



**SUPREME COURT OF CANADA**

**CITATION:** R. v. A.E., 2022 SCC 4

**APPEALS HEARD:** February 15,  
2022

**JUDGMENT RENDERED:** February  
15, 2022

**DOCKETS:** 39699, 39703

**BETWEEN:**

**A.E.**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Director of Public Prosecutions**  
Intervener

**AND BETWEEN:**

**T.C.F.**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Director of Public Prosecutions**  
Intervener

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**UNANIMOUS** Moldaver J.

**JUDGMENT READ**

**BY:**

(paras. 1 to 6)

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**A.E.**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Director of Public Prosecutions**

*Intervener*

- and -

**T.C.F.**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Director of Public Prosecutions**

*Intervener*

**Indexed as: R. v. A.E.**

**2022 SCC 4**

File Nos.: 39699, 39703.

2022: February 15.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

*Criminal law — Sexual assault — Consent — Accused charged with sexual assault and sexual assault with weapon after they both engaged in group sexual activity with complainant and other individual — Trial judge rejecting complainant’s evidence that she did not consent to sexual activity and acquitting both accused of sexual assault charges but convicting one accused of sexual assault with weapon charge on basis that complainant did not consent to use of weapon*

— *Court of Appeal setting aside acquittals and entering convictions for sexual assault* —  
*Convictions upheld.*

*Criminal law — Appeals — Powers of Court of Appeal — Substituted conviction —  
Accused acquitted of sexual assault charges at trial — Court of Appeal setting aside acquittals  
and entering convictions — Substituted convictions permitted — Convictions upheld — Criminal  
Code, R.S.C. 1985, c. C-46, s. 686(4)(b)(ii).*

### **Cases Cited**

**Applied:** *R. v. Cassidy*, [1989] 2 S.C.R. 345; **referred to:** *R. v. Barton*, 2019 SCC 33,  
[2019] 2 S.C.R. 579; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346; *Kienapple v. The  
Queen*, [1975] 1 S.C.R. 729; *R. v. M. (R.)*, 2020 ONCA 231, 150 O.R. (3d) 369.

### **Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 273.2(b), 686(4)(b)(ii).

APPEALS from a judgment of the Alberta Court of Appeal (Martin, O’Ferrall and  
Pentelechuk JJ.A.), **2021 ABCA 172**, 27 Alta. L.R. (7th) 1, 466 D.L.R. (4th) 226, [2021] A.J.  
No. 654 (QL), 2021 CarswellAlta 1181 (WL), setting aside the acquittals of the accused, entering  
convictions for sexual assault and remitting the matters for sentencing. Appeals dismissed.

*Andrea Serink and Alias Sanders*, for the appellant A.E.

*Balfour Q. H. Der, Q.C., James F. McLeod and David A. S. Roper*, for the appellant  
T.C.F.

*Andrew Barg and Tom Spark*, for the respondent.

*Blair MacPherson*, for the intervener.

The judgment of the Court was delivered orally by

[1] MOLDAVER J. — We would dismiss the appeals and uphold A.E. and T.C.F.’s convictions for sexual assault. The trial judge erred in law, in that he essentially applied a principle of “broad advance consent” (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 99). Consent must be linked to the sexual activity in question, it must exist at the time the activity occurs, and it can be withdrawn at any time (*Barton*, at para. 88; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 17). The trial judge failed to address the scope of the complainant’s consent to sexual activity and failed to consider whether her consent was withdrawn. Accordingly, the trial judge’s determination that the complainant had subjectively consented to the sexual activity in question was not entitled to deference.

[2] As this Court set out in *R. v. Cassidy*, [1989] 2 S.C.R. 345, in order to substitute a conviction on an appeal from acquittal, “all the findings necessary to support a verdict of guilty must have been made, either explicitly or implicitly, or not be in issue” (pp. 354-55). The Cassidy test is met in this case, thereby permitting a substituted conviction under s. 686(4)(b)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge’s explicit and implicit findings demonstrate

that both A.E. and T.C.F. continued, and A.E. escalated the sexual interactions with the complainant even after she cried out “No”, without taking any steps to find out if she was withdrawing her consent. Specifically, A.E. slapped the complainant’s buttocks, and T.C.F. continued to engage the complainant in sexual activity and ordered her to perform fellatio. In the circumstances, T.C.F.’s assertion of an honest but mistaken belief in consent lacks an air of reality and is unsupported by any reasonable steps (*Criminal Code*, s. 273.2(b); *Barton*, at para. 122). Finally, in view of our conclusion that the Cassidy test is met here, we need not comment on Martin J.A.’s statement of the test for substituted convictions, found at para. 91 of his reasons.

[3] With respect to the allegations of bias raised by A.E., we are all of the view that nothing asserted by him called into any question the integrity and impartiality of the Court of Appeal of Alberta in this case.

[4] The appellant A.E. also asks this Court to stay his conviction for sexual assault under *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, on the basis that it is a lesser included count within his conviction for sexual assault with a weapon. We would not give effect to this submission. In these circumstances, the offences involve different subsets of facts and address different forms of harm (see *R. v. M. (R.)*, 2020 ONCA 231, 150 O.R. (3d) 369, at para. 52). Specifically, the charge of sexual assault with a weapon addresses the injuries that the complainant suffered as a result of the use of the toothbrush, as well as the elevated risk that it brought about.

[5] We note that the Court of Appeal of Alberta addressed other issues in *obiter*, including: T.C.F.’s liability for sexual assault with a weapon; whether surreptitious recording constitutes

fraud vitiating consent; and whether consent to sexual activity can be given in situations involving intentional bodily harm. In the circumstances, it is unnecessary for us to address these issues.

[6] In the result, the appeals from conviction are dismissed and the matters are remitted to the Court of Queen's Bench for sentencing.

*Judgment accordingly.*

*Solicitors for the appellant A.E.: Serink Law Office, Calgary; Alias Sanders, Calgary.*

*Solicitors for the appellant T.C.F.: Der Barristers, Calgary.*

*Solicitor for the respondent: Alberta Crown Prosecution Service — Appeals and Specialized Prosecutions Office, Calgary.*

*Solicitor for the intervener: Public Prosecution Service of Canada, Yellowknife.*