R. v. Davis, [1999] 3 SCR 759, 1999 CanLII 638 (SCC)

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R. *v*. Davis, [1999] 3 S.C.R. 759

**Glenn Norman Davis**                                                                        *Appellant*

*v.*

**Her Majesty The Queen**                                                                  *Respondent*

**Indexed as:  R. *v*. Davis**

File No.:  26441.

1999:  February 26; 1999:  November 25.

Present:  Lamer C.J. and L’Heureux‑Dubé, Gonthier, Cory,[\*](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii638/1999canlii638.html%22%20%5Cl%20%22_ftn1%22%20%5Co%20%22) McLachlin, Major and Binnie JJ.

on appeal from the court of appeal for newfoundland

*Criminal law –* *Extortion – Extortion of sexual favours – Complainants persuaded to pose nude or semi-nude for accused who misrepresented himself as having connections with modelling agencies – Extortion of sexual favours by threatened exposure of compromising photographs – Whether extortion offence in*[*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)*includes extortion of sexual favours – Scope of word “anything” in extortion provision of*[*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)*– Criminal Code, R.S.C. 1970, c. C-34, s. 305(1).*

*Appeals – Supreme Court of Canada – Appeals as of right – Kienapple principle – Accused obtaining sexual favours from complainant by threatened exposure of compromising photographs – Supreme Court upholding both extortion and sexual assault convictions – Kienapple issue not raised in dissenting judgment in Court of Appeal –  Whether Supreme Court has jurisdiction to address Kienapple issue –*[*Supreme Court Act, R.S.C., 1985, c. S-26, s. 691(1)*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html#sec691subsec1_smooth)*(a).*

*Criminal law – Kienapple principle – Extortion – Sexual assaults – Accused obtaining sexual favours from complainant by threatened exposure of compromising photographs – Whether principle against multiple convictions arising from same delict precluded convictions for both extortion and sexual assault.*

*Criminal law – Sexual assaults – Defence of honest but mistaken belief in consent – Whether trial judge failed to consider defence of honest but mistaken belief in  consent – If so, whether there was air of reality to defence.*

*Criminal law – Sexual assaults – Reasonable doubt – Whether trial judge erred in applying principle of reasonable doubt – Whether trial judge’s comment that he was “not convinced” that complainants consented to sexual activity reversed burden of proof.*

Between 1984 and 1991, the accused,  holding himself out as a photographer with connections to a modelling agency,  invited the complainants, who ranged in age from 15 to 20, to pose for a portfolio of photographs with a view to initiating a modelling career.  He persuaded all of them to pose nude or semi-nude, and some of them were photographed in bondage.  The accused allegedly sexually assaulted the complainants D., K., S. and R. while they were posing in various stages of undress or were tied up and completely vulnerable.  In the cases of B. and D., it was alleged that the accused threatened to send revealing photographs to either their parents or to a pornographic magazine if they did not agree to perform sexual favours for him.  While D. ignored the accused’s threats, B. acceded to them and performed sexual favours over the course of a two- to three-month period in exchange for the negatives.  In her testimony, B. indicated that during that period there were at least two incidents in which the accused persisted in sexual activity after she had communicated her lack of consent.  The accused testified that any sexual activity between B. and himself was consensual and that the photography sessions began after they had already been involved in a sexual relationship.  He thus had no reason to threaten to expose the complainant, and never did so.  In the case of D.,  the accused admitted taking her photos, but denied that any semi-nude photos were taken or that any sexual impropriety had occurred.  He also denied trying to extort sexual favours from her, as there were no photographs with which to threaten her.  With respect to K., S. and R.,  the accused claimed that any sexual contact  was consensual.  The trial judge convicted the accused of two counts of extortion against B. and D. and of five counts of sexual assault against the five complainants.  On appeal, the majority of the Court of Appeal upheld the convictions.

*Held*:  The appeal should be dismissed.

It is a crime to extort sexual favours.   Although the extortion provision is located in the Part of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) entitled “Offences Against Rights of Property”,  the word “anything” in the provision is not  limited to things of a proprietary or pecuniary nature.  Headings will never be determinative of legislative intention, but are merely one factor to be taken into account.  In this case, the extortion provision’s location in the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) is outweighed by competing considerations in determining the scope of “anything”.  First, the ordinary meaning of “anything” in its immediate context is clear and supports a broad interpretation, which would include sexual favours. Second, an interpretation of “anything” that includes sexual favours is suggested by the purpose and nature of the offence of extortion.  That purpose, which  can be directly inferred from the wording of the provision, is that extortion criminalizes intimidation and interference with freedom of choice.  Given this objective, it would be unreasonable to criminalize extortion of money or property, but not extortion of sexual favours.  Third, Parliament could have easily limited the scope of the word “anything” to things of a proprietary or pecuniary nature.  Finally,  a number of Canadian courts have found that “anything” includes sexual favours.

It is unnecessary in this case to decide whether there is consent to sexual activity if it is obtained by threatened exposure of nude photographs.  The accused’s conviction of sexually assaulting B. may be affirmed on the basis of an independent sexual assault, wholly apart from his extortionate conduct.  B. testified that, during the two- to three-month period in which she went to the accused’s apartment and had sexual intercourse with him in exchange for the negatives, there were at least two incidents in which the accused persisted in sexual activity after she had unambiguously communicated her lack of consent.  The trial judge found B. to be a credible witness and this Court is satisfied that the events unfolded as the complainant described them.  This evidence supports a conviction of sexual assault.

Even though this is an appeal as of right pursuant to [s. 691(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec691subsec1_smooth)(*a*) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html)and the dissenting judge in the Court of Appeal dissented only on the extortion and sexual assault convictions in relation to B., the Court has jurisdiction to address the application of *Kienapple* in the case of B.  The Court’s jurisdiction over both the extortion and sexual assault convictions must, of necessity, include the jurisdiction to make whatever order that is required to dispose of these grounds of appeal.  The Court cannot make an order that would violate established principles or rules of law.  In the case of B., there is a possibility that in affirming the convictions without considering the potential application of *Kienapple* the Court might be convicting the accused of multiple offences arising from the same delict. Such a disposition would be illegal, as it would contravene an established legal principle.  Here, there is not a sufficient factual nexus between the extortion and sexual assault convictions to trigger the application of *Kienapple*in the case of B.  The convictions arise out of different factual transactions.  Any one of the occasions over the two- to three-month period in which the accused engaged in sexual activity with B. is sufficient to ground the extortion conviction.  By contrast, the sexual assault conviction arises from one or two specific occasions in which B. explicitly communicated her lack of consent to sexual contact.

In the case of K., assuming, without deciding, that the trial judge failed to consider the defence of honest but mistaken belief in consent, a review of the evidence leads to the conclusion that there was no air of reality to the defence.  Even if the testimony of the accused is completely accepted, it discloses that, at a minimum, he was wilfully blind as to whether K. consented to the fondling of her breasts and vagina.   There is no suggestion by the accused that K. posed nude for any reason other than to further her modelling career.  Nor was there any evidence that she invited him to touch her prior to his fondling of her breasts and vagina.

The trial judge did not err in his application of the principle of reasonable doubt.  He clearly directed himself properly and his judgment reveals a thorough review of the evidence.  In the cases of S. and R., the trial judge’s remarks that he was “not convinced” that the complainants consented to the sexual activity in question suggest, when read out of context, that he may have reversed the burden of proof.  These remarks, however, when viewed in the context of the entire judgment, were effectively neutralized by other passages.

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APPEAL from a judgment of the Newfoundland Court of Appeal (1998), [1998 CanLII 18030 (NL CA)](https://www.canlii.org/en/nl/nlca/doc/1998/1998canlii18030/1998canlii18030.html), 159 Nfld. & P.E.I.R. 273, [1998] N.J. No. 16 (QL), dismissing the accused’s appeal from his conviction of five counts of sexual assault, one count of extortion and one count of attempted extortion by Easton J., [1993] N.J. No. 143 (QL) (S.C.).  Appeal dismissed.

*Robin Reid*, for the appellant.

*Wayne Gorman*, for the respondent.

The judgment of the Court was delivered by

1                                   THE CHIEF JUSTICE – This is an appeal as of right of the appellant’s convictions of five counts of sexual assault and two counts of extortion involving five complainants.  The appellant challenged his convictions on a number of grounds.  The main issue to be decided in this appeal is whether the scope of the offence of extortion as set out in the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) includes the extortion of sexual favours.

I.  Factual Background

2                                   The appellant was charged with a total of 10 counts involving seven complainants: four counts of sexual assault contrary to s. 246.1(1)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now [s. 271(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec271subsec1_smooth)(*a*)), on complainants C.B., P.V.B., T.R., and C.D.;  two counts of extortion contrary to s. 305(1) (now s. 346(1)) involving complainants P.V.B. and C.D.; one count of buggery contrary to  s. 155 (now s. 159) involving complainant T.R.; and  three counts of sexual assault contrary to [s. 271(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec271subsec1_smooth)(*a*) of the [*Criminal Code*, R.S.C., 1985, c. C-46](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html),  on complainants E.V.K., D.A.S., and J.C.H.  The events which are the subject of the charges occurred on various dates between 1984 and 1991.  The facts in this case are quite intricate and were set out in considerable detail in the trial judgment.  A brief overview is provided below.  I will discuss the facts in greater detail in my review of the trial judgment.

3                                   In every case the appellant held himself out as a photographer with connections to a modelling agency.  In actual fact he had no such connections.  Under this guise, he would interest the complainants, who ranged in age from 15 to 20, in the idea of having a portfolio of photographs taken with a view to initiating a modelling career.  He persuaded all of the complainants to pose nude or semi-nude, and four of the complainants were photographed in bondage.  In all but one of the cases he allegedly sexually assaulted the complainants while they were posing in various stages of undress.  Some of them were assaulted when they were tied up and completely vulnerable.  In the cases of P.V.B. and C.D., it was alleged that the appellant threatened either to send some of the more revealing photographs to their parents or to a pornographic magazine if they did not agree to perform sexual favours for him.  While C.D. ignored the appellant’s threats, P.V.B. acceded to them and performed sexual favours over the course of a two- to three-month period in exchange for the negatives of the impugned photographs.

4                                   The appellant was convicted of sexual assault on E.V.K., D.A.S., T.R. and of extortion and sexual assault in the cases of P.V.B. and C.D.  He was acquitted of the charges of sexual assault relating to C.B. and J.C.H., and of the charge of buggery involving T.R.  He was sentenced to a total of nine years imprisonment.  This was later reduced to seven years by the Newfoundland Court of Appeal.

 5                                   The majority of the Court of Appeal dismissed the appellant’s appeals against the convictions.  O’Neill J.A., dissenting, would have allowed the appeals and ordered a new trial on the counts of sexual assault involving E.V.K., D.A.S., T.R. and C.D.  He would have acquitted the appellant on the count of sexual assault involving P.V.B. and on the counts of extortion involving P.V.B. and C.D.

II.  Relevant Statutory Provisions

6                                   The relevant section of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) at the time of the events was as follows:

**305.**(1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

III.  Judicial History

A.*Supreme Court of Newfoundland, Trial Division*, [1993] N.J. No. 143 (QL)

7                                   Easton J. addressed two issues at trial that are not before this Court on appeal.  The first was whether the Crown fulfilled its obligation of timely disclosure in respect of its intention to call expert evidence regarding post traumatic stress syndrome in sexual assault cases, as well as expert toxicological evidence.  The second was whether similar fact evidence should have been introduced at trial.  He found that the Crown made adequate disclosure.  He would also have admitted similar fact evidence, but limited its use to the *modus operandi* used by the appellant and as a tool in the assessment of the credibility of all witnesses.

8                                   After cautioning himself as to the proper application of the presumption of innocence in a case with a large number of complainants and a total of 10 charges, he then turned to an assessment of the evidence presented by each complainant and the appellant on each count.  I will not review the evidence pertaining to the complainant C.B.  The appellant was acquitted of sexually assaulting her and his acquittal is not in issue in this appeal.

(1)  P.V.B.

9                                   P.V.B., who was 15-16 years old at the time of the events in question, came to know the appellant through the motorcycle federation of which he was the chairman.  The complainant went to the appellant’s residence in the early spring of 1985 for several photo sessions.  After some coaxing, nude photographs were taken.  She testified that she kept asking the appellant about the photographs but he refused to show them to her.  She finally refused to pose for any more photographs and insisted that he give her the negatives.  The appellant told her that if she wanted the negatives she would have to perform sexual favours for him, and if she refused, he would send the photographs to her mother.

10                              The complainant explained that because of her fear that she would be, in her words, “exposed”, she agreed to his terms.  Her evidence was that for the next two to three months she would regularly go to the appellant’s apartment to have sexual intercourse with him.  During these visits she was subjected to bondage and whipping, and had vibrators and dildos inserted in her vagina.  At the end of each session, she received a strip of negatives.  She collected them all and burned them.  A friend of P.V.B.’s and her boyfriend of the time confirmed that they were aware of the “arrangement” she had with the appellant, and the friend saw P.V.B. destroy some of the negatives.

 11                              The appellant’s claim was that any sexual activity between the complainant and himself was consensual and that the photography sessions only began after they had been involved in a sexual relationship for some time.  As a result, he would have had no reason to threaten to expose the complainant, and he never did so.

12                              Easton J. accepted P.V.B.’s evidence, and convicted the appellant of sexual assault contrary to s. 246.1(1)(*a*), and extortion contrary to s. 305(1).

(2)  C.D.

13                              C.D. met the appellant at a local mall during the summer of 1984.  She was 19 years old at the time.  Photographs were eventually taken at C.D.’s parents’ home.  A second session was later arranged in the basement of her apartment building.  A friend of hers was present at this second photo session.  At one point during the shoot, she asked her friend to go and check on her daughter who was upstairs with a third person.  While her friend was away, the appellant asked her to take off her clothes.  She refused, and he became angry and said that she was wasting his time.  After some persuasion, she took off her top.  He then grabbed her breasts with his hands, squeezed them, and made lewd comments.  The complainant testified that she was shocked and did not know what to do.  The appellant then slid his hand inside her bikini bottom and onto her vagina.  C.D. claimed she became very upset and got up just as her friend returned from checking on her daughter.  The appellant packed up his photographic equipment and left.

14                              C.D. testified that he later returned to her apartment and brought the photographs with him.  She told him they were disgusting.  He replied that she would have to pay for them if she wanted them back.  A figure was mentioned but she did not have the money.  The appellant then told her that if she went to bed with him, she would not have to pay.  He also threatened to publish the photographs in a pornographic magazine and to put others in her father's mailbox if she did not have sex with him although he did not, in the end, carry out his threats.

15                              The appellant admitted taking photographs of the complainant, but denied that any semi-nude photos were taken or that any sexual impropriety had occurred. He also denied trying to extort sexual favours from her, as there were no photographs with which to threaten her.

 16                              Easton J. accepted the complainant’s evidence and convicted the appellant of sexual assault contrary to s. 246.1(1)(*a*) and of extortion contrary to s. 305(1).

(3)  E.V.K.

17                              E.V.K., who was approximately 20 years old at the time of the alleged assault, met the appellant near the Fraser Mall in August 1990. The appellant approached her and asked if she would consider modelling.  She expressed interest, and later attended his apartment on several occasions for photo sessions.  At her last photo session, the appellant convinced her to pose nude and tied her wrists with ropes to hooks in an archway in his apartment.  While she was tied up, he came up behind her, touched her breasts, and fondled and inserted a finger in her vagina.  She asked him: "[D]o you have to do that?" and he said: "No."  He then untied her, brought over a chair, and proceeded to tie her to the chair.  He again fondled her breasts and vagina.  According to her evidence she saw his reflection in the glass of the stereo and watched him undo his pants.  She asked him to untie her. He did, but not before touching her vagina with his penis.

18                              The accused  confirmed the two incidents in his testimony but claimed they were consensual.  Easton J. disagreed, and convicted him of sexual assault contrary to [s. 271(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec271subsec1_smooth)(*a*).

(4)  T.R.

19                              T.R., who was 19 years old at the time of the assault, was approached by the appellant in the spring of 1986.  She posed for semi-nude photographs at his apartment.  A couple of weeks later, she returned to his apartment.  Photographs were taken and some wine was consumed.  The appellant suggested some bondage shots, and she agreed.  He tied her wrists to each side of the archway, and while he was behind her, he moved her clothes aside and had intercourse with her from behind.  She said she tried to stop him when he tried to put his penis in her vagina, but he did not until he ejaculated.  She was very upset and he untied her.  According to her testimony, they had more wine and he assured her that nothing of that nature would ever happen again.  She later posed over a blanket on a coffee table. The appellant coaxed her into being tied to the table.  She was fairly drunk at the time.  He took some more photographs of her, then sodomized her.  Afterwards, he untied her and she gathered her belongings and left.  She later came back to his apartment to see some of the photographs, but there was no sexual contact, nor were any photographs taken.

20                              The evidence of the appellant was considerably different than that of the complainant.  He testified that he had a sexual relationship with T.R. prior to the events in question.  He also claimed that the two incidents T.R. complained of – intercourse and anal intercourse – did not occur on the same night.  He admitted that he had intercourse with the complainant while she was tied up, but that it was wholly consensual and that they had later gone into the bedroom to continue having sex.  The anal intercourse took place on another occasion.  It was his evidence that T.R. had discussed the idea with him.  She then performed oral sex on him until he became aroused and he reciprocated before anally penetrating her with her consent.  The appellant also described another consensual sexual encounter following the alleged offences when the complainant came over to look at photographs.

21                              Easton J. convicted the appellant of sexual assault contrary to s. 246.1(1)(*a*).  Although he wasn’t sure whether the anal intercourse occurred on the same night as the sexual assault, even if the complainant’s evidence that it occurred on the same night was accepted, he had grave doubts about her credibility*vis-à-vis* this second episode.  He found it surprising that the complainant would allow herself to be put in an even more vulnerable and compromising position following a sexual assault.  Accordingly, he was not convinced that the anal sex was not consensual and he acquitted the appellant of buggery.

(5)  D.A.S. and J.C.H.

22                              The sexual assault on D.A.S. allegedly occurred on the night of August 4, 1991.  D.A.S., who was 15 years old at the time, went to Davis’s apartment with her friend J.C.H., who had previously posed for photographs with the appellant.  After a discussion about modelling, D.A.S. signed a consent form.  She was then asked to stay in the bedroom for about half an hour while photographs were taken of J.C.H.  D.A.S. then remembers being photographed as she was tied to the archway, and said that the appellant  tried to take the straps off her bathing suit and touched her breasts and pinched her nipples "to make them hard".  D.A.S. told him to leave her alone, and he untied her.  This was the only allegation of sexual assault she made.  The next thing she remembered was J.C.H. phoning for a ride and leaving the appellant’s apartment.

23                              D.A.S.’s recollection of the events was sketchy, and there was a period of about one and one‑half hours for which she could not account.  She could not remember how she got tied up, and did not know if she consented to sexual activity with the appellant during that time frame.

24                              J.C.H., who was 17 years old, had previously been to the appellant’s apartment and posed nude for him.  On August 4, while D.A.S. was in the bedroom, it was J.C.H.’s testimony that he tied her to a chair and inserted a dildo in her vagina without her consent.  She said nothing because she was scared.  She further alleged that the appellant had touched her breasts while she was tied to the archway.  She also offered the following account of the sexual activities between the appellant and D.A.S.: the appellant tied D.A.S. to a chair and had J.C.H. perform oral sex on him.  The appellant then inserted his penis in D.A.S., who was crying at the time, and ejaculated over her.  They left shortly afterwards, after being picked up by J.C.H.’s former boyfriend.  He confirmed that when he picked them up both J.C.H. and D.A.S. appeared upset, and that D.A.S. seemed to be annoyed with J.C.H.

25                              The appellant claimed that he had slept with J.C.H. on one of her previous visits, and that any sexual activity that took place, including the incidents on the night of August 4, was purely consensual.  It was his evidence that on the night in question J.C.H. was urging  D.A.S. to pose for photographs, and that J.C.H. suggested D.A.S. be tied to the chair.  Once tied up, J.C.H. inserted a vibrator into D.A.S. and motioned him over and gave him oral sex.  He said that J.C.H. then took out the vibrator and that he had intercourse with D.A.S. while J.C.H. was urging him on.  He ejaculated over D.A.S., then untied her.  D.A.S. then said: "Get out, get me out of here", which the appellant said was in response to J.C.H.’s proposal of lesbian sex with her.

26                              A video of J.C.H. that had been seized at the appellant’s residence was also shown to the court.  It included a segment in which J.C.H., who was obviously a willing participant, was masturbating herself with a dildo. According to the appellant, the video had been made sometime after August 4, 1991.  J.C.H. denied having any knowledge whatsoever of this video.

27                              Easton J. found it extremely difficult to reconstruct the events of the night in question.  D.A.S. did not remember many events and contradicted herself at times.  In addition, there were numerous discrepancies between J.C.H.’s and  D.A.S.’s testimony.  Nevertheless, he found at paras. 95-97:

Here, even though we have the claimed lapse of memory; which I found suspect on the part of the complainant, this is not to say that she was not sexually assaulted. For many reasons she may not have told what I believe happened that evening at that residence.  While her evidence about the pinching of her breasts may or may not have been true and was the only sexual assault which she asserted had occurred, nevertheless, I am not convinced that a sexual assault did not in fact take place.

... In my view, here there is other evidence, including that of the accused, which proves to me beyond a reasonable doubt that the accused did, in fact, commit a sexual assault upon the complainant without her consent.... [T]he accused admits that he had sex with the complainant.... He stated that the complainant, D.A.S. was very upset.  It was his evidence that D.A.S.'s arms and legs had been tied and that D.A.S. was complaining while being tied to the chair.... D.A.S. said: "Get out, get out". While the accused tries to divert this comment more towards J.C.H. than himself, I am not convinced that it was not equally applicable to him.

I also accept the evidence of J.C.H. that at the time the accused inserted his penis in D.A.S., she was crying. I take this as a manifestation of lack of consent.

He convicted Davis of sexually assaulting D.A.S., contrary to [s. 271(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec271subsec1_smooth)(*a*) of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html).

28                              Easton J. acquitted Davis of sexually assaulting J.C.H.   The fact that she did not remember doing the video, in which she appeared to be a willing participant, along with the fact that similar memory losses were claimed by C.B. and D.A.S., who were all good friends, cast doubts on her credibility.

B. *Newfoundland Court of Appeal* (1998), [1998 CanLII 18030 (NL CA)](https://www.canlii.org/en/nl/nlca/doc/1998/1998canlii18030/1998canlii18030.html), 159 Nfld. & P.E.I.R. 273

(1) Green J.A. for the majority (Steele J.A. concurring)

29                              The appellant challenged his convictions on a number of grounds.  I will deal with each ground of appeal in the order disposed of by the majority of the Court of Appeal.

30                              Green J.A. first dismissed the appellant’s arguments that the trial judge erred in holding that the Crown fulfilled its disclosure obligations and in admitting similar fact evidence.  He then turned to consider more specific grounds of appeal relating to individual charges.

31                              The appellant argued that the trial judge erred in a number of respects in convicting him of extortion in the cases of P.V.B. and C.D.  His principal argument was that the word “anything” in [s. 346(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346subsec1_smooth) of the [*Criminal Code*, R.S.C., 1985, c. C-46](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) (formerly 305(1)), was limited to things of a proprietary or pecuniary nature and therefore did not include sexual favours.  Green J.A. rejected this argument.  Relying on the case of *R. v. Bird*(1969), 9 C.R.N.S. 1 (B.C.C.A.), he held that the scope of the word “anything” extended to intangibles and included sexual favours.  Acknowledging that the trial judge did not undertake a specific analysis of the law of extortion, he nevertheless found after a review of the record that the necessary elements of the offence were established.  He therefore dismissed this ground of appeal.

32                              The appellant argued that the trial judge erred in convicting him of sexual assault in the case of P.V.B.  Although P.V.B. chose to have sexual intercourse with him as a result of his threatened exposure of nude photographs of her, the appellant submitted that a threat of this nature did not render her choice non-consensual.  He argued that [s. 265(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec265subsec3_smooth)(*b*) (formerly s. 244(3)(*b*)), which refers to threats of force, was exhaustive of the types of threats that vitiate consent.  Green J.A. found that threatened exposure of nude photographs did not fall within the ambit of [s. 265(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec265subsec3_smooth).  However, relying on *R. v. Coughlan* (1992), [1992 CanLII 7124 (NL CA)](https://www.canlii.org/en/nl/nlca/doc/1992/1992canlii7124/1992canlii7124.html), 100 Nfld. & P.E.I.R. 326 (Nfld. C.A.), and *R. v. Caskenette* (1993), [1993 CanLII 6879 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1993/1993canlii6879/1993canlii6879.html), 80 C.C.C. (3d) 439 (B.C.C.A.), he concluded that [s. 265(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec265subsec3_smooth) was not exhaustive of the circumstances in which threats can vitiate consent.  He also held that the appellant’s threat in this case was sufficiently coercive to vitiate the complainant’s consent.  Accordingly, he dismissed this ground of appeal.

33                              Green J.A. then considered the appellant’s argument that the principle against multiple convictions arising from the same delict articulated by this Court in *Kienapple* *v*. *The Queen*, [1974 CanLII 14 (SCC)](https://www.canlii.org/en/ca/scc/doc/1974/1974canlii14/1974canlii14.html), [1975] 1 S.C.R. 729, should have precluded one of the two convictions on the charges related to P.V.B.   He found that for the *Kienapple* principle to apply, there must be both a factual and legal nexus between the offences.  In this case there was not a sufficient legal nexus between extortion and sexual assault, given the different societal interests the two offences sought to protect.  He dismissed this ground of appeal.

34                              The appellant argued that the trial judge erred in not considering whether there was an air of reality to the defence of honest but mistaken belief in consent in the case of E.V.K.  Green J.A. held that the trial judge’s failure to advert to the defence in an otherwise detailed judgment raised the question of whether he failed to consider it.  Another possibility was that the trial judge had decided the defence had no “air of reality” and therefore did not need to be addressed in his reasons.  Finding it impossible to resolve this question from a review of the judgment, Green J.A. conducted a review of the evidence and concluded there was no air of reality to the defence, and therefore dismissed this ground of appeal.

35                              Finally, Green J.A. addressed the appellant’s contention that the trial judge erred in his application of the principle of reasonable doubt in the cases of all five complainants.  He noted that the trial judge made two problematic statements in the cases of D.A.S. and T.R. where, in reviewing the evidence, he said he was “not convinced” that the complainants consented to the sexual activity in question.  Green J.A. found that the trial judge properly directed himself as to the presumption of innocence and the principle of reasonable doubt at the outset of his judgment.  He concluded that the problematic remarks, when viewed in the context of the entire judgment, were effectively neutralized by other passages.  Green J.A. also found that the verdicts were all reasonable and supported by the evidence.

(2) O’Neill J.A. in dissent

*36*                              O’Neill J.A. would have acquitted the appellant on both counts of extortion.  Adopting the views of A.W. Mewett and M. Manning (*Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 833), he found that the word  “anything” in the context of [s. 346(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346subsec1_smooth) could only refer to “something of some tangible proprietary or pecuniary nature”.  Therefore, “anything” could not include sexual acts.With respect to the extortion of sexual favours from C.D., O’Neill J.A. found that the offence required that an actual attempt be made by the appellant.  An attempt in law required something more than a statement of intention.  There was no evidence of any further contact between the appellant and the complainant after the meeting in her apartment, nor was there evidence to show that anything was done by the appellant in furtherance of the threats.  Accordingly, the charge should have been dismissed.

37                              O’Neill J.A. would have acquitted the appellant of sexual assault in the case of P.V.B.  Relying on *R. v. Guerrero* (1988), 64 C.R. (3d) 65 (Ont. C.A.), he found that [s. 265(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec265subsec3_smooth) was exhaustive of the circumstances in which threats vitiate consent.

38                              With respect to the appellant’s conviction of sexual assault in the case of E.V.K., O’Neill J.A. found that the trial judge was in error in not considering whether there was an air of reality to the defence of honest but mistaken belief in consent, and would have ordered a new trial.

39                              Finally, O’Neill J.A. held that the trial judge erred in his application of the principle of reasonable doubt in the cases of all five complainants.  He found that the trial judge made two notable errors.  First, in each case the trial judge failed to consider all of the evidence in determining whether there was a reasonable doubt in the manner set out by this Court’s decision in *R. v. W. (D.)*, [1991 CanLII 93 (SCC)](https://www.canlii.org/en/ca/scc/doc/1991/1991canlii93/1991canlii93.html), [1991] 1 S.C.R. 742.  Second, that in the cases of D.A.S. and T.R., the trial judge used language that suggests that he reversed the onus on the burden of proof from the Crown to the appellant.  He would have ordered new trials on the charges of sexual assault in the cases of D.A.S., T.R., and C.D.  O’Neill J.A. specifically did not dissent on the reasonableness of verdicts or whether they were supported by the evidence.

IV.  Issues

40                              This is an appeal as of right, and the issues on which this Court has jurisdiction are limited to questions of law on which O’Neill J.A. dissented.  There are five issues:

1. Is it a crime to extort sexual favours?

2. Is there consent to sexual activity if it is obtained by threatened exposure of nude photographs?

3. Does the *Kienapple* principle apply to the convictions of extortion and sexual assault in the case of P.V.B.?

4. Did the trial judge err in failing to consider the defence of honest but mistaken belief in consent in convicting the appellant of sexually assaulting E.V.K.?

5. Did the trial judge err in his application of the principle of reasonable doubt in the cases of all five complainants?

V.  Analysis

A*.               Is it a crime to extort sexual favours?*

41                              Is it a crime to extort sexual favours?  The answer to this question depends on the scope of the word “anything” in the extortion provision of the [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html).  The appellant was charged under [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth), where extortion was defined as follows:

**305.**(1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 305(1) was slightly modified in 1985 (S.C. 1985, c. 19, s. 47).  It is now [s. 346(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec346subsec1_smooth), which reads as follows:

**346.** (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Both Green J.A. and O’Neill J.A. referred to s. 346(1) in their reasons.  While ss. 305(1) and 346(1) are virtually identical, the words “with intent to extort or gain” precede the first reference to “anything” in s. 305, whereas the words “with intent to obtain” precede the first reference to “anything” in s. 346.  Given this subtle difference and the fact that the appellant was charged and convicted under s. 305, I will refer to s. 305 in the course of my analysis.

42                              In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 (SCC)](https://www.canlii.org/en/ca/scc/doc/1998/1998canlii837/1998canlii837.html), [1998] 1 S.C.R. 27, at para. 21, the Court adopted the following passage from Driedger’s *Construction of Statutes* (2nd ed. 1983)  as the general approach to be taken to statutory construction:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

 43                              I begin with the grammatical and ordinary sense of “anything”.  The *Oxford English Dictionary*  (2nd ed. 1989), vol. 1, defines anything as follows:  “A combination of  ANY and THING, in the widest sense of the latter, with all the varieties of sense belonging to ANY.”  The dictionary definition suggests a broad interpretation, which would include sexual favours.  Such an interpretation is also supported by the immediate context of the provision.  “Anything” is referred to three times in s. 305(1):

**305.** (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years. [Emphasis added.]

In my view, the meaning of “anything” in the immediate context of “to extort or gain anything” and inducing any person “to do anything or cause anything to be done” is clearly in keeping with the wide, unrestricted dictionary definition, and includes sexual favours.

44                              Mewett and Manning, *supra*, take a differing view.  Commenting on *R. v. Bird*, they argue at p. 833 that:

Not a great deal of discussion appears in *Bird*on this wide interpretation of “anything”, the court being content to say that the word is clear and unambiguous and used in this context is of wide unrestricted application.  Yet this is not what is normally meant by “extort or gain”.  It is true that, in isolation, “anything” can be of the widest meaning, but in the context of “extort or gain”, one might have thought that it referred to something of some tangible proprietary or pecuniary nature.

I respectfully disagree.  I do not believe the authors place sufficient weight on the fact that the meaning of “anything” is further qualified by the words “to do anything or  cause anything to be done” at the end of the section.

45                              I also find that an interpretation of “anything” that includes sexual favours is suggested by the purpose and nature of the offence of extortion.  Extortion criminalizes intimidation and interference with freedom of choice.  It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done.  Threats, accusations, menaces and violence clearly intimidate: see *R. v. McCraw*, [1991 CanLII 29 (SCC)](https://www.canlii.org/en/ca/scc/doc/1991/1991canlii29/1991canlii29.html), [1991] 3 S.C.R. 72, at p. 81; *R. v. Clemente*, [1994 CanLII 49 (SCC)](https://www.canlii.org/en/ca/scc/doc/1994/1994canlii49/1994canlii49.html), [1994] 2 S.C.R. 758, at pp. 761-62.  When threats are coupled with demands, there is an inducement to accede to the demands.  This interferes with the victim’s freedom of choice, as the victim may be coerced into doing something he or she would otherwise have chosen not to do.

46                              Given this purpose, I find it difficult to accept the appellant’s contention that “anything” should be limited to things of a proprietary or pecuniary nature.  If the appellant’s argument is accepted, it would be criminal to threaten exposure of nude photographs when coupled with a demand for money, but it would not be criminal to make that same threat when coupled with a demand for sex.  This strikes me as unreasonable, and at odds with the purpose of the provision.  The threat is equally intimidating in both cases, as the consequences of non-compliance are identical.  With respect to interference with freedom of choice, in both cases the victim is asked to do something he or she may not want to do.  It is likely that the victim would much sooner accede to the monetary demand than the sexual demand.  Freedom of choice in sexual matters is at least as highly valued as freedom of choice in matters concerning property.  Accordingly, there is no reason to think that extortion of sexual favours is not also a criminal offence.

47                              It may be objected that this conception of the purpose of s. 305 is overly broad, and does not take into account two important contextual factors: that the offence of extortion was historically a property offence and that the extortion provision was located in Part VII (now Part IX) of the *Code*, entitled “Offences Against Rights of Property”.  When these factors are properly taken into account, it is submitted that extortion only criminalizes demands of a proprietary or pecuniary nature.  Accordingly, “anything” should be given a more limited interpretation.

48                              In assessing the arguments about the historical origins of the offence,  I will briefly review the evolution of the offences of blackmail and extortion in English and Canadian law.  In Great Britain, “[b]lackmail was originally the tribute exacted by free-booters in the northern border countries to secure lands and goods from despoilment or robbery”: see W. H. D. Winder, “The Development of Blackmail” (1941), 5 *Modern L. Rev*. 21, at p. 24.  It later came to denote a number of offences in which property or some other advantage was demanded with threats: see G. L. Williams, “Blackmail”, [1954] *Crim. L. Rev.* 79, at p. 79.  In the early stages of its development, the crime of blackmail “seems to have been pretty well coextensive with robbery and attempted robbery, but over the years the definition has been extended to embrace more subtle methods of extortion”: J. C. Smith and B. Hogan, *Criminal Law* (8th ed.  1996), at p. 618.   Extortion was originally a separate common law offence punishing the conduct of public officials who sought personal financial gain under colour of their office.  It has since been statutorily expanded in some jurisdictions, such as Canada, to include more familiar forms of blackmail.

49                              The roots of [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth) of the[*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) lie in five separate and relatively narrowly defined offences from the first [*Criminal Code*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html) of 1892 (S.C. 1892, c. 29).   The five offences were defined in ss. 402 to 406, and may be briefly described as follows:

s. 402: Compelling the execution of a document by violence or restraint or by the threat of violence or restraint.

s. 403: Uttering a letter or other writing demanding with menaces any         property, chattel, money, valuable security or other valuable thing.

s. 404: Demanding with menaces anything capable of being stolen with       intent to steal it.

s. 405: Accusing or threatening to accuse a person of certain listed crimes with intent to extort or gain anything or to compel the execution of a                                                                      document.

s. 406: Accusing or threatening to accuse a person of crimes other than      those listed in s. 405 with intent to extort or gain anything or to  compel                                                               the execution of a document.

Minor changes were made to the provisions in the 1906 revision (R.S.C. 1906, c. 146), when ss. 402 to 406 were renumbered as ss. 450 to 454, and in the 1927 revision (R.S.C. 1927, c. 36).  In the comprehensive 1955 amendments (S.C. 1953-54, c. 51), ss. 450 to 455 were combined into one global offence called  “extortion” and re-enacted as s. 291, which in turn was subsequently renumbered unchanged as [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth) in the 1970 revision (R.S.C. 1970, c. C-34).

50                              Legislative history may be used as an aid in determining the intention of the legislature: see *Rizzo Shoes*, *supra*, at para. 31; see also *R. v. Vasil*, [1981 CanLII 46 (SCC)](https://www.canlii.org/en/ca/scc/doc/1981/1981canlii46/1981canlii46.html), [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982 CanLII 179 (SCC)](https://www.canlii.org/en/ca/scc/doc/1982/1982canlii179/1982canlii179.html), [1982] 1 S.C.R. 621, at pp. 635, 653 and 660.  However, the legislative history of [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth) does not shed much light on the meaning of “anything”.  As Cartwright J. (as he then was) held for a unanimous five-person bench in *R. v. Natarelli*, [1967 CanLII 11 (SCC)](https://www.canlii.org/en/ca/scc/doc/1967/1967canlii11/1967canlii11.html), [1967] S.C.R. 539,  at pp. 543-44:

It appears to me that the wording of s. 291 [later [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth)] of the present *Code* is so different from that of ss. 450 to 454 of the former *Code* that little is to be gained from a consideration of the cases decided under those sections.

The words of Lord Herschell in *Bank of England v*. *Vagliano Brothers* [[1891] A.C. 107, at pp. 144‑45] appear to me to be appropriate to the problem before us. They are accurately summarized in *Halsbury*, 3rd ed., vol. 36, p. 406, s. 614, as follows:

In construing a codifying statute the proper course is, in the first instance, to examine its language and to ask what is its natural meaning; it is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view.  The object of a codifying statute has been said to be that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of roaming over a number of authorities.  After the language has been examined without presumptions, resort must only be had to the previous state of the law on some special ground, for example for the construction of provisions of doubtful import, or of words which have acquired a technical meaning.

As a final point regarding legislative history I would note that there is no Hansard evidence or Committee Reports which illuminate Parliament’s intention in enacting the new extortion provision in 1955.

51                              I turn now to the fact that extortion is located in the Part of the *Code* entitled “Offences Against Rights of Property”.  The Court has held on a number of occasions that headings may be used as an aid in statutory construction: see *Attorney-General of  Canada v. Jackson*, [1946 CanLII 29 (SCC)](https://www.canlii.org/en/ca/scc/doc/1946/1946canlii29/1946canlii29.html), [1946] S.C.R. 489, at pp. 495-96;*Law Society of Upper Canada v. Skapinker*, [1984 CanLII 3 (SCC)](https://www.canlii.org/en/ca/scc/doc/1984/1984canlii3/1984canlii3.html), [1984] 1 S.C.R. 357;*Skoke-Graham v. The Queen*, [1985 CanLII 60 (SCC)](https://www.canlii.org/en/ca/scc/doc/1985/1985canlii60/1985canlii60.html), [1985] 1 S.C.R. 106, at pp. 119-20; *R. v. Lohnes*, [1992 CanLII 112 (SCC)](https://www.canlii.org/en/ca/scc/doc/1992/1992canlii112/1992canlii112.html), [1992] 1 S.C.R. 167, at p. 179.

52                              In *Skapinker*, Estey J. discussed the role of headings in constitutional interpretation.  His reasons are just as apposite to the interpretation of ordinary statutes.  At pp. 376-77 he held:

It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose.  At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*.  The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the *Charter*; and the relationship of the terminology employed in the heading to the substance of the headlined provision.

. . .

I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it.  If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning.  Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document. [Emphasis added.]

53                              In my view, Estey J.’s approach to the role of headings in statutory interpretation is the correct one.  Headings “should be considered part of the legislation and should be read and relied on like any other contextual feature”: *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 269.  The weight to be given to the heading will depend on the circumstances.  Headings will never be determinative of legislative intention, but are merely one factor to be taken into account: see *Lohnes*, *supra*, at p. 179.

54                              In this case, I find the fact that the extortion provision is located in the “Offences Against Rights of Property” Part of the *Code* is outweighed by competing considerations in determining the scope of “anything”.  First, the ordinary meaning of “anything” in its immediate context is clear and supports a broad interpretation.  Greater weight should be given to ordinary meaning than to headings.  As Estey J. held in *Skapinker*, *supra*, at p. 377, “[i]f . . . it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning.”  See also *Jackson*, *supra*, at pp. 495-96,*per* Kellock J.

55                              Second, the purpose of [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth) that can be directly inferred from the wording of the provision is that extortion criminalizes intimidation and interference with freedom of choice.  Given this objective, it would be unreasonable to criminalize extortion of money or property, but not extortion of sexual favours.  Adopting a narrower formulation of the purpose in light of the heading would lead to this consequence.

56                              Third, Parliament could have easily limited the scope of the word “anything” to things of a proprietary or pecuniary nature.  In Great Britain, the offence of blackmail is defined in s. 21 of the *Theft Act* *1968* (U.K.),  1968, c. 60, in part as follows:

(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces;

The ordinary meaning of “any unwarranted demand” is of similar breadth as “anything” in [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth).  However, the scope of s. 21 is expressly limited by s. 34 of the *Theft Act*, which states that for the purposes of the *Theft Act* (and thus for the purpose of s. 21) “‘gain’ and ‘loss’ are to be construed as extending only to gain or loss in money or other property”.  The fact that Parliament did not limit [s. 305](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec305_smooth) in this manner is yet another reason in favour of adopting a broad interpretation.

57                              Finally, a number of courts in Canada have found that “anything” includes sexual favours: see *Bird*, *supra*; *R. v. D.K.P. (No. 1)*(1991), 11 W.A.C. 302 (B.C.); *R. v. Bloch-Hansen* (1977),  38 C.C.C. (2d) 143 (Sask. Dist. Ct.).

58                              For all these reasons, I agree with the British Columbia Court of Appeal in *Bird*, *supra*,at p. 17, that “anything” should be given a “wide unrestricted application” and that sexual favours fall “squarely within the meaning of the word ‘anything’ as used in the section”.

 59                              I note that O’Neill J.A. dissented on the ground that the appellant did not attempt to extort anything from C.D. because his threats amounted merely to a statement of intention.  I respectfully disagree with this conclusion.  The appellant’s threats clearly amounted to an attempt to extort sexual favours from C.D., thereby constituting the *actus reus* of extortion, which includes an attempt at inducing any person to do anything or to cause anything to be done.  The attempt is completed once the offender threatens the victim with a view to extorting or gaining anything.

B.               *Is there consent to sexual activity if it is obtained by threatened exposure of  nude photographs?*

60                              The trial judge found that P.V.B. chose to engage in sexual activity with the appellant by reason of his threats to expose the nude photographs he had taken of her.  He found this choice to be non-consensual and convicted the appellant of sexual assault.

61                              The appellant, adopting O’Neill J.A.’s dissent, argued that the trial judge erred because [s. 265(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec265subsec3_smooth)(*b*), which refers to threats of force, was exhaustive of the circumstances in which no consent is obtained by reason of threats.  The Crown took the contrary position, arguing that [s. 265(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec265subsec3_smooth)(*b*) was merely illustrative, and not exhaustive.

62                              I find that I do not need to decide this issue.  The appellant’s conviction of sexually assaulting P.V.B. may be affirmed on the basis of an independent sexual assault, wholly apart from his extortionate conduct.  This alternative basis of affirming the appellant’s conviction was argued by the Crown.

63                              Over the course of a two- to three-month period P.V.B. would go to the appellant’s apartment and have sexual intercourse with him in exchange for the negatives of the photographs he had taken of her.  By the appellant’s own admission P.V.B. was tied up on several occasions.  On at least two such occasions, P.V.B. testified that the appellant persisted in sexual activity after she had unambiguously communicated her lack of consent.  I reproduce the following excerpts from her examination in chief:

A. He would tie my wrists, one in each corner; and my ankles                                     to the bottom corners and then he would blindfold me and perform sexual acts on me in there[,] [i]nsert objects in me and sometimes he would use a leather strap to hit me with.

Q. Where would he hit you?

A. He would hit me on various parts of my body and on my vagina.

Q. Were you consenting to these activities, what would you, what did you say to him?

A. No, I never told him anything to do to me.  And I told him to stop hitting me with [the] strap, it was hurting me.

Q. Yes.

A.  And he would continue to do so. [Emphasis added.]

P.V.B. also referred to at least one other incident in which the appellant persisted notwithstanding her lack of consent:

A. He had me bent over the back of the couch with each leg tied to a corner and my hands tied together and bound around the middle leg of the couch and I was blindfolded and he was performing sexual acts on me this way and it was very uncomfortable.  He was inserting objects in me that were very uncomfortable and it was hurting me and I managed to get my hands free and I took the blindfold off and I looked at him and said to stop, he was hurting me and he said you’re not playing fair.  And the tone of his voice and the look in his eyes frightened me that I went back to the position and he tied my hands again and I just stayed still, just hoping that it would be over soon so I could leave.

. . .

Q.        There was that occasion where you had broken free and told him to stop and you’d also mentioned other occasions when he was strapping you?

A. Yes.

. . .

Q. Okay.  What other forms of resistance did you make known to him?

A.  I had asked him to stop inserting large objects because it was hurting me.  I was experiencing discomfort and pain and he would not.  He would continue to do so.  Most times though, I was in bondage, [so] I couldn’t stop him. [Emphasis added.]

64                              Davis was cross-examined by Crown counsel as to these incidents.  I reproduce the relevant excerpts:

Q. She was consenting to everything that took place.

A.       Yes.

Q.       How about the vegetables inserted up her?

A.       There was no vegetables inserted up her.

Q.       How about the dildos inserted up her?

A.    There was one time that I can recall, maybe twice, that the vibrator was used.

Q.       Consensual.

A.       Yes.

Q.       How about the strapping of her?

A.       She was never strapped.

Q.       The tying up, that took place.

A.       She was never blindfolded either.

Q.       Never blindfolded.  How about being bent over the couch?

A. She was.

Q.       She wasn’t blindfolded at that time.  She didn’t indicate it hurt at that time.

A.       She indicated that she was sore.

65                              While the trial judge did not comment directly on these incidents in his reasons, he did find P.V.B. to be a credible witness.  At para. 62 he held: “On an overall assessment of the credibility of the complainant, it is fair to say that she gave her evidence in a straightforward manner with no apparent evasiveness”.  The trial judge made only one qualification to this conclusion: “[O]n cross-examination it was evident that she was somewhat defensive and on occasions almost belligerent”.  However, he quickly went on to add, “When considering the nature of the evidence that was given and the type of cross-examination which obviously had to be conducted, it is not surprising that the witness would react in a defensive manner”.

66                              By contrast, the trial judge found the appellant’s testimony incredible.  The appellant contended that he had an ongoing consensual relationship with P.V.B. well before the photography sessions took place, and that P.V.B. initiated the sexual activity between them.  He denied ever threatening to expose the photographs.  He said there was no reason to extort sex from her, since they were already having sex anyway. Despite his testimony, the trial judge was satisfied beyond a reasonable doubt that the appellant threatened to expose the photographs and that any sexual activity that took place occurred because of P.V.B.’s fear that the appellant would expose her.

67                              Given the trial judge’s findings in this regard, I am satisfied that the events unfolded as the complainant described them.  The testimony of a friend of the complainant, provides further support for this conclusion.  P.V.B.’s friend testified that on a couple of occasions following sexual encounters with the appellant, P.V.B. arrived at her apartment distraught.  She further testified that she knew P.V.B. was hurt because she was bleeding from her vagina even though she was not menstruating.  I would note that her testimony was accepted by the trial judge to corroborate P.V.B.’s testimony regarding the burning of the negatives after P.V.B. received them from the appellant.

68                              The question, then, is whether this evidence supports a conviction of sexual assault.  The Crown argued before us that it does.  I agree.  P.V.B. clearly communicated her lack of consent to the appellant.  She asked him to stop, yet he persisted.  He did so even though, through his own admission, he knew she was “sore”.  As such, both the *actus reus* and *mens rea* of sexual assault have been made out.  I would therefore affirm the appellant’s conviction of sexual assault on these grounds.

C.               *Does the Kienapple principle apply to the convictions of extortion and sexual assault in the case of P.V.B.?*

69                              The appellant argued that the*Kienapple* principle, which precludes multiple convictions in respect of the same “delict”, “matter”, or “cause”, ought to apply to his convictions of sexual assault and extortion in relation to P.V.B.

70                              As a preliminary matter, I will first consider whether the Court has jurisdiction to address this issue.  At the hearing the Crown argued that the Court does not have jurisdiction because this issue was not raised by O’Neill J.A. in his dissenting judgment.  Since this is an appeal as of right pursuant to s. 691(1)(*a*) of the *Code*, the jurisdiction of this Court is limited to questions of law on which a judge of the court of appeal dissents.  O’Neill J.A. dissented only on the extortion and sexual assault convictions in relation to P.V.B.  He did not dissent on the application of *Kienapple*.  Accordingly, the Crown contended the Court’s jurisdiction is limited solely to these grounds, unless leave to appeal to address the application of *Kienapple* is granted.

71                              I do not find this argument convincing.  In light of the fact that I would affirm both convictions, the Court has, by necessary implication, the jurisdiction to consider *Kienapple*.  The Court’s jurisdiction over both the extortion and sexual assault convictions must, of necessity, include the jurisdiction to make whatever order  is required to dispose of these grounds of appeal.  It goes without saying that any order the Court makes in this regard must be a legal order.  The Court cannot make an order that would violate established principles or rules of law.  There is a possibility, however, that in affirming the convictions without considering the potential application of *Kienapple*that the accused could be convicted of multiple offences arising from the same delict.  Such a disposition would be illegal, as it would contravene an established legal principle.  Thus, in order to safeguard against this possibility, the Court has an implied jurisdiction to consider the application of *Kienapple*, to which I now turn.

72                              The scope of the *Kienapple*principle was considered in *R. v. Prince*, [1986 CanLII 40 (SCC)](https://www.canlii.org/en/ca/scc/doc/1986/1986canlii40/1986canlii40.html), [1986] 2 S.C.R. 480.  Dickson C.J. found that the application of the principle required that there be both a factual and legal nexus between the offences in issue.  At p. 493 he held “[o]nce it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves”.

73                              In this appeal there is not a sufficient factual nexus between the extortion and sexual assault convictions to trigger the application of *Kienapple*.  The convictions arise out of different factual transactions.  Any one of the occasions over the two- to three‑month period in which the appellant engaged in sexual activity with P.V.B. is sufficient to ground the extortion conviction.  By contrast, the sexual assault conviction arises from one or two specific occasions in which the complainant explicitly communicated her lack of consent to sexual contact.  Since there are separate factual circumstances which give rise to the different convictions, *Kienapple* does not apply.

D.               *Did the trial judge err in failing to consider the defence of honest but mistaken belief in consent in convicting the appellant of sexually assaulting E.V.K.?*

74                              The appellant argued that the trial judge erred in convicting him of sexual assault in the case of E.V.K. because the trial judge failed to consider the defence of honest but mistaken belief in consent.

75                              Although the trial judge gave detailed reasons for his findings, he did not specifically advert to the possibility that the appellant honestly but mistakenly believed the complainant consented to the sexual activity in question.

76                              Green J.A. held that the trial judge’s failure to advert to the defence of honest but mistaken belief in an otherwise detailed judgment raised the question of whether the trial judge failed to consider it.  If so, the accused may not have been afforded the benefit of the doubt on that issue.  Another possibility was that the trial judge had decided that the defence had no “air of reality” and therefore did not need to be addressed in his reasons.  Finding it impossible to resolve this question from a review of the judgment, Green J.A. conducted an extensive review of the evidence to determine whether there was an air of reality to the defence.  He concluded there was none.  Therefore, he held that even if the trial judge had failed to consider the issue at all, no reversible error was committed.  O’Neill J.A. dissented, and would have ordered a new trial.

 77                              In order for the appellant to succeed on this ground of appeal, he must establish two things.  First, that the trial judge failed to consider the defence, and second, that there was an air of reality to the defence.  Failure of a trial judge to consider the defence when there is an air of reality to it, whether sitting alone or with a jury, is an error of law.

78                              Since the trial judge did not advert to the defence at all in his reasons, it cannot be determined whether he in fact considered it.  Resolving this issue requires the Court to determine whether in these circumstances the failure to give reasons may be deemed a failure to consider the defence, and thus an error of law.

79                              Counsel did not address this issue in either oral or written arguments, focussing instead on whether there was an air of reality to the defence.  Given that there was no argument on this point and that I am of the opinion that the appeal can be disposed of on the grounds that there was no air of reality to the defence, it is safer to assume without deciding that the failure of the trial judge to advert to the defence amounted to a failure to consider it.  It is best to leave to another day the question of whether a trial judge’s complete silence as regards a defence raised by the evidence constitutes a failure to consider it and therefore an error of law.

80                              The defence of honest but mistaken belief in consent is simply a denial of the *mens rea*of sexual assault: *R. v. Ewanchuk*, [1999 CanLII 711 (SCC)](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii711/1999canlii711.html), [1999] 1 S.C.R. 330, at para. 44; *Pappajohn v. The Queen*, [1980 CanLII 13 (SCC)](https://www.canlii.org/en/ca/scc/doc/1980/1980canlii13/1980canlii13.html), [1980] 2 S.C.R. 120, at p. 148.  The *actus reus* of sexual assault requires a touching, of a sexual nature, without the consent of the complainant.  The *mens rea* requires the accused to intend the touching and to know of, or to be reckless or wilfully blind as to the complainant’s lack of consent: *Ewanchuk*, *supra*, at paras. 25 and 42.  In some circumstances, it is possible for the complainant not to consent to the sexual touching but for the accused to honestly but mistakenly believe that the complainant consented.  In these circumstances, the *actus reus* of the offence is established, but the *mens rea* is not.

81                              Before the defence can be considered, there must be sufficient evidence for a reasonable trier of fact to conclude that (1) the complainant did not consent to the sexual touching, and (2) the accused nevertheless honestly but mistakenly believed that the complainant consented: see *R. v. Osolin*, [1993 CanLII 54 (SCC)](https://www.canlii.org/en/ca/scc/doc/1993/1993canlii54/1993canlii54.html), [1993] 4 S.C.R. 595, at p. 648, *per* McLachlin J.  In other words, given the evidence, it must be possible for a reasonable trier of fact to conclude that the *actus reus* is made out but the *mens rea* is not.  In these circumstances, the defence is said to have an “air of reality”, and the trier of fact, whether a judge or jury, must consider it.  Conversely, where there is no air of reality to the defence, it should not be considered, as no reasonable trier of fact could acquit on that basis: see *R. v. Park*, [1995 CanLII 104 (SCC)](https://www.canlii.org/en/ca/scc/doc/1995/1995canlii104/1995canlii104.html), [1995] 2 S.C.R. 836, at para. 11.

82                              In determining whether there is an air of reality to the defence, the trial judge should consider the totality of the evidence: see *Osolin*, *supra*, at p. 683,*per*Cory J.; *Park*, *supra*, at para. 16.  The role of the judge in making this determination was set out by Major J. in *Ewanchuk*, *supra*, at para. 57.  He held that the judge should make “no attempt to weigh the evidence”.  The sole concern is “with the facial plausibility of the defence”, and the judge should “avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence”.  Care should be taken not to usurp the role of the trier of fact.  Whenever there is a possibility that a reasonable trier of fact could acquit on the basis of the defence, it must be considered.

83                              It is not necessary for the accused to specifically assert a belief that the complainant consented.  By simply asserting that the complainant consented, either directly under oath or through counsel, the accused is also asserting a belief that the complainant consented: see*Park*,*supra*, at para. 17.  However, the accused’s mere assertion will not give the defence an air of reality: see *R. v. Bulmer*, [1987 CanLII 56 (SCC)](https://www.canlii.org/en/ca/scc/doc/1987/1987canlii56/1987canlii56.html), [1987] 1 S.C.R. 782, at p. 790.

84                              While this is evidence of a belief in consent, it is not sufficient evidence of an honest but mistaken belief in consent.  Sexual assault is not a crime that is generally committed by accident: see *Pappajohn*, at p. 155, *per*Dickson J.; *Osolin*, at pp. 685-86, *per*Cory J.  In most cases, the issue will be simply one of “consent or no consent”, and there will be only one of two possibilities.  The first is that the complainant consented, in which case there is no *actus reus*.  The second is that the complainant did not consent, and the accused had subjective knowledge of this fact.  Here, the *actus reus*is made out, and the *mens rea* follows straightforwardly.

 85                              For example, suppose the complainant and the accused relay diametrically opposed stories.  The complainant alleges a brutal sexual assault and vigorous resistance, whereas the accused claims consensual intercourse.  Suppose further that  it is impossible to splice together the evidence to create a third version of events in which the accused honestly but mistakenly believed the complainant consented.  In such circumstances, the trial becomes, essentially, a pure question of credibility.  If the complainant is believed, the *actus reus* is made out and the *mens rea*follows straightforwardly.  If the accused is believed, or if there is a reasonable doubt as to the complainant’s version of events, there is no *actus reus*.  There is no third possibility of an honest but mistaken belief in consent, notwithstanding the accused’s assertion that the complainant consented: *Park*, *supra*, at paras. 25-26.

86                              Although the accused’s mere assertion that the complainant consented will not be sufficient evidence to raise the defence, the requisite evidence may nevertheless come from the accused: see *Park*, *supra*, at paras. 19-20, *per*L’Heureux-Dubé J.;*Osolin*, *supra*, at pp. 686-87, *per*Cory J., and pp. 649-50, *per*McLachlin J.  It may also come from the complainant, other sources, or a combination thereof.  In *R. v. Esau*, [1997 CanLII 312 (SCC)](https://www.canlii.org/en/ca/scc/doc/1997/1997canlii312/1997canlii312.html), [1997] 2 S.C.R. 777.  McLachlin J., dissenting in the result, accurately conveyed the nature of this evidence at para. 63:

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.

87                              Finally, the Court has held that there will be no air of reality where the evidence shows that the accused was reckless or wilfully blind as to whether the complainant consented.  In those circumstances, the accused has subjectively adverted to the absence of consent, and therefore cannot have an honest but mistaken belief that the complainant consented.

88                              I note that the appellant was charged with offences allegedly committed prior to the introduction of [s. 273.2](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec273.2_smooth) in August of 1992.  Consequently, the statutory amendments to the defence of honest but mistaken belief in consent do not apply to this appeal.

89                              With these principles in mind I turn to consider the evidence in the case of E.V.K.  I will begin with the complainant’s testimony.  She claims to have first met the appellant while walking near a mall in Gander, Newfoundland in August 1990.  She was 20 years old at the time.  The appellant, who was in his late thirties, approached her on his motorcycle.  He held himself out as a photographer for a Toronto agency and asked her if she would consider modelling, as she had great potential.  Some time later, she met with him at his residence to discuss the matter further, and she thought it a good idea.  No photographs were taken on this occasion.

90                              A few days later, the appellant contacted the complainant and told her to come to his residence and to bring some clothes with her.  She posed for photographs, fully clothed.  Towards the end of the session, he discussed the possibility of nude photographs, as they were needed if she wanted to be sent to Toronto to pursue a career.  She demurred because of her religious upbringing.

91                              Roughly one week later she returned to his apartment.  Photographs were taken of her in a bathing suit and lingerie.  Eventually he convinced her to pose nude.  She was very hesitant, but he assured her that only he and some people in Toronto would see the photographs.  While she was posing nude in his living room, the appellant approached her, took her hands, and tied her wrists with ropes that were attached to hooks inserted in an archway such that her arms were reaching up towards the ceiling.  He took some photographs of her in that position.   He then came up behind her and, without asking her permission, touched her breasts and inserted his finger into her vagina.  The complainant said that she froze and did not know what to do.

92                              After some time he untied her.  He then brought over a chair, bent her over it, and tied her to it by her hands and feet.  While tied to the chair, the complainant saw his reflection in the glass of the stereo and watched him approach her and undo his pants.  She said he touched her vagina with his penis.  She screamed for him to untie her, saying “I don’t want to do this”.  The appellant then untied her and apologized for his conduct, and the complainant left his apartment.  There were no more photography sessions after that.

93                              The accused confirmed that he met the complainant near the Fraser Mall and that she was interested in modelling.  He testified that there were one or two photo sessions in August of 1990.  In his direct examination he offered the following description of events on the evening during which the alleged assault occurred:

She did everything that she did that night was just lingerie and nudes, and I had asked her about if she would like to try something different with the light bondage.  As I told you, I was having very, very strong feelings for her.  When she was in the archway I did come up behind her one time.  She had her breasts exposed and I reached around behind her and I said, “I really like you”.  I was just telling her I really liked her, she really turned me on.  I was just gently fondling her breasts and she said, “What are you doing?”  I said, “I really like you and I’m making your breasts hard for the pictures”.  She didn’t say anything else.  I placed my hand down on her vagina.  I was fondling her for a little while and she said, “Well do you have to do that?”  I said, “No”, and I left her alone.  So anyway we took some more pictures, then we did the – tied her up over the chair.  Again, after taking a couple of photographs I leaned forward, I touched her, I was fondling her vagina and I said, “I really want you.  I really, really like you.  I want to have sex with you.”  She had not said no or anything before that and I was touching her on her vagina, and I don’t know, I started to undo my pants.  I don’t know if she heard the noise or what it was at the time, but all of a sudden like she sort of lifted her head and said, “No, don’t do that.”  I said, “Oh, come on, I really, really want you.”   She said, “No, no, don’t do that.  I have no protection, you can’t do it.  Stop.”  I just withdrew like that, and what I was touching her with was my hand, and I immediately withdrew.  I said, “I’m sorry.”  I immediately untied her. [Emphasis added.]

The appellant also testified that he never asked the complainant for permission to touch her.

94                              In my view, even if the testimony of the appellant is completely accepted, it discloses that, at a minimum, he was wilfully blind as to whether  the complainant consented to the fondling of her breasts and vagina.  Consequently, the defence of honest but mistaken belief has no air of reality.

 95                              There is no suggestion by the appellant that the complainant posed nude for any reason other than to further her modelling career.  Nor was there any evidence that she invited him to touch her prior to his fondling of her breasts and vagina.  Nevertheless, the appellant approached the complainant when she was in an extremely vulnerable position and began fondling her breasts.  I agree with Green J.A., who held at p. 314 that:

This is not a case of a subtle and tentative initiation of preliminary sexual exploration by one person towards another in a situation of autonomy, in the belief or hope that the feelings will be reciprocated and that the other party will be receptive to progressively more intimate activity.  E.V.K. had made no prior request for sexual activity and had given no other indication she was interested.  There was a manifest power imbalance present of which the appellant took advantage.  The appellant was directing operations, ostensibly for a photographic purpose, but with the (unexpressed, before the first touching) intent of pursuing a sexual encounter.  The touching occurred when E.V.K. was vulnerable by being tied up.  There was no basis in the evidence for the appellant thinking, at the time of the initiation of sexual touching, that E.V.K. might have been receptive to his advances.

96                              In cross-examination, the appellant testified that he did not immediately touch the complainant’s breasts, but rather began by touching her shoulders and telling her how much he liked her.  The complainant was silent.  Taking her silence and passivity as evidence of consent, he then proceeded to fondle her breasts.  In these circumstances, I fail to see how the complainant’s silence could have led the appellant to believe she was consenting to more intimate sexual contact.

97                              Moreover, after he pinched her nipples, the appellant admits that the complainant said, “What are you doing?”.  Undeterred, he fondled her vagina.  She then said “Do you have to do that?”.  The appellant stopped.  This is clear evidence that he understood she was not consenting to further contact.  Notwithstanding these statements, he tied her to a chair and again fondled her breasts and vagina.  The appellant provided no evidence to suggest that the complainant had a change of heart.  As the Court held in *Ewanchuk*, *supra*, at para. 58, there can be no air of reality in these circumstances.

98                              In *Sansregret v. The Queen*, [1985 CanLII 79 (SCC)](https://www.canlii.org/en/ca/scc/doc/1985/1985canlii79/1985canlii79.html), [1985] 1 S.C.R. 570, at p. 584, McIntyre J. held that “wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth.  He would prefer to remain ignorant”.  More recently in *Esau*, *supra*, McLachlin J. described wilful blindness as follows at para. 70:

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.... [Emphasis in original.]

In light of the foregoing evidence, I am convinced that the appellant was wilfully blind as to whether the complainant consented.  Accordingly, the defence of honest but mistaken belief in consent has no air of reality.

99                              I note that O’Neill J.A. also dissented on the grounds that the trial judge failed to consider the defence of honest but mistaken belief in consent in the cases of T.R. and D.A.S.  The appellant, however, made no submissions on this point in either oral or written arguments.  It is not clear whether this was an oversight, or a concession that there was no air of reality to the defence in either case and thus a waiver of this ground of appeal.  To rule out the possibility of a potentially harmful oversight and in an abundance of caution, I have reviewed the record, and am of the opinion that there was no air of reality to the defence.  The issue was simply one of consent or no consent in both cases.

E.               *Did the trial judge err in his application of the principle of reasonable doubt in the cases of all five complainants?*

100                           The appellant argued that the trial judge erred in his application of the principle of reasonable doubt to each of the charges against him in the cases of all five complainants.  O’Neill J.A. in dissent held that the trial judge made two notable errors.  First, in each case the trial judge failed to consider all of the evidence in determining whether there was a reasonable doubt in the manner set out by this Court’s decision in *R. v. W. (D.)*, *supra*.  Second, that in the cases of D.A.S. and T.R., the trial judge used language that suggests that he reversed the onus on the burden of proof from the Crown to the appellant.

 101                           At the beginning of his judgment, before dealing with any of the individual charges, the trial judge specifically referred to *W. (D.).*At paras. 3-5 he held:

. . . it is important to ensure that one applies the presumption of innocence to the accused in each of the cases.  The obligation is never lifted from the Crown to prove the guilt of the accused beyond a reasonable doubt on each of the counts.  It has been pointed out in numerous cases that proof beyond a reasonable doubt is that degree of proof which “convinces the mind and satisfies the conscience that the Crown has proven all the essential elements of the offence”: see *R. v. W. (D.)*. . . .

It has been said by a number of trial judges that it is incorrect to approach these cases in terms of whether or not one believes the defence’s evidence or the Crown’s evidence.  The correct approach is to ask oneself; even if I do not believe the evidence of the accused, whether or not, viewing the evidence as a whole, I have a reasonable doubt as to the accused’s guilt. . .  .

It is important to review all of the testimony and consider the evidence in its totality in the broader context of the presumption of innocence and the requirement for proof beyond a reasonable doubt to finally reach a decision on each count.

102                           The trial judge clearly directed himself properly as to the principle of reasonable doubt.  His judgment also reveals a thorough review of the evidence.  While he did not specifically advert to *W. (D.)* while dealing with each count, this does not mean that he erred.  I agree with Green J.A. who held at pp. 325-26:

. . . the trial judge, near the beginning of his reasons for judgment, when dealing with general principles, specifically referred to and properly stated, the effect of *R. v. D. W.*as it affects the application of the principle of reasonable doubt on the issue of credibility.  The fact that he did not repeat the admonition each time as he dealt with the facts of each count does not necessarily mean that he failed to consider or apply the principle in each case.  Just because a judge, after considering the evidence, decides to accept a complainant’s version of events over that of an accused’s does not mean he has fallen into the trap which *R. v. D. W.*warns against.

103                           With respect to the cases of T.R. and D.A.S., in the course of reviewing the evidence, the trial judge said that he was “not convinced” that the complainants consented to the sexual activity in question.  Read out of context, these comments suggest that the trial judge may have reversed the burden of proof.  However, in my view, this is simply plucking colloquial elements of the trial judge’s thorough reasons.  I agree with Green J.A., who held at p. 316:

It is not sufficient to “cherry pick” certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages.  This is especially true in the case of a judge sitting alone where other comments made by him or her may make it perfectly clear that he or she did not misapprehend the import of the legal principles involved.  As McLachlin J. said in [*R. v. B. (C.R.)*, [1990 CanLII 142 (SCC)](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii142/1990canlii142.html), [1990] 1S.C.R. 717, at p. 737]: “[t]he fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence.”

I would dismiss this ground of appeal.

VI.  Disposition

104                           In the result, the appeal is dismissed.

*Appeal dismissed.*

*Solicitor for the appellant:*  *Robin Reid, St. John’s, Newfoundland.*

*Solicitor for the respondent:  The Department of Justice, St. John’s, Newfoundland.*

[\*](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii638/1999canlii638.html%22%20%5Cl%20%22_ftnref1%22%20%5Co%20%22)Cory J. took no part in the judgment.