R. *v*. Esau, [1997] 2 S.C.R. 777

Her Majesty The Queen *Appellant*

v.

Able Joshua Esau *Respondent*

Indexed as: R. *v*. Esau

File No.: 25409.

1997: March 18; 1997: July 10.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for the northwest territories

Criminal law -- Sexual assault -- Defences -- Defence of honest but mistaken belief in consent -- Whether trial judge erred in not putting defence to jury -- Whether there was sufficient evidence to give defence "air of reality".

Criminal law -- Sexual assault -- Defences -- Defence of honest but mistaken belief in consent -- Defence not raised by accused at trial -- Whether defence can be raised on appeal.

The accused, a second cousin of the complainant, had sexual intercourse with her after a party at her home. The accused was later charged with sexual assault and tried before a jury. At trial, the accused testified that, in his view, the complainant was in a condition to be "able to control what she was doing". He said that they kissed each other and then she invited him to come to her bedroom, where they had consensual sexual intercourse. The complainant testified that she was drunk and denied kissing the accused and inviting him to her bedroom. She testified that she had no memory of anything from the time she went to her bedroom until the next morning when she awoke and realized that she had engaged in sexual intercourse. Although she could not remember what occurred, the complainant testified that she would not have consented to intercourse with the accused because they were related. The trial judge charged the jury on the issue of consent, but not on the defence of honest but mistaken belief in consent. Defence counsel did not object. The accused was convicted of sexual assault. On appeal, the Court of Appeal, by majority, allowed the appeal, quashed the conviction and ordered a new trial. The court concluded that there was an 'air of reality' to the defence of honest but mistaken belief and that, notwithstanding the failure of defence counsel to raise the issue, the trial judge was obliged to put that defence to the jury.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Gonthier, Iacobucci and Major JJ.: Before a court should consider the defence of honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence. Here, the plausible evidence comes from the testimony of the complainant and the accused and the surrounding circumstances of the alleged sexual assault. The accused's evidence amounted to more than a bare assertion of belief in consent. He

described specific words and actions on the part of the complainant that led him to believe that she was consenting. This alone may be enough to raise the defence, but there was more. The complainant's evidence did not contradict that of the accused, as she cannot remember what occurred after she went to her bedroom. In addition there was no evidence of violence, struggle or force. The absence of resistance or violence alone could not raise the defence as it is only one factor that must be considered. Moreover, not only was the testimony of the parties not "diametrically opposed", but even on a slightly stricter test, the parties' stories may be "cobbled together" in a coherent manner. The complainant did not testify that she did not in fact consent, but was only able to say that because she was related to the accused, she would not have consented. The accused's evidence of the complainant's participatory actions, if believed, might lead a jury to conclude that he honestly believed she was consenting despite his being mistaken about her ability to legally consent because of intoxication. This meets the threshold of a plausible explanation of the facts and should have been put to the jury. The question of whether a particular complainant could inadvertently disguise her intoxication, say things or perform acts that raise an honest but mistaken belief in consent is for the jury to determine taking into account all the factors in the case. A court cannot make an *a priori* determination that honest but mistaken belief is impossible when the complainant is intoxicated. Lastly, while passivity by the complainant may not be consent, her absence of memory has to be considered with the evidence of the accused that the complainant seemed to participate willingly. This is sufficient to justify charging the jury on that defence.

Section 273.2 of the *Criminal Code* was not raised at the trial or on the appeal. Those circumstances restrict this Court's ability to consider the effect of that section.

Although the defence of honest but mistaken belief was not raised at trial, it is not a bar to its being raised on appeal. A trial judge must charge the jury on every defence which has an "air of reality", whether or not that defence is raised by the accused.

Per McLachlin J. (dissenting): Section 273.2 of the *Criminal Code* provides that, in a case of sexual assault, an accused cannot raise the defence of mistaken belief in consent if he did not take "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". In this case, where the complainant was on any view of the evidence quite drunk, the absence of any evidence of steps taken by the accused to ascertain consent precludes him from raising the defence.

In any event, an application of the common law principles governing the defence leads to the same result. To put the defence of honest but mistaken belief to the jury, there must be sufficient evidence to give the defence an "air of reality". Mere assertion of belief in consent by the accused will not suffice to give the defence an air of reality. As well, diametrically opposed assertions by the parties -- the complainant's clear consent as far as the accused is concerned, and her clear refusal of consent as far as the complainant is concerned -- will seldom, if ever, give rise to the defence. Consent for purposes of sexual assault is found in the communication by a person with the requisite capacity by verbal or non-verbal behaviour to another of permission to perform the sexual act. The issue of mistake as to consent must be assessed on the basis of the particular accused person before the court, but the accused cannot have been wilfully blind or reckless. An accused is not entitled to presume consent in the absence of communicative ability and thus cannot raise the defence in the case of an unconscious or incoherent complainant. Passivity without more is also insufficient to provide a basis

for the defence. Since the defence of honest but mistaken belief is designed to meet the situation where there has been an honest miscommunication of non-consent, it may arise only where the evidence indicates a situation of ambiguity resulting from the complainant's conduct or external circumstances which the accused, not being wilfully blind or reckless and acting honestly, misinterpreted as consent. The requirements of the defence are thus: (1) evidence that the accused believed the complainant was consenting; (2) evidence that the complainant in fact refused consent, did not consent, or was incapable of consenting; and (3) evidence of ambiguity or equivocality showing how the accused could honestly, and without wilful blindness or recklessness, have mistaken the complainant's lack of consent for consent.

Here, the trial judge did not err in failing to put the defence of honest but mistaken belief to the jury, since it did not realistically arise on the evidence. The complainant and the accused presented divergent and incompatible versions of the events. The accused's evidence is consistent only with capacity and actual consent. The complainant's evidence is consistent with denial of consent or with unconscious incapacity to give consent. Either the complainant would have vehemently refused sex, or she was unconscious and incapable of refusing it. Neither case suggests a situation of ambiguity or equivocality which the accused could honestly have read as capacity and consent. Drunkenness cannot constitute evidence of a situation in which the complainant might appear to be consenting when in fact she was not. If the complainant is so drunk that she is unable to communicate, she is incapable of giving consent, and no question of honest mistake can arise. If she was less drunk and had the capacity to consent, the question for the jury is whether she actually consented or not, depending on whose evidence they accept. Further, the assertion that the complainant's drunkenness and lack of memory raise the defence of honest but mistaken belief depends not on the evidence but on speculation. The law, however, does not permit speculation based on

stereotypes but rather demands specific evidence of a state of affairs which could give rise to an honest misapprehension of consent when no consent existed. No such evidence was presented in this case. The complainant's inability to recollect is not in itself evidence of miscommunication. Nor does the absence of evidence of violence support the hypothesis of honest but mistaken belief in consent. If the accused wrongly inferred clear capacity and an active communication of consent from lack of struggle or passivity, he must have been either wilfully blind or dishonest. On the evidence, there were thus only two possible scenarios: either the complainant did not consent to the sexual activity or she had capacity and consented. Neither scenario is consistent with the defence of honest but mistaken belief in consent and there is no evidence to support a third scenario of ambiguity as to capacity or as to what was communicated.

Per L'Heureux-Dubé J. (dissenting): The reasons of McLachlin J. were agreed with. The traditional common law understanding of "lack of consent" as it relates to the *mens rea* in the offence of sexual assault should be changed. The customary focus on the complainant's communication of refusal or rejection of the sexual touching in question should be rejected in favour of an assessment of whether and how the accused ascertained that the complainant was consenting to such activity. The *mens rea* of the offence should be established where the accused is shown to have been aware of or reckless or wilfully blind as to the fact that the complainant has not communicated consent to the activity in question. In determining whether an accused had the requisite culpable state of mind, it is necessary for the trier of fact objectively to examine not only the verbal and behavioural indicators in the evidence of the complainant's subjective state, but also the accused's subjective perception thereof, in light of any relevant circumstances known to him at the time. Where an accused has demonstrated that he honestly, with some basis in the circumstances, misperceived these indicators, and therefore lacked the necessary "culpable mind", the defence of honest but mistaken

belief may arise. Here, there was no evidentiary basis for ambiguous communication on the part of the complainant or external circumstances which could have influenced the perceptions of the accused. The trial judge was thus correct in not putting the defence to the jury.

Cases Cited

By Major J.

Referred to: *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *R. v. Lemky*, [1996] 1 S.C.R. 757; *R. v. Bulmer*, [1987] 1 S.C.R. 782.

By McLachlin J. (dissenting)

Director of Public Prosecutions v. Morgan, [1976] A.C. 182; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. Reddick*, [1991] 1 S.C.R. 1086; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Park*, [1995] 2 S.C.R. 836; *People v. Rhoades*, 238 Cal. Rptr. 909 (1987); *People v. Williams*, 841 P.2d 961 (1992); *R. v. Darrach* (1994), 17 O.R. (3d) 481; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *People v. Mayberry*, 542 P.2d 1337 (1975); *People v. Romero*, 215 Cal. Rptr. 634 (1985); *People v. Vasquez*, 281 Cal. Rptr. 661 (1991); *Tyson v. Trigg*, 50 F.3d 436 (1995); *Tyson v. State of Indiana*, 619 N.E.2d 276 (1993); *Commonwealth v. Fionda*, 599 N.E.2d 635 (1992).

By L'Heureux-Dubé J. (dissenting)

R. v. Park, [1995] 2 S.C.R. 836; *State of A.P. v. Murthy*, (1997) 1 S.C.C. 272; *State of Punjab v. Singh*, (1996) 2 S.C.C. 384.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 15, 28.

Criminal Code, R.S.C., 1985, c. C-46, ss. 150.1 [ad. c. 19 (3rd Supp.), s. 1], 265(3), (4), 273.2 [ad. 1992, c. 38, s. 1].

Authors Cited

Malm, H. M. "The Ontological Status of Consent and its Implications for the Law on Rape" (1996), 2 *Legal Theory* 147.

Vandervort, Lucinda. "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88), 2 *C.J.W.L.* 233.

Webster's Third New International Dictionary. Springfield, Mass.: Merriam-Webster, 1986, "consent".

Wertheimer, Alan. "Consent and Sexual Relations" (1996), 2 *Legal Theory* 89.

Williams, Glanville. *Textbook of Criminal Law*. London: Stevens & Sons, 1978.

APPEAL from a judgment of the Northwest Territories Court of Appeal, [1996] N.W.T.R. 242, [1996] N.W.T.J. No. 51 (QL), allowing the accused's appeal from his conviction for sexual assault and ordering a new trial. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

M. David Gates and *Bernadette Schmaltz*, for the appellant.

Adrian C. Wright and *Catherine Stark*, for the respondent.

The judgment of Lamer C.J. and Sopinka, Gonthier, Iacobucci and Major was delivered by

1 MAJOR J. -- This appeal returns the Court to a consideration of the defence of honest but mistaken belief in consent in relation to a charge of sexual assault. This defence has been frequently reviewed in recent cases and these reasons strive only to restate what has previously been said.

I. Facts

2 The respondent, a second cousin of the complainant, was one of five people present at a party at the complainant's home. At the party a considerable amount of alcohol was consumed. The complainant testified that she was drunk. The respondent testified that, in his view, the complainant was in a condition to be "able to control what she was doing". Other witnesses testified that the complainant looked "pretty drunk".

3 As the party progressed into the early morning, only the complainant, the respondent and a third person, James Harry, remained in the house. Mr. Harry testified that he did not see any unusual behaviour or physical contact between the respondent and the complainant in his presence. He left the house, leaving the complainant and respondent alone. He testified that at that point the complainant was "pretty high".

4 The respondent testified that he and the complainant kissed each other and then the complainant invited him to come to her bedroom where they had consensual sexual intercourse. The complainant denied the kissing and said that she had not invited

the respondent to her bedroom. She testified that she had no memory of anything from the time she went to her bedroom until the next morning when she awoke and realized that she had engaged in sexual intercourse. Although she could not remember what occurred, the complainant testified that she would not have consented to intercourse with the accused because they were related.

II. Jury Charge

5 The respondent was charged with sexual assault. He was tried before a jury. Prior to closing submissions of counsel, the trial judge discussed with counsel the issues in the case and his proposed jury charge. Crown counsel raised the issue of whether or not the accused would be relying on the defence of honest but mistaken belief in consent. Defence counsel's position was that the only issue in the case was actual consent.

6 The trial judge charged the jury on the issue of consent, but not on the defence of honest but mistaken belief in consent. Defence counsel did not object. During deliberations, the jury asked a question about consent while impaired and the trial judge recharged the jury on that point.

7 The respondent was convicted of sexual assault. On appeal, the Court of Appeal, by majority, allowed the appeal, quashed the conviction, and ordered a new trial: [1996] N.W.T.R. 242.

III. Court of Appeal Judgment

(1) *The Majority*

8 Lieberman J.A. (Irving J.A. concurring) noted that neither counsel expressed any objection to the charge, nor made any mention of the absence of instructions on the defence of honest but mistaken belief.

9 Lieberman J.A. concluded (at p. 245):

> The accused was consistent in stating that the act of sexual intercourse took place with the consent and active participation of the complainant. His evidence in this regard may well be interpreted as his belief based on his allegations of the complainant's conduct thus raising the defence of honest but mistaken belief. In this case there was evidence in addition to the bare assertion by the [respondent] that if believed could lead a jury to give effect to that defence. There was, therefore, an 'air of reality' to that defence. In our respectful view, notwithstanding the failure of counsel to raise the issue, the learned trial judge was obliged to put that defence to the jury.

(2) *The Minority*

10 Richard J.A., dissenting, found no merit in the appeal from conviction. He stated the trial judge had been alive to the issues raised by the evidence and was correct in concluding that there was no evidence to warrant putting the defence of honest but mistaken belief to the jury. In his opinion the defence lacked the requisite "air of reality".

11 Richard J.A. pointed out that experienced counsel did not request the trial judge to instruct the jury on this defence. Although this failure was not fatal on appeal, he said it was a factor to be considered in deciding whether there was an air of reality to the mistaken belief defence.

12 Richard J.A. held that the defence of honest but mistaken belief should be rarely invoked in sexual assault cases. In his opinion, the issue was consent or no consent and the jury, by its verdict, did not believe the respondent's testimony.

IV. Analysis

13 In my opinion, the majority of the Court of Appeal was correct to find an "air of reality" to the defence of honest but mistaken belief. As well, it has long been established that a trial judge must charge the jury on every defence which has an "air of reality", whether or not that defence is raised by the accused.

(1) *Air of Reality*

14 The principal question that arises where the defence of honest but mistaken belief is alleged is whether in all the circumstances of the case there is any reality to it. In *R. v. Park*, [1995] 2 S.C.R. 836, L'Heureux-Dubé J. wrote, at para. 20:

> Although there is not, strictly speaking, a requirement that the evidence be corroborated, that evidence must amount to something more than a bare assertion. There must be some support for it in the circumstances. The search for support in the whole body of evidence or circumstances can complement any insufficiency in legal terms of the accused's testimony. The presence of "independent" evidence supporting the accused's testimony will only have the effect of improving the chances of the defence.

In *R. v. Osolin*, [1993] 4 S.C.R. 595, McLachlin J. stated at pp. 648-49:

> . . . before any defence can be put to the jury, the evidence must provide a basis for that defence. This requirement is sometimes described by saying that there must be an "air of reality" to the defence. To put a defence to the jury where this "air of reality" is lacking on the evidence would be to risk confusing the jury and to invite verdicts not supported by the evidence.

...

> In order to give an "air of reality" to the defence of honest but mistaken belief, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting.
>
> The evidence of lack of consent in most cases is supplied by the complainant's testimony. To prove honest but mistaken belief, on the other hand, the accused typically testifies that he honestly believed that the complainant consented. Theoretically, such a belief could be asserted in every case, even where it is totally at odds with the evidence as to what happened. So it has been held that the bare assertion of the accused that he believed in consent is not enough to raise the defence of honest but mistaken belief; the assertion must be "supported to some degree by other evidence or circumstances": *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 790. The support may come from the accused or from other sources....
>
> ...
>
> [T]he accused's mere assertion of his belief is not evidence of its honesty. The requirement that the belief be honestly held is not equivalent to an objective test of what the reasonable person would have believed. But nevertheless it does require some support arising from the circumstances. A belief which is totally unsupported is not an honestly held belief. A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them. Therefore, for a belief to be honest, there must be some support for it in the circumstances. The level of support need not be so great as would permit the belief to be characterized as a reasonable belief. But some support there must be.

15 I conclude from the foregoing that before a court should consider honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence. Here, the plausible evidence comes from the testimony of the complainant and the respondent and the surrounding circumstances of the alleged sexual assault. The respondent's evidence amounted to more than a bare assertion of belief in consent. He described specific words and actions on the part of the complainant that led him to believe that she was consenting. This alone may be enough to raise the defence. However, there was more. The complainant's evidence did not contradict that of the respondent, as she cannot remember what occurred after she went

to her bedroom. In addition there was no evidence of violence, no evidence of a struggle and no evidence of force.

16 The parties' testimony is usually the most important evidence in sexual assault cases. In *Osolin*, *supra*, there was debate whether, if the parties' testimony were "diametrically opposed", the defence of mistake should be put to the jury. In the present case, not only was the testimony not "diametrically opposed", but even on a slightly stricter test, the parties' stories may be "cobbled together" in an entirely coherent manner. In *Park*, *supra*, L'Heureux-Dubé J. stated at para. 25:

> ... the question is whether, in the absence of other evidence lending an air of reality to the defence of honest mistake, a reasonable jury could cobble together some of the complainant's evidence and some of the accused's evidence to produce a sufficient basis for such a defence.... Put another way, is it realistically possible for a properly instructed jury, acting judiciously, to splice some of each person's evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent?

17 The procedure outlined by L'Heureux-Dubé J. applies here in the following way. The accused testified that they had been drinking and engaged in intercourse, with the complainant's consent. The complainant testified that she was drunk and has no memory of anything that happened after she went to her bedroom. She did not testify that she did not in fact consent, but was only able to say that because she and the accused were related, she would not have consented. The appellant Crown argued for a conviction based on, *inter alia*, the theory that as the complainant was intoxicated she was incapable of consenting.

18 The accused's evidence of the complainant's participatory actions, if believed, might lead a jury to conclude that he honestly believed she was consenting

despite his being mistaken about her ability to legally consent because of intoxication. This meets the threshold of a plausible explanation of the facts and should have been put to the jury.

19 The absence of memory by the complainant as to what happened in the bedroom makes it easier to "cobble together" parts of both the accused and complainant's evidence to reach a reasonable conclusion of honest but mistaken belief. Any number of things may have happened during the period in which she had no memory. The evidence of the accused combined with the lack of memory of the complainant and, as previously noted, the absence of violence, struggle or force, when taken together makes plausible and gives an air of reality to the defence of mistaken belief.

20 Passivity by the complainant may not be consent: see *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3. However, the absence of memory by the complainant has to be considered with the evidence of the accused that the complainant seemed to willingly participate. The jury would not need to believe much of the respondent's testimony about what occurred in order to reasonably conclude that he had an honest but mistaken belief in consent. This is sufficient to justify charging the jury on that defence.

21 The defence of honest but mistaken belief is mandated by both common law and statute. My colleague, Justice McLachlin, in her reasons in this case, narrows the defence to where it practically ceases to exist. The trial judge's role in evaluating the legal standard of "air of reality" as a question of law is a limited one. The strictures placed on the defence by my colleague would expand the role of the trial judge and deny the jury the ability to apply its wisdom to issues that arise in these cases by removing nearly all questions of fact from them.

22 In this appeal, it is the totality of the evidence that gives the defence an air of reality. The absence of resistance or violence is only one factor that must be considered alongside the accused's evidence that the complainant did and said things that led him to believe she was consenting. I intended my reasons to conclude that the absence of resistance or violence alone could not raise the defence.

23 My colleague's reasons state that I have asserted "that the complainant's drunkenness and lack of memory raise the defence of honest but mistaken belief" (para. 95). These factors were cited merely because they leave the accused's evidence that the complainant did and said things that led him to believe she was consenting uncontradicted. My colleague concludes that the complainant would not for personal reasons have consented. This, in view of the complainant's failure to remember, is no evidence of her denying consent.

24 My colleague further posits that an accused could never have an honest but mistaken belief in consent where the complainant is incapable of consent because she is intoxicated. She states that "[s]uch lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible" (para. 73). With respect, this conclusion is incorrect, unless it means that the only time a person is legally incapable of giving consent is when they are intoxicated to the point of unconsciousness. The question of whether a particular complainant could inadvertently disguise her intoxication, say things or perform acts that raise an honest but mistaken belief in consent, is for the jury to determine taking into account all the factors in the case. The Court cannot make an *a priori* determination that honest but mistaken belief is impossible when the complainant is intoxicated.

25 My colleague suggests that there are only two possibilities in this case: "either the complainant would have vehemently refused sex, or she was unconscious and incapable of refusing it" (para. 91). With respect, this is a question for the jury to consider. There is a logical third alternative. The jury could have believed the accused's testimony that the complainant appeared to consent, but also believed that the complainant was intoxicated to the point of legal incapability. If honest but mistaken belief as a defence is removed in those circumstances, the jury would have no option but to convict. The effect of McLachlin J.'s reasons would usurp the role of the jury when she states that "[t]here is no evidence to support a third scenario of ambiguity as to capacity or as to what was communicated. There is no evidence to indicate that while the complainant appeared to be consenting, she was not" (para. 94). It appears plain on the facts of this case that it was possible for the jury to do just that.

(2) *Defence First Raised on Appeal*

26 That the defence of honest but mistaken belief was not raised at the trial is not a bar to its being raised on appeal. The trial judge must charge the jury with respect to every defence which has an "air of reality". See *R. v. Lemky*, [1996] 1 S.C.R. 757, *per* McLachlin J. at para. 12:

> It is common ground that the trial judge must instruct the jury on any defence that on the evidence has "an air of reality": *R. v. Osolin*, [1993] 4 S.C.R. 595. The threshold test is met when there is an evidentiary basis for the defence which, if believed, would allow a reasonable jury properly instructed to acquit. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. Park*, [1995] 2 S.C.R. 836.

Defence counsel's decision not to raise the defence may have obscured the issue; however, the obligation remained with the trial judge.

27 This point is further strengthened by the wording of s. 265(4) of the *Criminal Code*, R.S.C., 1985, c. C-46:

> **265.** ...
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief. [Emphasis added.]

This section essentially codifies the "air of reality" test in relation to the defence of honest but mistaken belief: *Osolin*, *supra*, *per* Cory J. The use of the mandatory "shall instruct the jury" makes it clear that the defence must go forward whether raised by the accused or not.

28 An accused person is entitled at his or her trial to have all defences which arise on the facts considered by the court. See *R. v. Bulmer*, [1987] 1 S.C.R. 782, *per* McIntyre J., at p. 789: "[i]t is well settled law that in his charge the trial judge must put to the jury all defences that may arise upon the evidence, whether they have been raised by counsel for the defence or not."

V. Conclusion

29 The ability to reconcile the evidence of both the accused and the complainant with an honest but mistaken belief in consent and the circumstances of the alleged offence mandates that the jury should have considered the defence. Section 273.2 of the *Criminal Code* was not raised at the trial or on the appeal. Those

circumstances restrict this Court's ability to consider the effect of that section. This is not a case where the only issue is consent or no consent. A new trial is required.

30 In the result, I would uphold the decision of Lieberman J.A. in the Court of Appeal, and dismiss the appeal.

The following are the reasons delivered by

31 L'HEUREUX-DUBÉ J. (dissenting) -- I agree entirely with McLachlin J.'s reasons and the result she reaches. In *R. v. Park*, [1995] 2 S.C.R. 836, I similarly advocated altering the traditional common law understanding of "lack of consent" as it relates to the *mens rea* in the offence of sexual assault. This required rejecting the customary focus on the complainant's communication of refusal or rejection of the sexual touching in question in favour of an assessment of whether and how the accused ascertained that the complainant was consenting to such activity. The *mens rea* for sexual assault should, therefore, also be established where the accused is aware of, or reckless or wilfully blind to, an absence of communicated consent on the part of the complainant.

32 In that case, at para. 2, while concurring in the reasons for judgment and the result I reached, Lamer C.J., writing for a majority of the Court, expressed the following reservation about the section of my analysis where I had elaborated this new approach to consent:

> I prefer to make no comment on this subject since it is not necessary to deal with these matters in deciding this appeal. As this Court did not have the

> benefit of any argument on the aspects discussed by my colleague in this section, I would prefer to reserve these matters for another time.

As McLachlin J. has now adopted this understanding of consent in her reasons in the present appeal, some elaboration of the general principles and rationale as articulated in *Park, supra,* is in order.

33 In *Park, supra,* after clarifying a number of difficulties which relate to the nature and application of the "air of reality" test to honest belief defences, I observed that these appear to flow from our approach to the *mens rea* of the offence of sexual assault in the common law. It is well understood that the *mens rea* of the offence of sexual assault requires that the accused intended to touch the complainant in a sexual manner and knew that the complainant was not consenting, or was reckless or wilfully blind to the fact. In application, these requirements have translated into an onus on the Crown to prove beyond a reasonable doubt that the accused was aware of, or reckless or wilfully blind to the complainant's communication of non-consent.

34 In my view, the *mens rea* should also be established where the accused is shown to have been aware of or reckless or wilfully blind as to the fact that the complainant has not communicated consent to the activity in question. As I stated at para. 39 of the judgment:

> In other words, the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".

35 This change to our traditional approach to consent is necessary if we are effectively to address the underlying concerns of the present offence of sexual assault. As society's mores and attitudes as regards gender roles and relations have changed, the

aim of this criminal offence has evolved from its original focus on the proprietary rights men once had over their wives and children and even the more recent emphasis on the physical harm caused by forced sexual activity to a complainant. As I indicated in *Park*, *supra*, at para. 42, today's offence of sexual assault is founded on respect for women's "inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in".

36 On the basis of these considerations, I advocated a shift in our perspective on this legal concept, from consent as "the private mental state" of the complainant to consent as the communication of permission to engage in behaviour from which the accused otherwise has a legal obligation to refrain. This new approach was developed and elaborated by L. Vandervort, in "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88), 2 *C.J.W.L.* 233, as I observed in *Park*, *supra*, and has been reviewed by my colleague McLachlin J. in her reasons in the present appeal. I note that this approach to consent in the offence of sexual assault continues to find favour in academic commentary on this issue. See H. M. Malm, "The Ontological Status of Consent and its Implications for the Law on Rape" (1996), 2 *Legal Theory* 147; A. Wertheimer, "Consent and Sexual Relations" (1996), 2 *Legal Theory* 89.

37 As I further explained in *Park*, *supra*, consideration of communication of consent has always implicitly informed our determination of whether an accused in a sexual assault case had the *mens rea* as regards the complainant's lack of consent. In determining whether an accused had the requisite culpable state of mind, it is necessary for the trier of fact objectively to examine not only the verbal and behavioural indicators in the evidence of the complainant's subjective state, but also the accused's subjective perception thereof, in light of any relevant circumstances known to him at the time. Where an accused has demonstrated that he honestly, with some basis in the

circumstances, misperceived these indicators, and therefore lacked the necessary "culpable mind", the defence of honest but mistaken belief may arise.

38 The following passage from my reasons in *Park*, *supra*, at para. 44, represents the recommended manner in which to address the issues of consent and mistake of fact:

> An accused cannot say that he believed the complainant to be consenting without pointing to the basis for that belief. As a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary. [Emphasis in original.]

39 Evaluating consent and mistaken belief in consent in terms of the complainant's communication is essential if we are to bridge the damaging communication gap between men and women, to encourage men to ascertain whether their sexual partners are consenting, and, most importantly, to prevent sexual behaviour on the part of men which is driven by the biased views and stereotypes that women are consenting when passive or incapable of communicating and do not have a full right of control over what is done to and with their bodies. Sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* have established that the law must neither give rise to nor perpetuate inequality between men and women. Contemporary social norms and beliefs as regards sexual behaviour and sexual assault are fortunately evolving to reflect this ideal. These provide ample grounds and a strong impetus for this Court to develop the common law approach to consent along the lines suggested above and as applied by my colleague to the case at bar.

40 When this approach to consent is applied in the present appeal, as my colleague McLachlin J. has demonstrated, the complainant either consented, or, as she testified, refused or was incapable of communicating permission or agreement to the activity in question. There is no evidentiary basis at all for ambiguous communication on the part of the complainant or external circumstances which could have influenced the perceptions of the accused. To put this defence to the jury would require assumptions about the behaviour of severely intoxicated women which have no demonstrated basis in reality and could potentially be seen as biased or stereotypical.

41 In a recent case before the Supreme Court of India, in recognition of the trier of fact's propensity to base conclusions not on the evidence but on biased or stereotypical assumptions about the complainant, Thomas J. provided the following very valuable advice:

> It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation.

State of A.P. v. Murthy, (1997) 1 S.C.C. 272, at pp. 279-80. See also *State of Punjab v. Singh*, (1996) 2 S.C.C. 384. These comments are most apposite in the present appeal. We must remain sensitive to the very serious danger involved in putting this defence to the jury. In so doing, in this case, the Court is effectively permitting the trier of fact to proceed on the basis of potentially biased assumptions as opposed to the totality of the evidence. Such an approach would likely serve to perpetuate inequality between the genders, a result which should be avoided by this Court.

42 In view of the foregoing elaboration of the concept of consent in the offence of sexual assault, I concur entirely with the reasons of McLachlin J., both in her approach to consent and the mistake of fact defence and in the result she reaches.

The following are the reasons delivered by

43 MCLACHLIN J. (dissenting) -- I have read the reasons of Justice Major. I do not share his conclusion that the evidence gave an air of reality to a defence of honest but mistaken belief in consent. In my view, the only issue raised by the evidence was whether the complainant consented to sexual intercourse with the respondent. That issue was put to the jury and the jury convicted the respondent. There being no other issue, I am of the view that the trial was properly conducted and the verdict should stand.

I. The Facts

44 The respondent and the complainant had sexual intercourse after a party. Both had been drinking. The complainant was quite drunk. She testified later that she could not remember much of what had gone on at the party, and that her last recollection before going to sleep was climbing the stairs to her bedroom. The next morning she woke to find that she had been violated. Charges were laid against the respondent. At trial he admitted intercourse but asserted that the complainant was not that drunk, had participated actively in the sexual activity and had consented.

45 The only issue at the trial was whether the complainant had consented. The theory of the Crown was that she was too drunk to consent. The complainant testified that she would never knowingly have consented to intercourse with the defendant, because they were second cousins. The theory of the defence was that she had in fact consented, as attested to by her alleged active participation. A third possibility -- that

the complainant had not consented but that the accused had honestly and mistakenly believed she had consented -- was not raised at trial. Defence counsel never put this possibility to the complainant. The respondent never raised it in his testimony. The judge did not put it to the jury. No one suggested that he should have. The case was a simple case -- consent or no consent. The jury convicted, evidently concluding beyond a reasonable doubt that the complainant had not consented.

46 Matters changed, however, on appeal. The respondent for the first time suggested that if the complainant did not consent, he honestly but mistakenly believed that she did. Notwithstanding that this was never an issue at trial, he asserted that the trial judge had a legal obligation to put this possibility to the jury. The trial judge's failure to do so, it was argued, entitled the respondent to a new trial. The Court of Appeal agreed and directed a new trial: [1996] N.W.T.R. 242. With respect, I cannot accept that conclusion. In my view, the evidence does not support the scenario of honest but mistaken belief. The required air of reality that is a condition of putting the defence is absent.

II. The Issue

47 This appeal requires this Court to decide what evidence suffices to give an air of reality to the defence of honest but mistaken belief in consent to sexual activity. Does the accused's evidence of willing participation suffice, absent contrary evidence as to the sexual acts and absent evidence of violence, as Major J. suggests, or is more required?

III. Analysis

(1) *The Criminal Code Provisions*

48 The events in this case took place on March 13, 1994. They are thus governed by s. 265(4) and s. 273.2 (proclaimed effective on August 15, 1992) of the *Criminal Code*, R.S.C., 1985, c. C-46, relating to the defence of honest but mistaken belief in consent:

> **265.**...
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.
>
> **273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (*a*) the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or
>
> (ii) recklessness or wilful blindness; or
>
> (*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

49 Section 273.2 precludes an accused from raising the defence of mistaken belief in consent if he did not take "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". In this case, where the complainant was on any view of the evidence quite drunk it would seem reasonable to expect the accused to take steps to ascertain whether her apparent participation represented actual consent, thus obviating the possibility of mistake. No

such steps were taken. This suggests that under the law in force at the time of the alleged offence, the defence could not arise.

50 Major J. does not consider s. 273.2. This may be because it was not argued on the appeal or in the proceedings below. With respect, I do not believe that the force of s. 273.2 may be avoided on that ground. Parliament has spoken. It has set out minimum conditions for the defence of mistaken belief in consent. If those conditions are not met, the defence does not lie. This Court cannot resurrect the defence on the ground that the parties failed to allude to the governing provisions. The proof is in the absurdity of the outcome. The Court of Appeal has directed a new trial solely because the defence of mistaken belief was not put to the jury. If Parliament has precluded that defence, there is no need for a new trial. The appeal should accordingly be allowed.

51 In the event that an argument could successfully be made that s. 273.2 does not apply, I would reach the same result on an application of the common law principles governing the defence of honest but mistaken belief in consent, for the reasons that follow.

(2) *The Common Law Principles*

52 The crime of sexual assault, like most other crimes, consists of two elements. The first element is a criminal act, or *actus reus.* The criminal act is the act of sexual contact without the consent of the other person. The second element is a guilty mind, or *mens rea.* The *mens rea* of sexual assault consists of knowledge that the complainant did not consent or that she lacked the capacity to consent, or alternatively, wilful blindness or recklessness as to whether or not she consented or whether or not she had the capacity to consent. These elements lead to several possible defences. One is that

the complainant in fact consented to the act, negating the *actus reus*. Another is that, although the complainant did not consent, the accused honestly and mistakenly thought she did, depriving him of the necessary guilty mind.

53 The first question which arises with respect to the *mens rea* of sexual assault is whether the test is objective or subjective. In *Director of Public Prosecutions v. Morgan*, [1976] A.C. 182, the House of Lords rejected the objective test, holding that even an unreasonable belief in consent was capable of supporting the defence of honest but mistaken belief in consent. Unreasonableness, however, could be considered by the jury in deciding whether the accused actually honestly held the alleged belief in consent.

54 Not long after, the Supreme Court of Canada pronounced on the same issue in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120. Like the House of Lords, the Supreme Court rejected the suggestion that the accused's belief in consent must be reasonable to afford a defence. However, the majority held that it must be honest, and that the accused cannot have been wilfully blind. The majority also held that, as with other defences, the judge need put the defence of honest but mistaken belief to the jury only where the evidence provided an adequate basis for the defence. There must be sufficient evidence to give the defence an "air of reality".

55 Since *Pappajohn*, this Court has repeatedly confirmed these rules: *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. Reddick*, [1991] 1 S.C.R. 1086; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Park*, [1995] 2 S.C.R. 836. The result is, as Major J. puts it, that there must be "plausible evidence" in support of the defence before a judge must put it to the jury.

56 There is no disagreement on the foregoing propositions. The area of uncertainty concerns not the general principles, but their application. In particular, what suffices to give an "air of reality" to a defence of honest but mistaken belief?

(3) *The Requirement of the Air of Reality*

57 The air of reality required for the defence of honest but mistaken belief in consent is not a special rule applied only to this defence. It is merely an application of the general rule that judges are not obliged to put defences to the jury unless there is a foundation for them in the evidence: *Osolin*, *supra*. The threshold for putting the defence to the jury is not any evidence, but sufficient evidence: *Robertson, supra*. There must be sufficient evidence to make the defence plausible, or a realistic possibility.

58 The next task is to identify in a more precise way the situations which will require the defence of honest but mistaken belief. This may be done negatively, by isolating circumstances which do not suffice to raise the defence, as well as positively, by indicating circumstances which do raise the defence.

59 This Court has identified certain evidentiary situations which do not suffice to give the defence an air of reality. It is clear that the mere assertion of belief in consent by the accused will not suffice. The majority of this Court in *Pappajohn* held that the defence of honest but mistaken belief must be supported by sources other than the accused's bare statement that the complainant consented, in order to give it "any air of reality". The additional evidence may come from the accused or from others. As confirmed in *Robertson* (citing *Pappajohn* at p. 150), the defence is available when "there is sufficient evidence presented by an accused, by his testimony or by the circumstances in which the act occurred" (p. 935). See also *Osolin, supra.*

60 This Court has also suggested that the defence will rarely arise where the case is a simple one of evidence of clear non-consent by the complainant and evidence of clear consent by the accused: *Pappajohn*, *supra*; *Osolin*, *supra*, *per* Cory J. at pp. 683-85. This is because this combination of evidence typically excludes the possibility of an ambiguous situation where an honest mistake as to consent could be made. There is evidence of consent and of non-consent, between which the jury must choose. But there is no evidence capable of realistically supporting a third version, that of non-consent but honest mistake. It follows that the only issue in such cases is typically consent or non-consent and the defence of honest but mistaken belief need not be put to the jury. Canada is not alone in taking this position: see *Morgan*, *supra*, at p. 204, *per* Lord Cross of Chelsea; *People v*. *Rhoades*, 238 Cal. Rptr. 909 (Ct. App. 1987); *People v*. *Williams*, 841 P.2d 961 (Cal. 1992).

61 It is thus clear that the mere assertion of belief in consent by the accused is insufficient to lay the necessary evidentiary foundation for the defence of honest but mistaken belief in consent. It is also clear that diametrically opposed assertions of clear consent on the one hand and clear refusal of consent on the other hand, will seldom if ever give rise to the defence. These negative indicators suggest, in my view, that the trial judge was correct not to put the defence of honest but mistaken belief to the jury. However, the arguments relating to the complainant's drunkenness and incapacity require a more profound inquiry into the type of evidence which may give rise to the defence of honest but mistaken belief.

62 To determine when the defence of honest and mistaken belief arises it is useful to consider two questions: first, the purpose of the defence; and second, what we mean by consent. I turn first to the purpose of the defence of honest but mistaken belief.

The defence of honest but mistaken belief is designed to meet the situation where there has been an honest miscommunication of non-consent -- the situation where the complainant refuses consent but the accused honestly misreads that refusal as consent. Ordinarily, people communicate things like consent or non-consent simply and effectively. For this reason, sexual assault trials typically focus on whether the physical acts alleged occurred and if so, whether the complainant consented to them. Occasionally, however, there is evidence that there may have been a miscommunication of consent, suggesting that the accused may have honestly misunderstood the complainant's refusal and hence may not have possessed the necessary guilty mind or *mens rea.*

63 It follows that the defence of honest but mistaken belief depends on a scenario distinct from the typical consent or no-consent situation. It is based on the co-existence at one and the same time of two states of fact: (1) that the complainant did not consent; and (2) that the accused nevertheless believed that she consented. Given the fact that human beings have the capacity to understand each other on matters such as these, the two states do not usually go together. To believably be combined, these two propositions require a third element of proof -- evidence explaining how it could be that the complainant's non-consent could honestly be read by the accused as consent. Without this third element, the scenario of honest but mistaken belief, while perhaps a theoretical possibility, is not plausible. When the cases speak of more being required than the defendant's assertion of belief the complainant consented, or of the need for an "air of reality" to the defence of honest but mistaken belief in consent, it is to this third element that they typically refer. There must be evidence not only of non-consent and belief in consent, but in addition evidence capable of explaining how the accused could honestly have mistaken the complainant's lack of consent as consent. Otherwise, the defence cannot reasonably arise. There must, in short, be evidence of a situation of

ambiguity in which the accused could honestly have misapprehended that the complainant was consenting to the sexual activity in question.

64 I turn next to the common law concept of consent. Much of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails. Consent in the context of the crime of sexual assault is a legal concept. At law, it connotes voluntary agreement. It embraces the notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question. *Webster's Third New International Dictionary* (1986), at p. 482, defines consent as "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action".

65 Consent for purposes of sexual assault is found in the communication by a person with the requisite capacity by verbal or non-verbal behaviour to another of permission to perform the sexual act. The actual thought pattern in the mind of the complainant cannot be the focus of an inquiry into consent on a sexual assault trial; direct observation of the complainant's mind is impossible and in any event, the inquiry is into the accused's conduct in the circumstances as they presented themselves to him. When we speak of consent in a sexual assault trial we are talking about the complainant's verbal and non-verbal behaviour and what inferences could be drawn from this behaviour as to her state of mind.

66 The importance of conceiving consent as an act of communication was admirably set out by L'Heureux-Dubé J. in *Park, supra*. As she noted at para. 48:

> Such an approach will enable [triers of fact] to separate more effectively the wheat from the chaff -- the myth and the stereotype from the reality -- in determining whether the accused was aware of the complainant's absence

> of consent, or whether he could have entertained an honest but mistaken belief as to her consent. It will help them to identify, and filter out, stereotypical beliefs on the part of the accused that lead him to override non-consent, or that lead him to be reckless towards whether a woman is consenting or not. I believe that it may therefore lead to fairer, more accurate factual determinations. I believe that it will also take women's and men's distinct realities more equitably into account.

67 In most cases this social act of communication is clear: "in the ordinary and unproblematic case the person who consents is assumed to 'say what they mean'" (L. Vandervort, "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-1988), 2 *C.J.W.L.* 233, at p. 267). In some cases, however, the communication goes awry, giving rise to honest mistake. In these cases, there is some reason why the normal communication process has gone awry. The reason for this miscommunication is the situation of ambiguity of which there must be evidence to give rise to the defence of honest but mistaken belief in consent.

68 Consent has a legal effect. It changes the rights and duties of the persons involved. As Vandervort, *supra*, at p. 267, puts it:

> The social act of consent consists of communication to another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform. Consenting, like promising, is thus performative, a behaviour that has normative consequences. To consent is to waive a right and relieve another person of a correlative duty. Consent thus alters the rights and duties between the persons who are parties to an agreement created by communication. When the rights and duties in question are not merely conventional or ethical ones, but are legal rights and duties, consent is an act that has specific legal consequences. The only conditions are that it be voluntary and knowing or informed, that is, freely given with reference to some general or specific concrete objective or content.

69 As Vandervort goes on to point out (at p. 267), it follows that any analysis of consent must consider "what, if anything, was actually communicated, as well as

whether the communication was voluntary. We need to know what verbal and non-verbal behaviours constitute communication of consent in the context of a sexual transaction, and how the voluntariness of the communication is to be assessed" where this is in issue.

70 The concepts of wilful blindness and honesty in relation to consent merit further comment. Canadian law does not, unlike most jurisdictions in the United States, require that the defendant in a sexual assault trial have acted reasonably. The issue of mistake as to consent must be assessed on the basis of the particular accused person before the court. If he is more obtuse than the reasonable man, he may raise this in support of his contention that he mistakenly thought the complainant was consenting. However, Canadian common law does impose two requirements. First, the defendant cannot have been wilfully blind or reckless. The term wilful blindness connotes a deliberate avoidance of the facts and circumstances. It is the legal equivalent of turning a blind eye, of not seeing or hearing what is there to hear or see. It is the making of an assumption that the complainant consents without determining whether, as a matter of fact, the complainant consents. Blindness as to the need to obtain consent can never be raised by an accused as a defence, since the need for consent is a legal requirement which the law presumes the defendant to know. On the facts, wilful blindness to conduct or language which might support an inference of non-consent is similarly of no avail. The person who is not wilfully blind is the person who is appropriately aware, not only of the need to obtain consent (which he is presumed to know), but of what the conduct and circumstances reveal to one who looks to see whether that consent was being given or withheld. Second, the requirement that the defendant's belief have been honest has a similar effect. The defendant is not allowed to deceive himself, or to sharply take advantage of a passive or unclear response. He must honestly believe that the complainant consented.

71 Against this background, I turn to the circumstances in which the issue of consent may arise. While varied, they include the following fact situations:

(a) Explicit consent, where voluntary agreement is expressly communicated by verbal or body language;

(b) Explicit refusal, where refusal of consent is expressly communicated by verbal or body language;

(c) A complainant lacking the capacity to consent or refuse because of unconsciousness or incoherence;

(d) A complainant lacking the legal capacity to consent, e.g., a child;

(e) Consent vitiated by force or duress;

(f) Passivity where neither assistance nor resistance is offered;

(g) Ambiguous conduct, which can be read in different ways;

(h) Ambiguity arising from external circumstances.

72 The first two situations, explicit consent and explicit denial of consent, do not raise the possibility of honest mistake as to consent. They deal with explicit communication between the complainant with capacity and acting voluntarily, and the defendant, through words or actions which both parties are capable of understanding.

Explicit consent precludes a finding of sexual assault. Explicit refusal, on the other hand, makes any suggestion of honest mistake implausible. If the jury finds that the complainant explicitly communicated her refusal to the defendant, then the defendant who receives the communication cannot realistically claim to have made an honest mistake on consent. Only if the defendant can show some additional circumstance taking the situation into the situation of ambiguous conduct (categories (g) and (h)) can he make such a claim.

73 Similarly, the defence of honest but mistaken belief in consent cannot be raised in the third situation, the case of an unconscious or incoherent complainant: see Vandervort, *supra*, at p. 269. This category posits a complainant who is unable to communicate consent because she is unconscious or incapacitated. Consent, as noted above, involves "capable, deliberate, and voluntary agreement to or concurrence" (*Webster's Third New International Dictionary*, *supra*). A person who is unconscious or unable to communicate is incapable of indicating deliberate voluntary agreement. At issue, as elsewhere in dealing with consent, is the social act of communicating consent, not the internal state of mind of the complainant. The accused is not expected to look into the complainant's mind and make judgments about her uncommunicated thoughts. But neither is he entitled to presume consent in the absence of communicative ability. The complainant in this category lacks the capacity to communicate a voluntary decision to consent. Such lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible. To put it another way, the necessary (but not sufficient) condition of consent -- the capacity to communicate agreement -- is absent. The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the

earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent.

74 That being said, situations may exist which could give rise to an honest mistake as to the complainant's capacity or ability to communicate consent. These circumstances constitute a situation of ambiguity as described in categories (g) or (h).

75 The fourth and fifth situations do not raise the common law defence of honest but mistaken belief because they are covered by special provisions of the *Criminal Code.* The situation of an underage person whom the law deems to lack capacity to consent, is dealt with by s. 150.1. Special rules govern mistake as to age, and the defence of honest but mistaken belief does not arise. Consent vitiated by force or duress is also the subject of a special provision of the *Criminal Code* (s. 265(3)), and stands to be considered on its own terms.

76 The sixth category is that of the conscious but passive complainant. A strong case can be made that passivity without more does not constitute consent, and hence cannot support the existence of an honest but mistaken belief in consent. Again, if consent involves the communication of "capable, deliberate, and voluntary agreement to or concurrence" (*Webster's Third New International Dictionary*, *supra*) then something more would seem to be required than simply passivity. Failure to indicate yes or no is no communication at all and hence cannot amount to communication of consent. Much less does it offer any indication of capacity, deliberateness or voluntariness. Absent exceptional circumstances, it is unrealistic to suppose that a person acting honestly and without wilful blindness could draw an inference of consent from mere passivity. Putting it another way, to say that passivity amounts to consent is to presume consent. To equate submission with consent is to overlook the essential character of

consent as a social act whereby one person confers on another person the right to do something. Women may submit for many reasons inconsistent with consent. For this reason, something more is required to permit the inference that the passive person is consenting. It follows that passivity alone is insufficient to provide a basis for a defence of honest but mistaken belief. Additional evidence of circumstances or conduct is required to establish the situation of ambiguity that underlies the defence. It is only with such evidence that passivity falls into one of the final two categories: (g) or (h).

77 Failure to recognize that passivity without more does not permit an inference of consent is reflected in certain common misconceptions and mistaken generalizations that bedevil the law of sexual assault. One is the notion that absence of evidence of struggle or violence permits an inference of consent. The corollary of this proposition is the false notion that unless a woman struggles or has been physically forced, she must have consented. This now discredited notion may skew an analysis of whether the basis for a defence of honest and mistaken belief in consent has been made out. It may be argued that the absence of evidence of resistance or violence constitutes evidence supporting a finding that the accused honestly but mistakenly believed that the complainant consented (an argument accepted by Major J. in this appeal). In fact, the absence of violence or struggle is neutral. An accused who infers consent from passivity without more makes a dishonest, irresponsible inference. Since it is as reasonable to infer non-consent as consent from passivity, an honest assessment of passive conduct does not, without more, permit the conclusion that the complainant is consenting. Only where other circumstances elevate passivity to a situation of ambiguity (categories (g) and (h)) does the possibility of honestly inferring consent arise. Rather, the effect of passivity on the honest defendant is to create a situation where, before proceeding, he must obtain a positive indication of consent.

78 The two remaining circumstances where consent is at issue are situations of ambiguity: ambiguity arising from the complainant's conduct and ambiguity arising from external circumstances. These, in my view, are the only circumstances where the defence of honest but mistaken belief in consent may arise.

79 The first situation targets ambiguous conduct by the complainant. While in the vast majority of sexual encounters the parties successfully communicate consent or refusal of consent without any difficulty or misunderstanding, the law recognizes that occasionally conduct may be so ambiguous that an appropriately concerned defendant will honestly misread the complainant's actual refusal or incapacity as consent with capacity. The judge must put the defence of honest but mistaken belief in consent to the jury where there is evidence of ambiguous conduct capable of supporting this honest misunderstanding by a defendant who is not wilfully blind. An accused who, due to wilful blindness or recklessness, believes that a complainant had the capacity and in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii). The focus in this category, as elsewhere, must be on what the complainant said or did and how that would have impacted on the defendant, acting honestly and without wilful blindness. The defence should be put where there is sufficient evidence to lead the trial judge to conclude that a jury might realistically (i.e., not speculatively) accept that the complainant was refusing consent or incapable of consenting, but that what she said and did were capable of leading the defendant to honestly conclude the opposite.

80 It follows that there must be not only conduct or words which are contradictory or ambiguous, but that the result of the contradiction or ambiguity must be such that the defendant, acting honestly and without wilful blindness or recklessness,

could have concluded that the complainant was capable and consenting. A person is not entitled to take ambiguity as the equivalent of consent. If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent. This appears to be the rule at common law. In this situation, to use the words of Lord Cross of Chelsea in *Morgan*, *supra*, at p. 203, "it is only fair to the woman and not in the least unfair to the man that he should be under a duty to take reasonable care to ascertain that she is consenting to the intercourse and be at the risk of a prosecution if he fails to take such care". As Glanville Williams, *Textbook of Criminal Law* (1978), at p. 101, put it: "the defendant is guilty if he realised that the woman might not be consenting and took no steps to find out".

81 I note that Parliament has affirmed this common sense proposition in enacting s. 273.2 of the *Criminal Code* of Canada which states that "[i]t is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where ... the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". See also *R. v. Darrach* (1994), 17 O.R. (3d) 481 (Prov. Div.). The question is whether the defendant at bar, properly attentive to the issue of consent (i.e., not wilfully blind), could have, in light of the ambiguity, honestly concluded that the complainant had the capacity and was consenting to the sexual activity.

82 Care must be taken to avoid the false assumptions or "myths" that may mislead us in determining whether the conduct of the complainant affords a sufficient basis for putting the defence of honest mistake on consent to the jury. One of these is the stereotypical notion that women who resist or say no may in fact be consenting.

Given that the focus is not the reasonable man but the defendant himself, a defendant may argue, for example, that he interpreted as consent conduct which a reasonable person would read as refusal because he had been conditioned to accept that no means yes. Yet more would need to be shown to establish a basis for putting the defence of honest but mistaken belief. Further questions would arise. Was the man wilfully blind in believing that no means yes? Can his belief that the complainant who says no was consenting, be seen as honest? Only if these questions can plausibly be answered in favour of the accused does the defence of honest but mistaken belief arise. It may be ventured that in the social context of Canadian society in the late twentieth century, these questions will seldom be capable of being answered in favour of such an accused. The result will be that the defence will lack the realistic sufficiency required for it to be put to the jury.

83 The final situation in which consent issues may arise is where there is ambiguity arising not from the conduct of the complainant, but from external circumstances. This category targets the rare situation where the complainant's refusal or passivity/lack of consent is rendered ambiguous by some external circumstance. McIntyre J. in *Pappajohn* gives two examples of this situation (at p. 133):

> In *R. v. Plummer and Brown, supra*, Evans J.A. (as he then was), speaking for the Ontario Court of Appeal, considered that there was such evidence as far as Brown was concerned and directed a new trial because the defence had not been put. In that case, the complainant had gone to Plummer's "pad" where she had been raped by Plummer. Brown entered the room where the rape occurred after Plummer had gone. Apparently he had arrived at the house separately from Plummer. It was open on the evidence to find that he was unaware then that Plummer had threatened the complainant and terrorized her into submission. He had intercourse with her and she said that because of continuing fear from Plummer's threats, she submitted without protest. In these special circumstances, the defence was required. The facts clearly established at least an air of reality to Brown's defence. In *Morgan*, there was evidence of an invitation by the complainant's husband to have intercourse with his wife and his assurance that her show of resistance would be a sham. In other words, there was evidence explaining, however

> preposterous the explanation might be, a basis for the mistaken belief. In the case at bar, there is no such evidence.

84 In this category as in others, care must be taken to avoid substituting unfounded assumptions for evidence of consent. For example, in earlier times it was sometimes suggested that the fact that a woman was a prostitute or perceived as promiscuous might amount to a circumstance entitling a man to read her refusal as consent. It is difficult in this age to conceive of a man so concluding in the absence of wilful blindness or dishonesty. It is now recognized that the fact that a woman is a prostitute or perceived as promiscuous does not render her refusal any less valid than another woman's refusal: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, *per* McLachlin J., at p. 604, and *per* L'Heureux-Dubé J., at p. 690.

85 These considerations lead me to conclude that the defence of honest but mistaken belief may arise where the evidence indicates a situation of ambiguity which the accused, not being wilfully blind or reckless and acting honestly, misinterpreted as consent. The requirements of the defence are thus: (1) evidence that the accused believed the complainant was consenting; (2) evidence that the complainant in fact refused consent did not consent, or was incapable of consenting; and (3) evidence of a state of ambiguity which explains how lack of consent could have been honestly understood by the defendant as consent, assuming he was not wilfully blind or reckless to whether the complainant was consenting, that is, assuming that he paid appropriate attention to the need for consent and to whether she was consenting or not.

86 The view that before the defence of mistake can be put to the jury there must be evidence of a state of ambiguity explaining how a refusal of consent, lack of consent, or incapacity to consent could honestly have been misinterpreted by the defendant as

actual consent, has gained increasing acceptance in the United States in recent years with the adoption in many states of the "equivocality" rule. In *People v. Mayberry*, 542 P.2d 1337 (1975), the Supreme Court of California ruled that the evidentiary predicate of an instruction to the jury on mistake as to consent was evidence not only that the accused in good faith believed the complainant was consenting, but of "equivocal" behaviour which "might have misled [Mayberry] as to whether she was consenting" (p. 1346). In *People v. Romero*, 215 Cal. Rptr. 634 (Ct. App. 1985), it was said that there must be evidence that the "manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not" (p. 638). In *People v. Vasquez*, 281 Cal. Rptr. 661 (Ct. App. 1991) (citing *Rhoades, supra*, at p. 914), it was said that where there was a conflict between the evidence of the accused asserting consent and the evidence of the complainant asserting non-consent, the defence of mistake need not be put "(u)nless the evidence reveals *some way* to harmonize the conflicting accounts of defendant and prosecutrix through a mistake of fact, so that the jury can evaluate proof relating to defendant's *belief* in consent (as distinguished from his mere *assertion* of consent)" (pp. 670-71 (emphasis added by Deegan J. in *Rhoades*)).

87 In what is viewed as the leading case on the matter, *People v. Williams, supra*, the California Supreme Court revisited and reaffirmed its decision in *Mayberry*. As in the case at bar, the stories of the complainant and the defendant diverged widely in *Williams.* The defendant testified that the complainant was a willing and active participant in the sexual intercourse. The complainant, on the other hand, testified that she refused consent and was forced to have intercourse. The trial judge refused to instruct the jury on mistaken belief. The Court of Appeal reversed. The Supreme Court of California restored the trial judge's decision. After reviewing the sharply conflicting accounts, the court held that the defence, as a matter of law, could not be put. In the

court's view, Williams' testimony established only actual consent, while the complainant's evidence, if believed, would preclude a reasonable belief in consent. It held that "[t]hese wholly divergent accounts create no middle ground from which Williams could argue he reasonably misinterpreted [the complainant's] conduct" (p. 966). Evidence of actual consent was evidence of "unequivocal conduct". Such evidence could not support the defence of mistake. To establish the defence, there must be evidence of equivocal conduct. The rule established in *Williams* has since been applied by other states: *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995 (Posner C.J.)); *Tyson v. State of Indiana*, 619 N.E.2d 276 (Ind. Ct. App. 1993); *Commonwealth v. Fionda*, 599 N.E.2d 635 (Mass. App. Ct. 1992).

88 I conclude that before the defence of honest but mistaken belief must be put to the jury, there must be evidence not only of denial of consent, lack of consent, or incapacity to consent which the defendant interprets as consent, but evidence of ambiguity or equivocality showing how the accused could honestly and without wilful blindness or recklessness, have mistaken the complainant's refusal of consent, lack of consent, or incapacity to consent. Otherwise, the defence is implausible. To use the language of McIntyre J. in *Pappajohn*, *supra*, at pp. 132-33, it lacks the necessary "air of reality" and does not arise as a "realistic issue".

89 With these propositions in mind, I turn to the case at bar.

IV. Application to this Appeal

90 I have already indicated that, in my view, the absence of any evidence of steps taken by the respondent to ascertain consent precludes the defence of honest but

mistaken belief in consent in view of s. 273.2 which was in force at the time of these events. The common law principles enunciated above lead to the same result.

91 The complainant and the respondent presented divergent and incompatible versions of the events. The complainant testified (at p. 33 of the Case on Appeal) that at no point did she agree to a sexual relationship with the respondent. While she could not recall the actual assault, she testified that she would not have consented to it because the respondent was her second cousin. This evidence is consistent with denial of consent or with unconscious incapacity to give consent. In essence, either the complainant would have vehemently refused sex, or she was unconscious and incapable of refusing it. Neither scenario suggests a situation of ambiguity or equivocacy which the respondent could honestly have read as capacity and consent. The respondent, on the other hand, testified that the complainant was able to control herself, and participated actively in the intercourse over a period of time. This evidence is directly contrary to the complainant's evidence and is consistent only with capacity and actual consent.

92 On the basis that an accused's evidence of actual consent must be taken to include by implication the proposition that the accused believed the complainant consented, it is argued that there is evidence of honest belief in consent. However, for purposes of the defence the jury would have had to reject the respondent's evidence of capable, active participation inconsistent with non-consent, while accepting only his bare (implicit) assertion of belief in consent. This involves a winnowing of the respondent's evidence which, while not legally impermissible, introduces an element of improbability. The jury, for the purposes of the defence, would then have had to combine this evidence of bare belief with the complainant's evidence that she did not consent, and would not have consented unless incapacitated to the point of unconsciousness. At this point, a further difficulty would have presented itself. The

complainant's evidence was that short of unconsciousness she would have unequivocally refused because of her aversion to sexual relations with a relative. This evidence is inconsistent with the ambiguity required to support the theory that the respondent honestly and without wilful blindness or recklessness mistook the complainant's incapacity and/or refusal for consent. To make the theory work it would be necessary to reject the complainant's evidence that short of unconsciousness she would have rejected the accused vehemently, while somehow salvaging the proposition that she refused consent. In summary, to give any credit to the defence, the jury would have had to reject a large portion of the respondent's evidence and virtually all of the complainant's evidence. It would then, in the absence of any other evidence, have had to come up with the conclusion that there was a situation of ambiguity which led to an honest misunderstanding on the vital issue of capacity and consent. At this point the defence becomes so implausible that it is impossible to see how any jury acting reasonably and in accordance with the evidence could have given it any credence.

93 Putting the case for the defence of mistake at its highest, it may be seen to be based on the supposition that some ambiguous event occurred, notwithstanding that neither the respondent nor the complainant testified to that effect. One is left to speculate as to what that event was. Moreover, to even suppose such an event is to contradict the only evidence of what in fact occurred, the respondent's evidence of participatory, consensual intercourse. In short, one is invited to speculatively infer a situation of ambiguity in the absence of any supporting evidence and contrary to the only existing evidence. All this is to be inferred from the fact that the complainant was drunk and does not remember what happened in the bedroom. This cannot constitute the realistic defence based on a sufficiency of evidence required by the majority of this Court in *Pappajohn.*

94 Drunkenness cannot constitute evidence of a situation in which the complainant might appear to be consenting when in fact she was not. If this were so, the defence would be available in every case where the complainant was drunk at the time of intercourse. If the complainant is so drunk that she is unable to communicate (the Crown's position at trial), she is incapable of giving consent, and no question of honest mistake can arise. If she is less drunk, and able to communicate (the defence's position at trial), the question is what she communicated. Again, there is no possibility of honest mistake as to capacity. The only evidence of what she communicated was the evidence of the respondent that she clearly and actively communicated consent, and of the complainant that she would never have consented. The third possibility is that the circumstances gave rise to ambiguity as to whether the complainant possessed the requisite capacity to consent. There is no evidence of this third situation. The result is this. On the first scenario of extreme drunkenness, the complainant did not consent because she could not. On the second scenario of lesser drunkenness the complainant had the capacity to consent and the question for the jury is whether she actually consented or not, depending on whose evidence they accept. There is no evidence to support a third scenario of ambiguity as to capacity or as to what was communicated. There is no evidence to indicate that while the complainant appeared to be consenting, she was not.

95 Nor does lack of memory of what happened in the bedroom coupled with drunkenness constitute such evidence. To say the complainant may have appeared to consent because she has no memory of the events is simply to speculate. It is, moreover, to speculate contrary to the evidence of both complainant and respondent. The respondent describes a situation of capacity and active participation, inconsistent with the ambiguous state where the complainant does not have capacity or does not consent but nonetheless appears to. The complainant says that she would have rejected the

respondent because they were related, again evidence inconsistent with an apparent but unreal consent. Thus the assertion that the complainant's drunkenness and lack of memory raise the defence of honest but mistaken belief depends not on the evidence but on speculation. It depends, moveover, on dangerous speculation, based on stereotypical notions of how drunken, forgetful women are likely to behave. The law as established by this Court in *Pappajohn* does not permit such speculation. It demands specific evidence of a state of affairs which could give rise to an honest misapprehension of consent when no consent existed. No such evidence was presented in the case at bar.

96 My colleague Major J. concedes that the defence of honest but mistaken belief might not arise on the respondent's testimony alone (para. 14). More, he agrees, must be found. He finds the necessary additional evidence in two items: (1) the fact that the complainant did not contradict the respondent's evidence as to what happened in the bedroom due to her lack of recollection; and (2) the absence of evidence of violence. With respect, I do not see how either of these items, taken singly or together, provide the missing evidence. They are not evidence, but merely the absence of evidence. They do not contradict the respondent's version, but neither do they add to it. We are left with the respondent's assertion that over a considerable period of time, the complainant indicated in various ways that she had capacity and was consenting to the sexual activity. This evidence, far from supporting an honest mistake, is contrary to that theory. The respondent's assertion that the complainant clearly consented and cooperated in the sexual activity undermines the propositions essential to the defence -- namely that she did not consent but that he made a mistake on the matter. The complainant's inability to recollect is not in itself evidence of miscommunication. Nor, as indicated earlier, does the absence of evidence of violence support the hypothesis of honest but mistaken belief in consent. If the respondent wrongly inferred clear capacity and an active

communication of consent from lack of struggle or passivity, it is hard to avoid the conclusion that he must have been either wilfully blind or dishonest.

97 On the evidence, there were only two possible scenarios. The first, presented by the Crown, is that the complainant did not consent to the sexual activity. This scenario was supported by evidence that the complainant was very drunk and that she would not have consented had she had the capacity to do so because she was related to the respondent. The second, presented by the respondent, was that the complainant had capacity and did consent. This scenario was supported by his evidence of her control over her actions, and her active and willing participation in the acts. Neither scenario is consistent with the defence of honest but mistaken belief in consent. For that defence to arise, there would need to be evidence of a third scenario -- a situation of ambiguity or misunderstanding where denial of consent or absence of capacity could co-exist with an honest belief in consent or capacity. Such evidence was totally lacking.

98 I conclude that the trial judge did not err in failing to put the defence of honest but mistaken belief to the jury, since it did not realistically arise on the evidence. I would allow the appeal and affirm the conviction.

Appeal dismissed, L'HEUREUX-DUBÉ *and* MCLACHLIN JJ. *dissenting*.

Solicitor for the appellant: George Thomson, Ottawa.

Solicitors for the respondent: Phillips & Wright, Yellowknife.