial judge was not suggestive of any particular answer to the questions raised by the trial judge in the course of the proceedings. The scrupulous fairness with which the trial judge conducted the proceedings went some way towards overcoming the potentially adverse effects of the extraordinary role he assumed in the conduct of the proceedings… (emphasis added, some citations omitted).

R. v. Hamilton (2004), 186 CCC (3d) 129 (Ont. C.A.) at ¶¶62 – 72
R. v. V.H.M., [2004] N.B.J. No. 364 (C.A.) at ¶ 24

42. Similarly in *Cronk v. Canadian General Insurance Co.* Justice Weiler (dissenting in part) noted the following:

It is not an easy task for a judge to know when it is possible to take judicial notice of studies which are not before the court without having to hear submissions from counsel. The answer depends on the use to be made of the research and the type of case before the court. In "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994), 26 Ottawa L. Rev. 551, Justice L'Heureux-Dubé examines the role of social science research with respect to issues before the courts and she discusses the doctrine of judicial notice in Canada in general terms before dealing with its potential application in the area of family law. In her article, L'Heureux-Dubé J. adopts a structure and definitions, which I will also employ here, that divides social science research into three categories: (1) social authority; (2) social framework; and (3) social facts. Where social science relates to the lawmaking process in the same way as judicial precedent then it may be treated in the same manner as courts treat legal precedents. Such materials are useful background when dealing with policy or constitutional questions. The second category, social framework, refers to research that is used to construct a frame of reference or background context for deciding a case. Used as a social framework, the generality of social research causes it to bear greater resemblance to social authority than it does to social facts. When social science studies are used as social authority or as a social framework by a trial judge or tribunal without giving the parties an opportunity to comment on the studies it is usually considered to be an error but not one which will itself result in reversal… **On the other hand, where social science research is used to resolve a dispute that is specific to the proceedings, the social science research takes on a character akin to the judge making a finding of fact based on it. If used in this manner, it appears to be necessary for trial courts to ensure that an opportunity is provided to the parties to properly introduce the evidence and to have it tested through cross- examination.** (emphasis added, citations omitted).

Cronk v. Canadian General Insurance Co., [1995] O.J. No. 2751 (C.A.)

43. The trial judge's approach fell into the same errors described in *Hamilton* and *Cronk v. Canadian General Insurance Co.* – he assumed the role of advocate, witness and judge and turned the Appellant's sexual assault trial into a scathing rebuke of how the trial courts treat complainants in sexual assault prosecutions and so called "rape myths." He relied on academic commentary as a social fact, which he used to resolve the issues before the court, without any input from the parties. However, unlike *Hamilton*, the trial judge did not provide *any notice* about the materials he intended to rely on. Nor was any evidence called.

The trial judge formed his opinions of the issues, and the complainant's credibility, on social science articles and research of his own choosing. This material was not tested before the Court and some of the sources included publications by the U.S. State Department and District Attorneys Office, which raise clear questions of partiality. This is a clear error in law. This not only impacts the fairness of the trial but it contributes to an apprehension of bias, unconscious or otherwise.

III. The trial judge applied different standards of scrutiny to the evidence

44. The Court of Appeal in *R. v. Gravesande*, recently reviewed the law surrounding arguments that the trial judge applied a different or stricter standard of scrutiny to the evidence of the defence and that of the Crown. The Court held:

> This court has repeatedly stated that it is an error of law for a trial judge to apply a higher or stricter level of scrutiny to the evidence of the defence than to the evidence of the Crown: *R. v. Owen* (2001), 150 O.A.C. 378, at para. 3; *R. v. H.C.* (2009), 241 C.C.C. (3d) 45, at para. 62; *R. v. Phan*, 313 O.A.C. 352 at para. 30. However, as noted by Laskin J.A. in *R. v. Aird* (2013), 307 O.A.C. 183, at para. 39:
>
> The "different standards of scrutiny" argument is a difficult argument to succeed on in an appellate court. It is difficult for two related reasons: credibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge's credibility determinations.
>
> For an appellant to successfully advance this ground of appeal, she must identify something clear in the trial judge's reasons or the record indicating that a different standard of scrutiny was applied and something sufficiently significant to displace the deference due to a trial judge's credibility assessments: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 59 (Ont. C.A.); *R. v. Rhayel* (2015), 324 C.C.C. (3d) 362, at para. 98.
>
> *R. v. Gravesande*, 2015 ONCA 774 at ¶¶18 - 20

45. There are clear areas of the reasons that suggest the trial judge applied a different standard of scrutiny. Without reiterating what is already set out above in detail, the trial judge gave a very brief review of the problems with the complainant's evidence, excusing most, if not all, of those problems based on untested academic commentary. There was a mere paragraph in which he suggested the problems in the complainant's evidence were of no import, and even there, there was no particularization or specific analysis of them. The trial judge did not address the inherent problems with the complainant's narrative – such as why the Appellant would out of the blue tell her "not to touch him", why she invited him to

the bar on the pre-text of later having "hot sex" and yet claimed they did not socialize at either bar and her evidence that she was "surprised" that he showed up at the bar, when his intention was communicated to her *via* text. He was only going out to see her at her prompting because he was not feeling well. There were a number of issues with the complainant's account that could be considered illogical, if not directly contradicted, that do not engage any alleged "rape myths." Moreover, the trial judge made little to no mention to the corroborating evidence called by the defence from Ms. Moore and Mr. So. If not for a review of the transcripts, one would scantly know that these two witnesses testified.

46. Leaving aside the trial judge's findings on the issues that were not really in dispute, when you compare the treatment of the complainant's evidence verses that of the Appellant – which the trial judge reviews in significant detail, as if every minute aspect of his account is dissected under a microscope in the crucible of truth – there is clearly a different standard applied.

IV. The verdict is unreasonable because the trial judge's reasoning process is irrational and at times impossible to follow

47. It is submitted that the reasons for judgment are immense but says very little on the key issues. It is difficult to decipher whether the trial judge properly applied the *R. v. W.D.* framework in assessing the witnesses' credibility. It is not the Appellant's position that this verdict is unreasonable in the sense that no reasonable trier of fact could have convicted the Appellant. However, the verdict is unreasonable for another reason, because the trial judge's reasoning process is so unclear, that the verdict cannot stand and a new trial, rather than an acquittal, should be ordered.

R. v. Beaudry, [2007] 1 S.C.R. 190
R. v. Sinclair, [2011] S.C.J. No. 40

48. The trial judge conducted the following review of the Appellant's evidence:

> Firstly, no doubt about it let the hot sex begin. He was very much inclined and he would try his best but, **he wasn't sure he would be up to standards.**
>
> **[439]** As if to awaken him from anything that might dissuade him otherwise, Mr. Ururyar gave evidence that **Ms. Gray personally assaulted him. Yes, assaulted him, groped him, in fact at the Victory Café. That upset him as he has testified, and according to Mr. Ururyar, Ms. Gray again, again sexually assaulted him at Paupers, another upsetting event he told us and this again as a consequence of Ms. Gray's aggressive, although not non-stop behaviour.**

[440] Mr. Ururyar, the possibility of sex later that evening presumably being stimulated somehow by Ms. Gray, at the Victory Café it never happened. Then a booth at Paupers, groping him under the table, it never happened.

[441] In spite of these attacks on his person according to Mr. Ururyar, they walked from the one bar to the other with others and then they finally left Paupers past closing time where upon Lacey (Ms. Gray's friend) grabbed a cab and went home. According to Mr. Ururyar, he and Ms. Gray then walked 20 – 30 minutes again happily arm in arm from Paupers to his residence talking about the weather. According to him Mandi asked "Am I not good enough for you?" And he said "yes, you are". It was very disappointing to Mr. Ururyar that Lacey did not join them to his place as described by Ms. Gray. She has reflected on Mr. Ururyar's anger and tone of voice on the walk.

[442] Two supposedly happy people, a relatively **newly formed albeit number five for him, admittedly a relatively casual relationship** as I find, on their way to his place most possibly to have sex, if he was up it.

[443] Why not? Lots of drinking, at least by Ms. Gray, happy students, positive strike vote, and who knows what else to come?

[444] They arrived at his place, got into bed according to Mr. Ururyar, got under the covers, and what happens? **Ms. Gray, according to Mr. Ururyar moves to kiss him. He says he moved away. Sexual assault number three appears.** A normal inclination by Ms. Gray? A sign of affection? Some might even call it foreplay? The first step to sex? And then of course we heard according to Mr. Ururyar what he said to Ms. Gray.

[445] Ms. Gray, if not crushed may have felt rejected and hurt it would appear from the evidence of Mr. Ururyar. She starts to cry, soothing words, an apology by him, apparently are exchanged, **then sexual assault number four committed by Ms. Gray, obviously, if not unexpected on Mr. Ururyar, "pulling down his pants and performing oral sex on him".** For Mr. Ururyar this was consensual sex, better, given **how aggressive Ms. Gray had been all evening.** And, and this should be the last time they would sleep together. **He was up to it, it seems, and Ms. Gray's aggression never, never, stops.** His description is vivid. Before you know it, it was the morning. Ms. Gray leaves to go home.

[446] According to Mr. Ururyar, Gazem had mentioned to him at Paupers that Ms. Gray might be interested in a threesome. He had been interested in such ideas, we know that. Was this before grope number two, after grope number one? We are not sure. He is not sure.

[447] Mandi, Lacey, and Mr. Ururyar add up to three except of course, three minus one, if you are serious and really want a threesome equals zero. The taxi went and the threesome went with it.

[448] Mr. Ururyar gave evidence that coincidentally just a few days after January 31, 2015 he was asked by Gazem how the threesome went? He said he told Gazem it never happened. That's what he tells us.

[449] Mr. Ururyar, it would appear, at least to Mr. Ururyar, had been victimized by Ms. Gray, he, the victim of her obsessive, aggressive sexual and assaultive behaviour including, apparently according to Mr. Ururyar, going so far as desirous of a threesome. According to Mr. Ururyar and Gazem the messenger, Mandi was interested in a threesome. That is what

Mandi may have been planning? Did Mandi encourage Lacey to come to Mr. Ururyar's place? No. Did Mandi discourage Lacey from coming to his place? No. Was Mr. Ururyar upset that Lacey, according to him, did not come back to his place for drinks with Mandi? According to him, No.

[450] Mr. Ururyar gave evidence as we heard that once back at this place he was quite upset with Mandi. **What a disappointment? I tell you NOT to grope me (touch me in public). You say, OKAY and instead you are even more aggressive groping me again, a second time. I tell you we are done, and why we are done and you cry. "We are no longer compatible".**

[451] Alison is moving back from Montreal he says in April 2015. Did that ever stop him before? Have to keep these things hush hush, Alison might find out, as if he cared. Devoted to Alison, when and where? How? **Tears are supposedly flowing but that doesn't stop Mandi. She even apologizes to him, he tells us. Kisses later and ready for sex with him and according to Mr. Ururyar she pounces, even doggie style.**

[452] This causal relationship has incredibly gone out of control. It is all over but he tell his counsel, consensual sex with Mandi, the aggressor.

[453] Mandi in bed with Mr. Ururyar according to him, his clothes mostly on. What's the rush to take off his clothes? Mandi only wearing a tank top, he thinks. The accused wearing a long sleeved shirt and long underpants. Mandi under the covers first. She tries to kiss him. He moves away. You are bad (he is thinking). He is not, not happy with her behaviour. He admonishes her. **We are not compatible. It is over. Mandi apologizes and cries. He says he tries to console her, he holds her. He touches her arm and back. "We lean into each other. We kiss. He rolls on his back. She pulls down his pants, removes his shirt and begins oral sex. He asks her. Do you want me inside of you? Yes, doggie style no condom. Was he tired? Just wanted to sleep? Maybe upset? Maybe angry? Maybe all of the above. Reject Mandi (he did it). Tell her off (he did it). We are done (he said it).**

[454] In any event, sex they had according to Mr. Ururyar, coupled with Mandi's aggressiveness. Think about it, positive emotions feel so good. Rejection usually hurts, at least initially. Before all of this of course, as indicated, he tells Mandi this is the last time for us. His version, and I stress his version, without reality. It never, never happened.

[455] The most intimate relationship may, may be, the one between your head and your heart but Ms. Gray according to Mr. Ururyar reacted differently. Didn't matter to Mandi what he said or did, we are going to have sex. According to him no heartbreak, no broken heart. Mandi's motto, according to Ms. Ururyar, let's do it.

[456] Such a story, scenario we heard from Mr. Ururyar from beginning to end begs credulity, a feeble, feeble attempt in hindsight that is unbelievable and incomprehensible.

[457] It never happened this way. None of it.

[458] The groping never happened. Did Ms. Gray grope him. No. That was not the nature of their relationship. That was not Ms. Gray.

[459] Groping incident number two at Paupers. Did it happen? Illogical, and why? Based on what? Ms. Gray couldn't keep her hands off him? She couldn't wait to grab him? She didn't even spend much of the evening near him, let alone grope him at each bar. What a

picture painted by the accused except a false picture and in between the groping, how about a threesome?

[460] Mandi and Gazem, Gazem and Mr. Ururyar, Mr. Ururyar, Mandi and presumably Lacey. Another obscene fabrication. **Hot set never equated with a threesome to Ms. Gray. We don't even know what the phrase "hot sex" means.**

[461] Mandi approaching Gazem to speak to Mr. Ururyar. Why? **Were not Gazem and Mr. Ururyar basically done as a couple. Mandi knows how to speak.** Never happened. Speaking to Gazem after January 31 about the threesome, never happened.

[462] Lovey, dovey on the way home, never happened. Attacking Mr. Ururyar under the covers in bed, never happened, **again a great illusion or delusion of Mr. Ururyar but also a joke.** A fabrication, credible, never. I must and do reject his evidence.

[463] I do so without hesitation. (emphasis added)

Reasons for Judgment, Appeal Book, pp. 169 - 173

49. The trial judge overstated the Appellant's narrative of what happened that night. He attended the bar after the complainant told him: "come drink and then we can have hot sex." He admitted in his evidence and it was verified by the contemporaneous text messages that he was not feeling well. At the both bars, he said the complainant socialized with him and was touching his leg, near his groin. He did not like the public display of affection – a fact corroborated by Ms. Moore, as was the nature of their open relationship. While a sexual assault – rubbing his leg without consent – the Appellant was not reacting as if he was violated. He told her politely and quietly to stop and she did. He was bothered by it, because he was in front of his work colleagues but it did not cause him to get angry or outraged at the complainant. As they returned to his apartment, talking and got into bed he decided that he did not want to continue the relationship. He told her about that and she is upset but they ultimately end up having consensual sex. The trial judge's findings that the "hot sex" text message is "ambiguous", that because he was in an open relationship and had *multiple partners* his version was incredible, or that he was portraying the complainant as some type of sex-crazed predator – are all completely illogical and do not accord with the evidence. These findings are unreasonable and require that a new trial be ordered.

V. The trial judge materially misapprehended the evidence

50. A misapprehension of the evidence refers to a failure on the part of the trial judge 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 evidence. As Justice Doherty stated in *R. v. Morrissey*:

> ...Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. 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

When the trial judge commits a misapprehension of the evidence, it does not matter whether the rest of the evidence was capable of supporting a conviction. A misapprehension that affects the reasoning process amounts to an unfair trial that can only be corrected by quashing the conviction.

R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 221
R. v. Lohrer (2004), 193 C.C.C. (3d) 1 (S.C.C.)
R. v. C.L.Y., [2008] 1 S.C.R. 5
R. v. Sinclair, supra

(a) The text messages

51. The trial judge materially misapprehended the impact of the text messages on the complainant's credibility. For no moment is it suggested that because she sent him a text message about coming down to the bar for "hot sex" that this meant she consented to any later sexual activity. However, that is not the point. In this case, the complainant in-chief never mentioned the fact that this was how the Appellant came to be at the bar. She completely downplayed and omitted it. She also omitted this detail from her police statement and deleted the text message exchange the day following the alleged assault. She also testified that she was "surprised" when the Appellant showed up and did not socialize with him. This was rebutted by the text messages. Not only were the text messages not ambiguous as the trial judge suggested, they were not caught under s. 276, they were very material to the complainant's credibility and the defence position that she fabricated the allegations. There is a difference between *delayed disclosure* and *selective disclosure*. The Courts

have recognized delayed disclosure is a weak indicator going to credibility because victims of sexual trauma do not behave in any uniformed way. We have abolished antiquated concepts of the requirement to immediately raise "the hue and cry" in order for a complainant to be believed. Any delay in disclosure is but a factor that the courts can consider. However, *selective disclosure* is a very different animal. It can show at best carelessness with the truth by omitting key details or, at worst, deliberate deceit and manipulation. Here the trial judge explained away these inconsistencies through the delayed disclosure framework. He failed to grapple with the fact that the complainant's narrative had been contradicted by objective evidence. This was something the trial judge had to consider. His failure to do so results in a material misapprehension of the evidence.

R. v. D.D., [2000] 2 S.C.R. 275 at ¶¶60 – 63, *per* Major J. (for the majority)

(b) The public displays of affection

52. The trial judge also misapprehended the Appellant's evidence about his aversion to public displays of affection. Not only did he provide this evidence, but his girlfriend, Ms. Moore, confirmed this fact. The trial judge take on the Appellant's evidence, that he asked her politely and quietly to stop touching his leg in front of their work colleagues to mean that she was sexually attacking and violating him, like an unrelenting predator, was a complete misapprehension of the *substance* of his evidence. The trial judge's reference to the complainant committing multiple incidents of sexual assault against the Appellant, and using that fact to reject his evidence that they later had consensual sex, is also a material error.

VI. The trial judge erred in his assessment of the issue of consent

53. At ¶¶481 – 482 of the reasons, the trial judge seems to frame the issue for the court to decide as to whether sexual contact occurred, rather than whether or not the Crown had proven it was non-consensual or whether the Appellant had a mistaken belief in consent – both of which were issues raised by the defence. The trial judge noted as follows:

> Mr. Ururyar denies he sexually assaulted Ms. Gray. Consent is therefore not an issue and more importantly Ms. Gray's historical text, even if alleged by Mr. Ururyar, may well be irrelevant.

> Further since (it never took place) consent is a non-issue, there is no factual foundation, if argued, of any defence of honest, but mistaken belief in consent, although this defence was not advanced at trial. See *supra, R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 41-49.
>
> Reasons for Judgment, Appeal Book, p. 176

54. Not only does this factor into the above ground that the verdict is unreasonable, but this is clearly not the issue and a complete mischaracterization of the Crown's burden and the defence position.

PART IV

ORDER REQUESTED

55. It is respectfully requested that the appeal be allowed and that a new trial be ordered.

56. It is further requested that the restitution order be quashed.

All of which is respectfully submitted
this 16th day of January 2017.

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SCHEDULE 'A'

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R. v. C.L.Y., [2008] 1 S.C.R. 5

SCHEDULE 'B'

LEGISLATION TO BE CITED

None