S.C.C. File No. 38026

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

KINGSLEY YIANOMAH QUARTEY

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

REDACTED FACTUM OF THE APPELLANT

(PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA)*

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PART I – OVERVIEW and STATEMENT OF FACTS

Overview

1. Stereotypes, assumptions, and generalizations have no place in a Court of Law. This Honourable Court has made clear time and time again that where a court relies upon one of the above to found an acquittal, the trier has fallen into error and its decision must be overturned. This appeal is a clear example of such flawed thinking being permitted to support a conviction. It now falls to this Court to say, just as loudly, that this type of analysis has no place in a judge's mind and where such thinking is employed to support a finding of guilt, that finding too must be overturned.

2. The Learned Trial Judge in this case made two errors. He mischaracterized his judicial function as an attempt to determine "really what did happen" between the two parties involved. In so doing, he failed to properly assess the evidence before him in light of the test in *W(D)*. He also utilized stereotypes and assumptions about human behavior to assess the testimony of the Appellant, finding it wanting because it did not meet with the Trial Judge's expectations about how people behave.

3. At the Court of Appeal, the majority excused these two errors as within the purview of the finder of fact and declined to intervene. Justice Berger, in dissent, recognized the error in this reasoning, found that it had infected the Trial Judge's decision, and would have overturned the conviction.

4. The Appellant now prays to this Honourable Court for relief. He submits that these were not harmless errors but ones which undermined the integrity of his conviction and cry out for a remedy.

Statement of Facts

5. The evidence led at trial came from two witnesses, the Complainant, [redacted] and the Appellant, Mr. Quartey. No evidence corroborated or contradicted the testimony of these witnesses. Varying portions of the evidence of each witness were relied upon by the Justices at the Court of Appeal to support their different conclusions so there is a need for an extensive review of that evidence here.

A. [redacted] (the Complainant)

6. [redacted] testified that in March, 2008, she was residing in Lloydminster, Saskatchewan and working at a 7-Eleven there.[1] One of her regular customers was the Appellant, Kingsley Quartey.[2] On March 12th, the Appellant asked the Complainant to have coffee with him and she provided him with her phone number. They corresponded by text and telephone on March 13th to make arrangements to meet.[3] By the time the Complainant asked the Appellant to pick her up for coffee, it was late evening, 10:30-11:00 p.m.[4] She provided the Appellant with her friends' address but when he arrived he was about one block away so she went outside to wave him over to the correct location.[5] When she got into the car, the Appellant asked if she would like to go to his place for a beer and she agreed.[6]

7. The Complainant stated that the Appellant first touched her during the course of the drive to his house. She indicated he put his hand on her leg more than once, even though she removed it, until eventually she held his hand.[7] She stated that this made her "very uncomfortable" and that it was inappropriate, though she said nothing to the Appellant.[8]

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[1] Appellant's Record ("AR") Transcript, p. 3, ll.10-18
[2] AR Transcript, p. 3, ll. 33-39
[3] AR Transcript, p. 4, l. 7 – p. 5, l. 5
[4] AR Transcript, p. 5, ll. 23-32
[5] AR Transcript, p. 5, l. 34 – p. 6, l. 11
[6] AR Transcript, p. 6, ll. 9-11
[7] AR Transcript, p. 6, ll. 22-25
[8] The Complainant's first evidence respecting this was "he kept putting his hand on my leg and I kept removing it and he would always put it back" (emphasis added) though

8. A short time later, the two arrived at a residence and went inside. They spent a short time with an older woman on the main floor then went into the basement where the Appellant was renting a room.[9] In this room there wasn't much space with the majority of the area taken up with a bed, dresser, closet and night table.[10]

9. The Complainant testified that she sat on the bed because there was no where else to sit.[11] The Appellant passed her a beer and she started to drink it. He then began to kiss her and she moved her head away.[12] When she did so, the Appellant backed off a little bit and said he was sorry. He told her she was pretty and began kissing her again. At this point, she said that she could not move her head away because her head and back were against the wall.[13] The Complainant was not asked at this point whether these events took place in sequence or whether any time was spent talking either before, between or after.

10. According to the evidence of the Complainant, the Appellant was at first standing beside the bed, then sat on the bed next to her.[14] While he kissed her on the lips then the neck, she told him that she was shy. While she told the Court that she felt uncomfortable, she did not tell the Appellant so.[15] She could not remember whether she said anything other than that she was shy.[16]

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very shortly afterward she stated that this only happened one time, "Q: Okay. And after you removed his hand from your leg, as you said, what happened, did he put it back or did it stay off or what happened? A: He put it back and then that's when I decided to hold his hand to - - so that he would - - it wouldn't be on my leg" (AR Transcript, p. 6, ll. 21-41)

[9] AR Transcript, p. 8, ll. 16-31
[10] AR Transcript, p. 8, ll. 33-35
[11] AR Transcript, p. 9, ll. 13-14
[12] AR Transcript, p. 9, ll. 17-20
[13] AR Transcript, p. 9, ll. 20-24
[14] AR Transcript, p. 9, ll. 32-35
[15] AR Transcript, p. 10, ll. 11-23
[16] AR Transcript, p. 10, ll. 25-26

11. The Complainant then said that the Appellant "came at me again, kissing me and touching me" and that she tried "to push his hands away and get them off [her] body".[17] When asked to be more specific about where his hands were, she said that "he kind of held me and then was trying to feel up my breasts" and that she was trying to get him away to a "respectable distance".[18] She indicated all of this made her feel "really scared" and that she was "worried that if I put up too much of a fuss I'd get hurt".[19] Her reasoning for this fear had nothing to do with the Appellant or his actions but was based on her experiences in a small town and what she read in the paper.[20] She voiced none of this to the Appellant, simply stating that she did not want to have sex, with which the Appellant indicated he agreed.[21]

12. At this point, the Complainant's evidence indicates a significant change in her behavior with the Appellant continuing to try to kiss and touch her and she becoming more forceful in her refusals.[22] In spite of this, her clothes were removed and "before [she] knew it, [they] were - - well, he was having sex with me".[23] She indicated that she voiced that she "didn't want to".[24] Later, she clarified that while the Appellant pulled at the top of her pants, she told him she "didn't want to fuck".[25]

13. At this point, the Complainant described that she was vocal that this was not what she wanted.[26] She said to the Appellant when he began to have sex with her that it was painful and she did not want it.[27] The sex continued until the Appellant ejaculated (without a condom).[28] The Complainant said that the Appellant wanted her to stay the

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[17] AR Transcript, p. 10, ll. 35-37
[18] AR Transcript, p. 11, ll. 4-8
[19] AR Transcript, p. 11, ll. 16-18
[20] AR Transcript, p. 11, ll. 20-23
[21] AR Transcript, p. 11, ll. 25-28
[22] AR Transcript, p. 11, ll. 30-40
[23] AR Transcript, p. 12, ll. 5-8
[24] AR Transcript, p. 12, ll. 7-8
[25] AR Transcript, p. 14, ll. 20-29
[26] AR Transcript, p. 15, ll. 6-8, 18-19, 26-27
[27] AR Transcript, p. 16, ll. 10-11
[28] AR Transcript, p. 17, ll. 10-15

night but that she convinced him to take her back to her friends' house.[29] She indicated that during the car ride to her friends' house the Appellant was talking to her but she did not really register.

14. Finally, the Complainant alleged that she went to the hospital the next day (March 14, 2008) and was prescribed a morning after pill.

15. In cross-examination, the first reference was made to any communication between the Appellant and Complainant after the alleged assault. The Complainant was asked whether she sent the Appellant a text message when she got back to her friends' home. She confirmed that she "may have" but did not remember the contents.[30] When asked if the contents were "thanks hon, hugs and kisses" she confirmed it could have been[31] then non-sensically added, "I know I didn't want him to come back there".[32] The Complainant indicated that police had asked her to save her text messages with the Appellant but that her cellphone deleted them as her inbox was full.[33] There were no follow up questions about this feature, the type of phone or whether the message in fact existed on her phone at the time she was interviewed by police such that it could be viewed or photographed. The Complainant did confirm that when asked to surrender her phone to police she refused and though they told her they would collect it later no one ever did.[34]

16. The Complainant also confirmed that she exchanged other texts with the Appellant after these events.[35] Again, no follow up questions were asked with respect to whether these texts took place before or after she went to the police or the content of the messages.

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[29] AR Transcript, p. 17, ll. 19-24
[30] AR Transcript, p. 27, ll. 20-22
[31] AR Transcript, p. 27, ll. 24-28
[32] AR Transcript, p. 27, ll. 27-28
[33] AR Transcript, p. 28, ll. 12-15
[34] AR Transcript, p. 28, ll. 18-33
[35] AR Transcript, p. 31, ll. 11-16

17. The Complainant was not questioned by either party as to whether police asked her to participate in a sexual assault kit, sign a consent for release of medical records, or provide her cell phone provider information.

18. At the end of the Complainant's testimony the Crown closed its case without calling any further evidence.

B. Kingsley Yianomah Quartey (the Appellant)

19. The Appellant chose to take the stand in his own defence. He testified that in March, 2008 he had recently moved to Lloydminster, Alberta. The Complainant was the first person he met in town.[36] He saw her often as he went to the 7-Eleven where she worked every morning on his way to work.[37] He first asked her out to a nightclub with his friends but she was working so she suggested they go for coffee a different day instead.[38]

20. On March 13, 2008, the Appellant confirmed that he and the Complainant were texting back and forth throughout the day.[39] He had other things going on and it was not until 10:30 p.m. that he was ready to pick her up.[40] He indicated that she repeatedly asked him not to come to the door of her friends' residence as she did not want them to know that she was going out with a man.[41]

21. With respect to the car ride, the evidence of the Appellant began to diverge from that of the Complainant. He acknowledged that he touched the Complainant on the leg but stated it was fleeting.[42] He added that they may have also kissed one another on the cheeks when she entered the car.[43] He recalled the general topics that they had discussed

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[36] AR Transcript, p. 38, l. 32 – p. 39, l. 10
[37] AR Transcript, p. 39, ll. 15-17
[38] AR Transcript, p. 39, ll. 19-28
[39] AR Transcript, p. 39, ll. 33-35
[40] AR Transcript, p. 39, l. 41 – p. 40, l. 2
[41] AR Transcript, p. 40, ll. 2-5
[42] AR Transcript, p. 40, ll. 17-18
[43] AR Transcript, p. 40, ll. 14-15

in the car during the drive and confirmed that he drove very slowly.[44] Much of the evidence regarding what happened when they arrived at the house was similar to that of the Complainant, they met with his landlady in the kitchen then proceeded into the basement where his room was located.[45]

22. Again, with respect to what happened in the bedroom, the evidence of the Appellant and the Complainant completely diverged. While the Appellant agreed that things progressed from kissing, to touching, to removal of clothing and ultimately to intercourse, he testified that all of these acts were consensual and that a condom was utilized.[46] He stated to his counsel during his testimony that the wrapper had been provided to counsel though no further evidence was provided on this point. When asked specifically whether the Complainant showed any signs of being upset or any resistance, the Appellant replied only that on one occasion before intercourse she had attempted to fellate him but he had pushed her head away as he did not like that.[47]

23. The Appellant also described that it was the Complainant who wished to stay the night but he asked to take her home because he had to work at 4:00 a.m.[48], that he worried they would have sex again though he did not have any condoms[49], and that if he went to work in the morning and left her there she would go through his things.[50] As such, he asked to take her home and she agreed. The two got dressed and he drove her home. On the way he discussed with her that he was not looking for a serious relationship and they held hands.[51]

24. According to his evidence, when the Appellant got home it was very late. He provided further evidence about the exchange of text messages, stating that he texted the Complainant saying "thanks" as he did not want her to talk more and she replied "You're

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[44] AR Transcript, p. 40, ll. 21-39
[45] AR Transcript, p. 41, ll. 1-10
[46] AR Transcript, p. 42, ll. 25-36; p. 42, l. 39 – p. 43 l. 20
[47] AR Transcript, p. 42, ll. 22-39
[48] AR Transcript, p. 44, ll. 1-2
[49] AR Transcript, p. 44, ll. 2-4
[50] AR Transcript, p. 44, ll. 4-6
[51] AR Transcript, p. 44, ll. 10-22

welcome, honey. Hugs and kisses".[52] He further indicated that but for one conversation wherein he suggested that if she wanted to get serious with their relationship she would have to remove her earrings and tattoos, there was no further contact between them.[53]

25. In cross-examination, the Appellant confirmed much of the Complainant's evidence, consistent with his evidence in chief. He maintained his evidence that when he first went into the bedroom with the Complainant he wanted to "fool around with her" but not have intercourse.[54] He denied the suggestion that the Complainant had persuaded him to have sex, suggesting instead that matters progressed to the point where they both wanted to.[55] He further denied that his characterization of events put the Complainant as the aggressor.[56] Despite vigorous cross-examination, he never strayed from his evidence that what happened between himself and the Complainant was consensual.

26. It was raised for the first time in cross-examination that the Appellant had given his phone to the police for them to view the text messages between himself and the Complainant.[57] This point was not followed up on by Crown counsel but was addressed briefly in re-direct. At that time, the Appellant confirmed that he had volunteered to leave his cellphone with police so that they could see the text messages exchanged between himself and the Complainant.[58] He was not asked if the phone was ever returned or whether he still had access to those messages.

27. The defence called no further evidence.

The Trial Judge's Decision – Alberta Court of Queen's Bench

28. The Learned Trial Judge embarked on his decision from a troubling beginning. Noting that there had been only two witnesses in this trial, he stated that the versions of

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[52] AR Transcript, p. 44, ll. 33-41
[53] AR Transcript, p. 45, ll. 2-19
[54] AR Transcript, p. 53, ll. 10-18
[55] AR Transcript, p. 54, ll. 21-25
[56] AR Transcript, p. 61, ll. 8-39
[57] AR Transcript, p. 48, l. 11
[58] AR Transcript, p. 69, ll. 27-41

events were diametrically opposed, impossible to reconcile and that there was no option that one party was misperceiving what took place.[59] He stated, "Someone is not telling the truth".[60]

29. This foundation became a theme throughout the Trial Judge's decision. His reasons make clear that, though he was well versed in the law which he was required to apply, his desire to reconcile "what happened" between the Complainant and the Appellant overtook a proper application of the law.

30. An early error which the Trial Judge made was his statement that there was one thing, "and one thing only", that the parties agreed upon, that they engaged in an act of intercourse on March 13, 2008.[61] This was far from correct. There were many areas of the evidence which overlapped. The parties agreed on how they met, how well acquainted they were prior to this event, when and how they met up that evening, their plans for the evening[62], the non-sexual events which transpired between them, and the contact that they had after that evening. Some of these things would later be referred to by the Trial Judge as "unbelievable" and "fanciful" aspects of the Appellant's evidence, an observation which ignored that the Complainant confirmed many aspects of this evidence.

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[59] AR Transcript, p. 80, ll. 4-7
[60] AR Transcript, p. 80, l. 8
[61] AR Transcript, p. 80, l. 10
[62] When describing the Complainant's version of events at page 80 lines 33-38, the trial judge referred to the Complainant's evidence that the two parties were relative strangers, they planned to meet for coffee, and that she was unconcerned when the plan changed to an invitation to come to his place. In contrast, while describing the Appellant's version of these exact same events at page 81 lines 25-28 he states, "they certainly agreed upon going out for coffee that night. Somehow they ended up at his place rather than at a public coffee shop". The Appellant notes that he was neither asked, nor provided any evidence as to whether the Complainant was correct that he had invited her to his place for a beer instead, he certainly said nothing to contradict that evidence.

31. After briefly describing the two versions of events, the Trial Judge then turned to a discussion of the law which he was required to apply, citing this Honourable Court's decision in *R. v. W(D)*. He analyzed the Complainant's evidence first. Of course, this sequence alone is not an error so long as a trial judge applies the correct principles, but in this case it belies his errors in that application.

32. In analyzing this evidence, he stated that there was no evidence which could corroborate either version of events. While certainly there was no evidence called to corroborate either version, this was at best a neutral factor. For instance, the text messages from either party's phone might have confirmed the contact between the two parties before and after the events, the Complainant's medical records could have confirmed her statement that she took the morning after pill the next day, her friends whose home she went to after the fact could have confirmed her demeanour when she arrived, and the investigating officer could have confirmed what steps were taken to view, save or acquire the text messages on the parties' phones. The absence of such evidence could have given rise to a reasonable doubt about the Crown's case but this was not considered by the Trial Judge.

33. While the Trial Judge stated that he must not engage in stereotypical thinking about how the Complainant ought to have reacted to the alleged assault (a correct statement of the law)[63] he then went on to use other stereotypical thinking to arrive at his decision.

Decision of the Alberta Court of Appeal

34. The Appellant appealed his conviction to the Court of Appeal of Alberta alleging three errors on the part of the Trial Judge:

1. That the Learned Trial Judge erred in his credibility analysis by choosing between which version of events he believed;
2. The Learned Trial Judge erred in applying stereotypical myths to the version of events described by the Appellant and using these myths to reject his evidence; and

[63] AR Transcript, p. 83, ll. 12-25

3. The Learned Trial Judge shifted the burden of proof to the Appellant to prove his innocence.

35. The majority found that the Trial Judge had committed none of these errors. While they acknowledged that it would be as wrong to apply stereotypes to the behavior of an accused as it is to a complainant, they did not find the Trial Judge had done so in this case. Due to the high degree of deference owed to credibility findings of a trial court, they found there was no basis to interfere with this conviction.

36. Justice Berger, in dissent, would have overturned the conviction and ordered a new trial. While he did not characterize the Trial Judge's reasons as "stereotypical thinking", he found that the reasons exposed a reliance upon generalizations in assessing the conduct and testimony of the Appellant. He also found that the Trial Judge misconstrued his judicial function in attempting "to try to determine really what did happen".

PART II – QUESTIONS IN ISSUE

37. There are 2 grounds of appeal:

1. The Learned Trial Judge misconstrued his judicial function.

2. The Learned Trial Judge impermissibly relied on generalizations about how people behave or are expected to behave in his assessment of credibility.

PART III - STATEMENT OF ARGUMENT

1. The Learned Trial Judge misconstrued his judicial function

38. The application of reasonable doubt to evidence is a difficult task. This is especially so where a case is divided so neatly into twin compartments: Crown vs Defence; inculpatory vs exculpatory; he said vs she said. For this reason, it has long been the struggle of trial judges instructing juries to try to explain that they are not comparing versions of events to determine which they prefer. This is a problem which has not been easily solved.

39. In 1991, this Honourable Court attempted to assist trial judges by setting out a simple path to follow:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations… First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.[64]

40. Unfortunately, the volume of authority on this very issue before appellate courts since the release of *W(D)* makes clear that even this instruction has not completely clarified the task. The danger which arises when evidence is viewed as a battle between competing sides is that the presumption of innocence falters.

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[64] *R v W(D)*, [1991] 1 SCR 742

41. While *W(D)* was still being interpreted by trial courts, another case arrived at this Court which required it to affirm,

> It is erroneous to direct a jury that they must accept the Crown's evidence or that of the defence. To put forward such an either/or approach excludes the very real and legitimate possibility that the jury may not be able to select one version in preference to the other and yet on the whole of the evidence be left with a reasonable doubt. The effect of putting such a position to the jury is to shift a burden to the accused of demonstrating his or her innocence.[65]

42. In *R v CLY*, 2008 SCC 2 the majority re-affirmed that a verdict of guilt must not be based on a choice between the accused's evidence and the Crown's evidence:

> The trial judge must make it indisputably clear to the jury that reaching a verdict is not simply a question of choosing the more believable of the two competing stories . . . .
>
> To protect the innocent from conviction, we require proof beyond a reasonable doubt. The application of this standard to questions of credibility is an entrenched part of our law. The direction most consonant with this principle is a clear and specific instruction, where credibility is an important issue, that the jury must apply to it the test of reasonable doubt.[66]

43. The concurring Justices went even further,

> It seems to me, on the contrary, that this is precisely the kind of case where a departure from *W. (D.)* is fraught with particular danger. The *very purpose* of adhering to the procedure set out in *W. (D.)* is to foreclose an inadvertent shifting of the burden of proof where the complainant and the accused have both testified and the outcome of the trial turns on their credibility as witnesses.
>
> That was the case here. And the risk of an inadvertent shift in the burden of proof materialized, as the reasons of the trial judge make plain. The trial judge accepted the evidence of the complainant without taking into account *at all* the contrary evidence of the appellant. Before even considering the appellant's evidence, the trial judge had concluded not only that the complainant's evidence was "credible", but that it was in fact true: "I believe the complainant", she stated (at para. 6).

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[65] ***R v S(WD)***, [1994] 3 SCR 521 at para. 24
[66] ***R v CLY,*** 2008 SCC 2 at para. 8

> This conclusion, premature at best, amounted to a finding that the appellant was guilty as charged. As a matter of law, the appellant was presumed innocent; as a matter of fact, his fate had been sealed *without any consideration at all* of his evidence under oath at trial.[67]

44. In this case, the Learned Trial Judge reminded himself of the principles from *W(D)* prior to embarking on his analysis. However, the Appellant respectfully submits that when his reasons are canvassed in detail, a proper application of these principles is not apparent.

45. Just as surely as the failure to use the exact words of *W(D)* will not guarantee an error was made, the recitation of the correct words is not a vaccine that immunizes a judge from thorough appellate review. As Justice Berger stated in dissent,

> I appreciate full well that the trial judge did recite the *W(D)* test. It does not follow, however, that a statement by the trier of fact that he has no reasonable doubt is a shield for appellate review. If that conclusion is informed by a misstatement of the judicial role, as the Court in *R. v. Mah*, 2002 NSCA 99 pointed out at para. 41, the invocation of the *W(D)* principle will not serve as a "magic incantation".[68]

46. The Reasons are sprinkled with explicit references to the type of analysis the trial judge used in this case:

i) "The Court really has to determine <u>whose evidence can be accepted</u>, which evidence is credible <u>and which is not</u>."[69]
ii) "The Court looks at every possible piece of evidence that's been led to try to determine <u>really what did happen</u>."[70]
iii) "Basically the task that the Court is left with is <u>having to decide what happened</u> in that basement suite after they arrived there."[71]

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[67] Ibid at paras. 25-27
[68] ***R v Quartey,*** 2018 ABCA 12 at paras. 64-65, Appellant's Record, Tab 2
[69] AR Transcript, p. 83, l. 32 (emphasis added)
[70] AR Transcript, p. 83, ll. 36-37 (emphasis added)
[71] AR Transcript, p. 82, ll. 8-9 (emphasis added)

47. The majority of the Court of Appeal excused these statements, finding that the Trial Judge rejected the Appellant's evidence for proper reasons and therefore that his decision was entitled to deference.

48. In the Appellant's respectful submission, this ignored the very words that the Trial Judge used to describe his process. A similar reasoning found reproach with the concurring Justices in *CLY, supra*:

> I accept the proposition from *R. v. Morrisey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), adopted by my colleague that a trial judge's reasons "should not be read as a verbalization of the entire process engaged in by the trial judge in reaching a verdict" (p. 204). That is a very different thing, however, from disregarding what a trial judge carefully and explicitly describes as the pathway to her decision. Her statement quoted above could not be understood by the convicted accused, and should not be misunderstood by us, as anything other than that the trial judge had accepted the credibility of the complainant *before* "assessing" (her word) the evidence of the accused.[72]

49. Justice Berger, in dissent, agreed with the Appellant's position. He too was troubled by the statements outlined above and found that they were equally reflected in the way that the Trial Judge went about analyzing the evidence of the Complainant and the Appellant. For example, where the Trial Judge characterized the Appellant as putting a spin on the Complainant's version,[73] Justice Berger noted that it could equally be said that "each time she put the 'opposite spin' on his testimony".[74] The Learned Trial Judge characterizing the Appellant's evidence as "putting a spin on the evidence of the Complainant" subtly revealed that he did not approach his analysis with the presumption of innocence in mind.

50. This approach is equally confirmed by the way in which the Trial Judge described the evidence of the Appellant. He first indicated that on the Appellant's version of events the two parties "somehow" ended up at his residence. The Appellant was never asked

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[72] ***CLY***, *supra* note 64 at para. 29
[73] AR Transcript, p. 84, ll. 21-26
[74] **Quartey**, *supra* note 66 at para. 75, Appellant's Record, Tab 2

why the plan changed but his evidence did not contradict that of the Complainant that he had asked her to come to his house for a beer instead of coffee. The Trial Judge referred to the evidence as argumentative, overreaching, very fanciful, somewhat illogical (when referring to evidence consistent with the story of the Complainant), and unbelievable. Each of these characterizations was made prior to the Trial Judge beginning his analysis (purportedly pursuant to *W(D)*) and would have made clear to the ordinary person (including the Appellant listening to the reasons delivered in Court) that the Trial Judge approached his analysis not from a presumption of innocence but with the Appellant's guilt squarely in mind.

2. The Learned Trial Judge impermissibly relied on generalizations about how people behave in his assessment of credibility.

> *"Since the decision of the Supreme Court of Canada in R. v. Ewanchuk, the male public has been put on notice, indeed, that before any type of sexual activity takes place between individuals, there should be full and informed consent given".*[75]

51. These words appear very early in the reasons for judgment in this case. They are an unusual choice since mistaken belief in consent was most certainly not a live issue. They become even more puzzling when one considers that later in the reasons for judgment the Trial Judge uses the Appellant's evidence that he confirmed the Complainant's consent three times as a reason to disbelieve him. Surely, in light of *Ewanchuk* and in order to ensure that every individual's sexual integrity is respected, we expect people to act in just this way.

52. Words from *Ewanchuk* which may have been of greater assistance to the trial judge in this case are the following:

> The law must afford <u>women and men</u> alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, <u>it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.</u>[76]

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[75] AR Transcript, p. 80, ll. 19-21

[76] ***R v Ewanchuk***, [1999] 1 SCR 330 at para. 66 (emphasis added)

> …
> Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men.[77]

53. These words reflected one of the earliest recognitions that stereotypes and myths about individual behavior pervade the law surrounding sexual assault allegations – despite this Honourable Court's forceful statement in 1991 that "evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent … [myths] have no place in a rational and just system of law".[78]

54. It is the Appellant's respectful submission that, in an attempt to avoid judging the Complainant's actions improperly, the Learned Trial Judge "overshot the mark" and instead used similar stereotypical thinking (or as Justice Berger prefers, generalizations) to critique the testimony and actions of the Appellant.

55. Faced with no evidentiary reason to choose one version of events over the other, the Trial Judge turned to what he called common sense and logic for help. Unfortunately, what he called common sense and logic was in fact stereotypical thinking in disguise. As in *ARD*,

> Put plainly, the trial judge's reliance on his own "logic and common-sense"… is itself highly questionable as to relevance and reliability. But it becomes particularly dangerous when reliance on that "logic" overshadows any resort to or assessment of the actual evidence at trial.[79]

56. And as this Honourable Court said in *R v S(RD)*, [1997] 3 SCR 484,

> [I]t is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use

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[77] Ibid note 75 at para. 82 (citing Archard, David. *Sexual Consent*. Boulder, Colo.: Westview Press, 1998)
[78] ***R v Seaboyer***, [1991] SCJ No 62 at para. 91, as cited in ***R v ARD***, 2017 ABCA 237 at para. 62
[79] ***R v ARD***, 2017 ABCA 23 at para. 43

> common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.[80]

57. After summarizing the versions of events testified to by each party, the Trial Judge stated,

> One has to look at the totality of the evidence and put it into proper context to determine what happened. The person making the decision has to consider the nature and characteristics of the participants to see if their actions and utterances and the evidence that they give after the fact are logically accurate and logically truthful… The Court takes into consideration the ages of the individuals, their experience, the location of the event, their maturity, their relative sizes.[81]

58. Put a different way, this statement can be paraphrased as, when looking at the version of events provided by each party, do the parties' actions "logically equate" to how we would expect them to behave.

59. The Trial Judge found that the Complainant's version of events was consistent with the features he attributed to her – a somewhat naïve, unsophisticated, trusting individual: "She conceded when she should, even though it made her look foolish on occasion, she acknowledged defects in it, and she let her actions stand alone… Sometimes she did look very foolish, but she certainly wasn't attempting to paint a picture that put her in a better light. She was testifying about what really took place. It was logical."[82] Had a trier of fact come to the opposite conclusion, determining that a complainant's actions were illogical given her stated non-consent this would be a return to the use of myths and stereotypes to disbelieve her. Surely the opposite logic cannot bolster the credibility of a complainant and simultaneously damage the credibility of an accused.

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[80] ***R v S(RD)***, [1997] 3 SCR 484 at para. 129
[81] AR Transcript, p. 83, ll. 27-34
[82] AR Transcript, p. 86, ll. 2-7 (emphasis added)

60. The Trial Judge found that the Appellant's evidence on the other hand was inconsistent with what he would expect, and therefore unbelievable:

> His evidence at times was somewhat argumentative and overreaching in his attempt to meet every allegation of wrongdoing by claiming that she initiated this contact, that he was just responding to whatever she was initiating. When her evidence suggested aggression on his part or forwardness on his part, he put the opposite spin on it and made her the aggressor and he merely the responder to what she wanted to do.[83]
>
> He certainly took great pains to paint a picture of a considerate lover who was aware of the need to have her full and informed consent before he had intercourse with her. I certainly find that very fanciful evidence.[84]
>
> He gave a very unbelievable explanation that he was not really interested in sex but only in undressing and lying beside her on the bed and just fooling around a bit.[85]
>
> He also gave an unbelievable explanation that she attempted to fellate him and that he refused.[86]
>
> He gave a very fanciful explanation in his ability to read her body language to make sure that when she said she wanted to engage in intercourse, that she meant it.[87]
>
> It's somewhat illogical that these relative strangers who just wanted to get to know one another would not go to a coffee shop… If they were just going to talk to get to know one another, this is somewhat logical.[88,89]

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[83] AR Transcript, p. 84, ll. 21-26
[84] AR Transcript, p. 85, ll. 5-7
[85] AR Transcript, p. 85, ll. 9-10
[86] AR Transcript, p. 85, ll. 29-30
[87] AR Transcript, p. 84, ll. 32-34
[88] The Appellant wonders if this was not meant to be the word illogical which would seem to be more in keeping with what the trial judge is attempting to convey in this paragraph but is not how the decision was transcribed.
[89] AR Transcript, p. 84, ll. 28-32

61. These examples gave rise to Justice Berger's finding in dissent that the Trial Judge placed "impermissible reliance upon generalizations to impugn the testimony of the appellant for which there is no evidentiary support in the record."[90] The Appellant agrees.

62. The Trial Judge's first reason for rejecting the Appellant's evidence is his "claim" that the Complainant was the aggressor and that she had initiated the sexual contact between the two of them.[91] The Trial Judge called this version of events "overreaching" and argumentative, an attempt to meet the allegation before the Court. He stated that it represented the Appellant putting a spin on the events.[92] This is a mischaracterization of the evidence of the Appellant. When he was asked on multiple occasions to label the Complainant at the aggressor he refused to do so, indicating instead that these actions were mutual.[93] Even if this was not a mischaracterization, there was no other evidence to support who was the aggressor in this situation aside from the evidence of the two parties. This type of analysis implied that it is impossible that the female in a sexual encounter could be the aggressor and the male simply responsive to her overtures.

63. The Trial Judge then determined that the Appellant's evidence that he was listening for words of consent from the Complainant while also watching her body language to ensure she wanted to engage in sexual activity was "very fanciful".[94] On this point, Berger J.A. rhetorically queried why it would be "very fanciful" for "a man to be alert not only to his partner's vocal expression of consent but also to her so-called "body language"?"[95] The Appellant agrees his evidence on this point was not at all fanciful but was simply an expression of human behaviour.

64. At the Alberta Court of Appeal, the Appellant submitted that the Trial Judge erred in finding that it was illogical that the Appellant would not want to engage in sexual

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[90] ***Quartey***, *supra* note 66, at para. 73, Appellant's Record, Tab 2
[91] AR Transcript, p. 84, ll. 23-26
[92] AR Transcript, p. 84, ll. 24-26
[93] AR Transcript, p. 61, ll. 13-40
[94] AR Transcript, p. 84, ll. 32-34
[95] ***Quartey****, supra* note 66, at para. 76, Appellant's Record, Tab 2

intercourse or in oral sex. The Learned Trial Judge made these findings despite the absence of any other evidence on point and drew an adverse inference against the Appellant due to his asserted dislike of fellatio. Here again, the reasons of the Trial Judge relied on a "generalization that is in no way probative of the proposition that the asserted dislike of fellatio by the accused is 'unbelievable.'"[96] The Appellant urges this Honourable Court to apply the reasoning of Berger J.A. that such a generalization was incapable of making the evidence of the Complainant more worthy of belief, and was not a valid reason for rejecting the Appellant's evidence.

65. These types of errors are similar to the long-rejected myths which previously permeated thinking about sexual assault, such as that a woman who would engage in sexual activity with a near stranger is less worthy of belief.

66. Even as he cautioned himself about this type of stereotypical thinking, the Trial Judge demonstrated a tendency toward it in stating: "No court can have an expectation of how any young woman should act when they foolishly place themselves in a vulnerable situation".[97] The Trial Judge's generalization of the Complainant as a young, vulnerable and foolish woman directly contradicts his supposed understanding of non-stereotypical reasoning. A woman who attends the residence of a would-be sexual partner, male or otherwise, is not presumed in law to be foolish or vulnerable.

67. The Trial Judge's flawed attempt not to rely on "rape myths" led him into error based on equally fallacious myths that women are never sexually aggressive and that men would never be reticent to engage in sexual activity. Such thinking again amounts to the type of generalization that Berger J.A. highlights in his dissenting judgment and cannot be a proper basis to reject an accused's sworn testimony.

68. The Trial Judge also rejected the Appellant's evidence that he and the Complainant ended up in his bedroom rather than at a coffee shop or in the public sitting area of his home as being "somewhat illogical" as these were "relative strangers who just

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[96] ***Quartey****, supra* note 66, at para. 82, Appellant's Record, Tab 2
[97] AR Transcript, p. 83, ll. 14-16 (emphasis added)

wanted to get to know one another".[98] The Trial Judge relied on this evidence to disbelieve the Appellant even though the fact of the two having gone into the bedroom was not contentious. In fact, it was the Complainant who testified that they went straight to the bedroom, while the Appellant stated that they spent a brief period in the kitchen/living area of his suite where he retrieved a beer for each of them prior to going to the bedroom.[99] It was not open to the Trial Judge to measure the logic of this undisputed testimony against some unknown standard of expected behaviour. Moreover, the action of going into the bedroom would not be illogical if the goal was to engage in consensual sexual activity, as was the Appellant's evidence.

69. This Honourable Court recently had the opportunity to confirm that these types of generalizations about human behavior cannot support a reasonable doubt in *R v ARJD*, 2018 SCC 6:

> In considering the lack of evidence of the complainant's avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault.[100]

70. The Alberta Court of Appeal had put matters more plainly in the majority decision upheld by this Honourable Court (*R v ARD*, 2017 ABCA 237):

> An accused's right to make full answer and defence and the criminal standard of proof beyond a reasonable doubt, do not allow reliance on prejudicial generalizations about sexual assault victims; this is of paramount importance when adjudicating matters involving child complainants. This can happen when juries and the judiciary do not even realize they are relying on prejudicial generalizations, leading to the drawing of inferences that are not part of the record but are instead, based on their own "common sense and logic" which is, in fact, unfair and inaccurate.[101]

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[98] AR Transcript, p. 84, ll. 28-31
[99] AR Transcript, p. 42, ll. 14-23
[100] ***R v ARJD***, 2018 SCC 6
[101] ***ARD***, *supra* note 79 at para. 6

> To be clear, reliance on a stereotype to found an assessment of credibility bearing on reasonable doubt is impermissible—it is an error of law. Accordingly, reasonable doubt is not a shield for appellate review if that doubt is informed by stereotypical and therefore prejudicial reasoning. Similarly, to suggest that stereotypical thinking is merely logic or common sense is a licence for it to continue unmasked and unabated. That is why, as a matter of law, this type of reasoning must not be insulated from appellate review.[102]

71. If it is true that stereotypes, generalizations, and prejudicial reasoning cannot support a reasonable doubt, it must surely be the case that they cannot be used to bolster a case to proof beyond a reasonable doubt. Complainants in cases of all kinds must be treated fairly by the Court and their evidence must be assessed honestly and without reliance on these fallacies. But so too must other witnesses, especially those accused of such serious crimes, be given the same fairness.

72. The Trial Judge here, faced with no evidentiary reason to choose one version of events over the other, turned to what he called common sense and logic for help. Unfortunately, what is called common sense logic was in fact stereotypical thinking in disguise:

> Put plainly, the trial judge's reliance on his own "logic and common-sense"… is itself highly questionable as to relevance and reliability. But it becomes particularly dangerous when reliance on that "logic" overshadows any resort to or assessment of the actual evidence at trial.[103]

73. Myths and stereotypes have no place in a rational and just system of law, neither when they support an acquittal nor a conviction.

Conclusion

74. This case was a true "he said, she said" in that there were two versions of events before the Court, both entirely inconsistent with one another regarding the elements of

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[102] ***ARD***, *supra* note 79 at para. 9
[103] ***ARD***, *supra* note 79 at para. 43

the offence. The Learned Trial Judge fell into an all too common error and attempted to determine which of these versions of events was more worthy of belief. In doing so, he failed to undertake a full and fair analysis of the Appellant's evidence consistent with the burden and standard of proof. He effectively placed a burden on the Appellant to establish his innocence and failed to critically assess the Complainant's evidence.

75. The Trial Judge's reasons were infected by generalizations which were used to assess the Appellant's credibility, and which ultimately led to a flawed conviction. While it is true that there were valid reasons upon which the Appellant's evidence could have been rejected, it is impossible to know whether they would have been sufficient to banish all reasonable doubt in the absence of the invalid reasons relied upon. The only just response is therefore to order a new trial.

PART IV – SUBMISSIONS ON COSTS

76. The Appellant does not seek costs, and asks that no costs be awarded against him.

PART V – ORDERS SOUGHT

77. The Appellant respectfully requests that the appeal be granted, that the conviction be quashed and a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of May 2018.

Colleen Bauman per JC.

Kathryn Quinlan
Dawson Duckett Garcia & Johnson
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

Case Law	Paragraph No.
R v ARD, 2017 ABCA 237	55, 70, 72
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