SCC No.: 38547

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

M.R.H.

RESPONDENT
(Appellant)

APPELLANT'S FACTUM
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

I. Overview

1. This is a Crown appeal as of right based on a dissent on a question of law in the Court of Appeal for British Columbia.

2. The 38-year-old respondent was convicted after a jury trial of sexually abusing his niece when she was in grades five and six. The jury heard five days of evidence. The complainant testified about two occasions on which her uncle abused her. The respondent testified and denied the allegations. The only other witness was the complainant's mother (the respondent's sister).

3. Credibility was the central issue at trial. The trial judge correctly and completely instructed the jury on the applicable principles. The parties participated in creating a consensus jury charge and neither took issue with any aspect of it, including the instructions on the burden and standard of proof in relation to credibility. No judge of the Court of Appeal acceded to the argument that these instructions, while correct, should have been augmented with a further instruction that had never been asked for at trial.

4. But the jury had a question. The respondent was charged with sexual assault over a lengthy period. He was charged with sexual exploitation over the same period. The jury had heard evidence of two incidents of abuse within that period. They had also heard argument from defence counsel that the second incident was markedly less plausible than the first and had been disclosed much later. They wanted to know if they could convict the respondent based on the first incident alone.

5. The Court of Appeal divided over the judge's response to this question. The dissenting judge concluded that the judge had answered the question correctly by explaining that the two incidents were the evidence underlying both the charge of sexual assault *and* the charge of sexual exploitation, and that one incident was sufficient to convict on both charges so long as the jury was satisfied that the elements of the offences had been proven. In this the dissenting judge agreed with defence counsel at trial ("Your Lordship's answer was fine") and the jury foreperson ("that clears it up for us").

6. The majority, however, disagreed that the judge's answer clearly conveyed the correct principles. Moreover, because in the majority's view there was "no obvious rational basis" upon which a juror might accept *some* rather than *all* or *none* of the complainant's evidence, the majority held that the judge erred by not reinstructing the jury on credibility as well.

7. The appellant submits that the dissenting appellate judge, the trial judge, and defence counsel at trial were correct on all counts. The jury question and response unfolded in a manner that involved an exchange with counsel and the jury foreperson. But what matters is that by the end of that exchange the judge had clearly conveyed the legally correct answer to the jury's actual question.

8. This was an uncomplicated three-witness credibility case. The trial judge gave extensive and correct instructions on the principle of proof beyond a reasonable doubt of each element of the offences. As the dissenting judge recognized, there was nothing to be gained by repeating these instructions.

9. With respect, the majority of the Court of Appeal was insufficiently mindful of the deference it owed to the jury as the trier of fact deliberating in accordance with which what the parties agreed were proper instructions. The trier of fact can accept all, some or none of what a witness says. And the majority here was simply incorrect: there was an obvious rational basis upon which a juror could have accepted the complainant's evidence of the first incident but been left with a reasonable doubt about the second.

II. The Indictment

10. The complainant alleged that her uncle touched her sexually on two occasions: at her grandmother's house in Surrey when she was in grade five, and on a family camping trip to Harrison when she was in grade six.

11. Initially a six-count indictment was laid: two counts of touching for a sexual purpose at Surrey, spanning different date ranges, reflecting uncertainty as to exactly when the Surrey incident occurred and legislative changes to the age of consent; one count of touching for a

sexual purpose at Harrison; one count of invitation to sexual touching at Harrison; and two counts of sexual assault, one each at Surrey and Harrison.[1]

12. As a result of discussions with the judge who presided over a pre-trial conference, further discussions between counsel, and given that the complainant was at all material times under any age of consent, the original six-count indictment was replaced with the two-count indictment upon which the respondent was ultimately tried, as an attempt at simplification. The parties were "in agreement" that this was "appropriate".[2]

13. The resulting indictment charged one count of touching for a sexual purpose contrary to s. 151 of the *Criminal Code* between October 28, 2006 and October 28, 2011, at or near Surrey and Harrison Hot Springs, encompassing both incidents of which the jury would hear evidence. The same underlying factual allegations supported the second count, sexual assault contrary to s. 271 of the *Criminal Code*, between the same dates and at the same places. As the trial judge explained it to the jury, the two charges "do not relate to the incidents separate, one from the other. The incidents are simply evidence underlying each of two separate charges, one of sexual interference, one of sexual assault".[3]

14. The appellant observes that in addition to being by agreement of the parties, this indictment was consistent with longstanding principles of trial by jury, according to which the jury must be unanimously satisfied that the essential elements of each offence are proven but need not rely on the same factual route to arrive at a verdict. In other words, a number of incidents can be included within one charge of sexual assault. Similarly, the same facts can underlie different charges, in this case sexual assault and sexual exploitation.[4]

III. The Evidence at Trial

15. This was a straightforward three-witness credibility-based case. Over five days, the jury heard evidence from three people: the complainant and her mother, for the prosecution, and the

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[1] Appellant's Record, Vol. III, pp. 11-13.
[2] Appellant's Record, Vol. III, pp. 3(16)-6(9); pp. 20(47)-21(14).
[3] Appellant's Record, Vol. I, p. 76(20-24).
[4] *R. v. Thatcher*, [1987] 1 S.C.R. 652*; R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. S.(H.S.)*, 2009 ONCA 102, 242 C.C.C. (3d) 262.

respondent, for the defence. Jury addresses and the judge's jury charge took the better part of a sixth day.

(i) The complainant's evidence

16. The complainant, J.S., testified when she was 17 about events that occurred when she was not yet 12. M.R.H. was 38 at the time of the trial.

17. Asked about her relationship with her uncle, M.R.H., when she was four or five, the complainant testified that her mother and M.R.H. were very close, had the same friends, hung out with the same people, and so M.R.H. was "always around".[5] Sometimes he would babysit.[6] He would attend family dinners, outings and camping trips.[7]

18. Starting when she was very young, four or five, M.R.H. was very "hands-on", "cuddly" and "affectionate" with her.[8] Although she didn't realize it at the time, he was "always inappropriate and uncomfortable", in her space, crossing her boundaries—for example, helping her dress herself when she was old enough that she did not need help.[9] As she got older, it "didn't really change"—M.R.H. continued to be "very touchy-feely", which made her uncomfortable. By "touchy-feely", the complainant meant "hugging", "cuddling", "always having to…be around me and…somehow make contact with me". He was "too close most of the time".[10]

19. The complainant described two specific incidents underlying the charges: one at her grandmother's apartment when she was in grade five, and one on a camping trip when she was in grade six.

The first incident: at J.S.'s grandmother's apartment in Surrey

20. The respondent lived with his mother in her two-bedroom apartment. The complainant sometimes visited and sometimes stayed overnight. One such visit took place shortly after

[5] Appellant's Record, Vol. III, p. 42(24)-43(9).
[6] Appellant's Record, Vol. III, p. 42(25-26); p. 43(10-20).
[7] Appellant's Record, Vol. III, p. 44(35-47).
[8] Appellant's Record, Vol. III, p. 45(4-6).
[9] Appellant's Record, Vol. III, pp. 42(24)-43(9).
[10] Appellant's Record, Vol. III, p. 45(4-25).

Christmas of her grade five year. She and her grandmother came home from a movie and the complainant soon went to bed on the pull-out couch in the second bedroom which doubled as an office and, except when J.S. was visiting, as the respondent's bedroom.

21. Sometime later, J.S. awoke to the sound of the front door shutting as the respondent came home.[11] He came to the door of the bedroom, asked if she was awake, and started talking to her. He smelled like alcohol. She said she was tired, but he kept talking, and then got "very close", "too close for comfort", "hugging and cuddling", and began rubbing her arm and talking about how much he loved her. She felt uncomfortable.[12]

22. She was lying on her back. The respondent moved his hand down into her pants and began "playing with [her] vagina". She told him "stop", "leave me alone", "I don't want this". He told her "It's okay", "I love you", "don't worry". This went on for perhaps five to 10 minutes.[13]

23. The respondent took a container of Vaseline off a shelf, put some on his niece and some on himself, shifted her so that she was facing more towards him, and made her start touching his "semi-erect" penis, which he had pulled his pants down far enough to expose. He made her cup his penis in her hand and move her hand up and down, guiding her with his own hand. She expressed "multiple times" that she was "really uncomfortable".[14]

24. He pulled her pants down around her calves. She could not move her legs. He kept saying "I love you. It's okay" and told her not to "be loud" (his mother's bedroom shared a wall with the room they were in). He got on top of his niece and tried unsuccessfully to penetrate her vagina with his penis. It hurt. She kept asking him to stop, promising, "I won't say anything". He kept trying, repeating what he had been saying, but "it wasn't fitting" and he soon got frustrated and gave up. He sighed, got up, pulled up his pants, and told her, "We're not going to talk about

[11] Appellant's Record, Vol. III, pp. 52(26)-53(14).
[12] Appellant's Record, Vol. III, pp. 52(26)-55(30).
[13] Appellant's Record, Vol. III, p. 55(31-44); p. 56(11-45); p. 58(11-23).
[14] Appellant's Record, Vol. III, pp. 55(45)-56(10); pp. 58(24)-59(36).

this". She said she would not say anything, and he left. The whole incident took about 20-30 minutes.[15]

25. J.S. told no one about what happened because she was ashamed and embarrassed. While she stopped visiting her grandmother as often and usually did not spend the night, it was hard to avoid her uncle, who continued to attend family events—dinners, fireworks, camping trips.[16]

The second incident: on the camping trip to Harrison Hot Springs

26. The second incident occurred on a camping trip to Harrison Hot Springs towards the end of J.S.'s grade six school year. There were three tents in close proximity. One was shared by her mother and stepfather. One was shared by her two brothers. The third tent she shared with the respondent.[17]

27. On the Sunday morning of the camping trip, J.S. woke up early. She could not get the fire going so she went back to the tent to get the respondent to help her. He was lying awake and he had an erection. He asked his 11-year-old niece if she had ever performed oral sex before. Uncomfortable and embarrassed, she said no and asked him to help start the fire. He grabbed her head and forced his penis as far into her mouth as it would fit and made her perform oral sex. It hurt. She was close to gagging. He moved her head up and down as she tried to pull away. Eventually she got her head up. He said, "You can't leave me like this". She said "I'm going", so he "finished into his sock" and she went to get her brothers to help with the fire.[18]

28. J.S. did not tell anyone what happened because she was uncomfortable, embarrassed, struggled with it personally and did not know how to talk about it. Eventually, she told a friend, who encouraged her to talk to her parents. In J.S.'s grade nine year, her mother discovered that she had been "self-harming" (cutting her wrists and legs) as she struggled to deal with it, and she finally told her mother what had happened.[19]

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[15] Appellant's Record, Vol. III, pp. 60(2)-61(19).
[16] Appellant's Record, Vol. III, pp. 61(20)-62(43).
[17] Appellant's Record, Vol. III, pp. 62(44)-64(24).
[18] Appellant's Record, Vol. III, pp. 64(34)-67(24).
[19] Appellant's Record, Vol. III, pp. 69(30)-71(10).

Cross-examination of the complainant

29. The defence theory of the case was that the complainant had fabricated the allegations to get attention, and a feud between the respondent and the complainant's mother made the respondent an easy target. The complainant had not truly distanced herself from the respondent as she maintained. And specifically with respect to the second incident, the defence maintained that it was too implausible to have occurred as described, especially viewed in light of the fact that she did not disclose the second incident until the eve of the preliminary inquiry.

30. Defence counsel cross-examined the complainant extensively for more than one full day of the five days of evidence. Regarding the first incident, areas of cross-examination included that the complainant had not provided certain details in her police statement, including that her uncle had made her touch him and had tried to force his penis into her vagina.[20]

31. Cross-examination regarding the second incident was more extensive. Areas of cross-examination included:

- that the complainant did not disclose the second incident at all until just before the preliminary hearing in March 2015; the ensuing police statement; and her evidence about it at the preliminary hearing;[21]
- why the complainant did not protest sharing a tent with her uncle after the first incident had occurred;[22]
- why the complainant didn't leave the tent as soon as she saw her uncle's erection;[23]
- other details about the second incident and the rest of the camping trip.[24]

32. Other areas of cross-examination included:

- how the complainant distanced herself from her uncle or made it clear that she wanted her space, and the extent to which she truly did so or whether she instead continued to initiate contact with him, including via Facebook;[25]

[20] Appellant's Record, Vol. III, pp. 80(10-26).
[21] Appellant's Record, Vol. III, pp. 79(31)-81(5); pp., 82(2)-84(41).
[22] Appellant's Record, Vol. III, pp. 90(46)-91(43); pp. 152(19)-153(18).
[23] Appellant's Record, Vol. III, pp. 153(19)-154(3).
[24] Appellant's Record, Vol. III, pp. 154(4)-159(10); pp. 160(23)-163(17).
[25] Appellant's Record, Vol. III, pp. 73(11)-77(35); pp. 94(36)-(96(3); pp. 96(22)-141(32); pp. 163(18)-164(38).

- the complainant's first disclosure to her mother because of her self-harm and inner turmoil.[26]

33. Areas of cross-examination related to the "family feud" aspect of the defence theory, which overlapped with some of the above, included:

- the argument between the complainant's mother and the respondent that led to the respondent's being less close to the family;[27]
- whether she ever told her mother she was uncomfortable around her uncle or did not wish to see him, and whether her mother encouraged her to continue seeing the respondent even after her mother and the respondent had a falling out.[28]

(ii) The complainant's mother's evidence

34. The complainant's mother testified, first, about the family background and living arrangements.[29] Her evidence corroborated that of her daughter about details of her grandmother's apartment, including that when the respondent was living there the room set up as an office doubled as his bedroom.[30]

35. She testified that the complainant was close to her grandmother and that it was common for the complainant to go on weekend visits. But around the age of 12 or 13, the complainant "really started to resist going there. She just didn't want to go anymore". Without ever giving her mother a "straight answer as to why", she was "really reluctant to spend any sort of time there".[31]

36. The mother testified that the respondent was close to the family. He would babysit and was included in family activities, such as dinners, day trips and camping trips.[32] He was likewise close to the complainant, who adored him and whom he would go out of his way to see and spend time with. "They would cuddle…there was definitely a lot of physical contact." When, at around age 10 or 11, the complainant began to want to set her own physical boundaries, she began to be uncomfortable: "Why does he always have to touch me?" While she saw nothing to

[26] Appellant's Record, Vol. III, pp. 81(13)-82(1); p. 149(28-41).
[27] Appellant's Record, Vol. III, p. 96(4-21).
[28] Appellant's Record, Vol. III, pp. 149(38)-152(12).
[29] Appellant's Record, Vol. III, pp. 165(17)-166(27).
[30] Appellant's Record, Vol. III, pp. 167(39)-168(42).
[31] Appellant's Record, Vol. III, p. 169(6-38).
[32] Appellant's Record, Vol. III, pp,. 169(39)-170(11).

suggest her brother's affection towards her daughter was sexual, and did not think her brother would violate their trust in that way, this was "definitely something of concern" to the mother—a concern she "brought" both to the respondent and their mother.[33]

37. Regarding the camping trips, the mother confirmed that the family went camping two or three times per year, often in Harrison, and that the respondent accompanied them at least two or three times. The mother would share a tent with the complainant's stepfather, the two boys would share a tent, and the complainant and the respondent would share a tent.[34]

38. The mother's evidence also confirmed that at a certain point, when the complainant was nearing 14, the mother and the respondent had a "large blowout" argument, after which she essentially stopped speaking with him. She continued to encourage her children to have a relationship with the respondent and was aware that the complainant continued to have contact with her uncle via text message and online. Despite this, the complainant "started to pull back" and "made it very clear" that she did not want to have contact with her uncle.[35]

39. Finally, the mother testified about the complainant's disclosure of the first incident. The complainant transformed from a "bright, beautiful, cheery, friendly, outgoing, take-on-the-world kind of daughter" to someone who associated with people outside her "normal crowd", who got into trouble, whose grades slipped, and who hid in her room instead of engaging with the family.[36] Her mother found images on the complainant's social media that showed the complainant had been "cutting": she had "sliced up her arms and her thighs from the top of her hip, all the way down to her knees". When asked about them, the complainant broke down and told her mother "a generalization of what happened", and they contacted the police.[37]

(iii) The respondent's evidence

40. The respondent, as defence counsel felt compelled to "readily admit" in his closing address to the jury, "was not the ideal witness". He "had a tendency to explain himself when a simple direct answer could've sufficed and, yes, he had a tendency to make submissions, play

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[33] Appellant's Record, Vol. III, pp. 170(12)-171(2); pp. 191(14)-193(19).
[34] Appellant's Record, Vol. III, pp. 171(43)-172(32).
[35] Appellant's Record, Vol. III, pp. 173(1)-175(42).
[36] Appellant's Record, Vol. III, p. 176(7-35).
[37] Appellant's Record, Vol. III, pp. 174(46)-176(6).

lawyer". He was also "a very emotional person" who "let his emotions get the better of him".[38] Crown counsel characterized the respondent as "not careful", "cavalier" and unwilling to agree even on basic points.[39]

41. The respondent agreed he had a close relationship with his niece. They "always hung out"; she contacted him by Facebook, text message and "everything else"; they talked once or twice a week for "years and years and years". He denied the relationship was overly physically close.[40]

42. The respondent offered what his lawyer characterized as a "simple denial" of the two incidents described by the complainant.[41] He agreed that his niece used to come over for sleepovers "all the time" when he lived with his mother, but denied that he had ever touched her inappropriately.[42] He also agreed that he went camping with his sister's family over the Father's Day weekend in 2009, but denied that he forced the complainant to perform oral sex on him.[43]

43. The respondent testified about the falling out between himself and his sister. He also testified about his ongoing relationship with the complainant, which he said never changed. They continued to communicate via Facebook, and he identified a record of his Facebook communications with her. They also continued text messaging and saw each other "many times". The complainant never expressed any difficulty being in his presence.[44]

IV. The Parties' Positions at Trial

44. The Crown's position was that M.R.H.'s evidence should not be believed and should not raise a reasonable doubt, and that the evidence of J.S. proved both incidents beyond a reasonable doubt.

45. As summarized by the trial judge, the defence position was that the complainant fabricated the allegations to get attention. Both she and her mother testified untruthfully about

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[38] Appellant's Record, Vol. III, p. 315(42)-316(13).
[39] Appellant's Record, Vol. III, p. 331(20)-332(47).
[40] Appellant's Record, Vol. III, p. 204(43)-205(18).
[41] Appellant's Record, Vol. III, p. 313(30).
[42] Appellant's Record, Vol. III, p. 205(27-32).
[43] Appellant's Record, Vol. III, pp. 205(33)-206(45).
[44] Appellant's Record, Vol. III, pp. 206(46)-210(31).

the respondent's physical contact with the complainant as a child to lay the foundation for false allegations of sexual abuse, of which the family feud made the respondent an easy target. And their evidence as the complainant's withdrawal from the respondent had to be seen in light of the demonstrated contact between them.

46. Specifically with respect to the second incident on the camping trip, the defence position was that the events described were not plausible, noting that it was not until just before the preliminary hearing that these events were disclosed.[45]

47. To the extent that the defence position was premised on the complainant's failure to distance herself effectively from the respondent, the respondent was permitted to advance a seriously flawed argument, imputing to a vulnerable child the ability and responsibility to do so and perpetuating the myth that a victim of sexual abuse would necessarily have the power to separate herself from the abuser, in this case a family member.[46]

V. The Instructions to the Jury

48. Relevant portions of the jury charge will be discussed below in relation to the grounds of appeal. Suffice it to note here that the final jury charge was a consensus charge resulting from a collaborative process between counsel and the judge. The judge invited the parties to alert him to "anything particular that either of you see requires any kind of special instruction" and to provide summaries of their positions for inclusion in the charge. He said he would provide a draft charge and invited their comments and submissions.[47] This process was largely conducted by email over a weekend in anticipation of closing arguments on jury instructions the following Monday.[48]

49. Crown counsel requested an instruction about "the treatment of evidence when a witness was a child at the time the incidents occurred" but was testifying as an adult;[49] a correction

[45] Appellant's Record, Vol. I, p. 62(43)-63(18).
[46] See e.g. *R. v. M.P.S.*, 2017 BCCA 231 at para. 6.
[47] Appellant's Record, Vol. I, pp. 34-36; Vol. III, pp. 279(7)-280(46).
[48] Appellant's Record, Vol. II, pp. 124-149.
[49] Appellant's Record, Vol. I, pp. 35(34)-36(18).

regarding the evidence with which defence counsel agreed;[50] and a change of wording to reflect the possibility that the jury might accept that one incident occurred but not the other.[51]

50. Defence counsel requested changes to the manner in which the judge referred to the exhibits;[52] a special caution regarding a witness that deliberately lied under oath, in the event they concluded the complainant had lied, given the defence position that the complainant had testified untruthfully at the preliminary inquiry;[53] and minor changes to ensure that references to the evidence were accurate.

51. Virtually all of the changes or additions sought by the parties were made. The judge said he was unlikely to add a special caution regarding a lying witness given the general comments pertaining [to] the jury's assessment of credibility, but added an instruction regarding prior inconsistent statements,[54] which he did, which counsel accepted, which was in the charge as delivered, and which warned the jury that it would be "very dangerous" for them to accept the complainant's evidence if they decided her previous sworn statement was inconsistent with her testimony before them.[55]

52. Both counsel were content with the final charge.[56]

VI. The Jury Question

(i) The question

53. The jury commenced deliberating at 3:00 p.m. Three hours later, they sent a question to the judge. As read in by the judge, the question was:[57]

> If we believe the 1st incident, can we convict on this alone? *Find him not guilty on the 2nd* …

[50] Appellant's Record, Vol. I, p. 39(10-18);
[51] Appellant's Record, Vol. I, p. 39(19-26);
[52] Appellant's Record, Vol. I, p. 39(37-41).
[53] Appellant's Record, Vol. I, p. 39(41-46); Vol. II, pp. 134, 140.
[54] Appellant's Record, Vol. II, p. 136.
[55] Appellant's Record, Vol. I, pp. 52(2-40); Vol. II, pp. 104-105.
[56] Appellant's Record, Vol. I, pp. 41(45)-42(5).
[57] Appellant's Record, Vol. I, p. 67(4-9)

54. The italicized portion was very faintly written. The judge surmised that the pencil had run out of steam.[58] It would later emerge that the jury had intended to erase that portion of the question and limit its question to the first sentence only.

55. Immediately upon hearing the question read out, defence counsel said, "Well, I think we know the answer to that, My Lord". The judge agreed: "we know the answer". The judge was "not looking for guidance on the legal question", which he had "no doubt about as soon as he read the question. There was "no question"; the "simple answer to the question is, of course, yes, you can".[59]

56. The judge was open to saying more than that simple, correct answer. Observing that the evidence of both incidents came from the same witness, he invited submissions as to whether it was problematic for the jury to believe the complainant about only one incident, if there was "nothing to distinguish one from the other"—whether, in defence counsel's words, it was a question of "either…she's believed or she's not".[60]

57. At the same time, the judge recognized that one might conclude that the second incident was less plausible than the first (which had been defence counsel's position before the jury). Crown counsel reminded the judge that there was also the significantly later disclosure of the second incident, just before the preliminary inquiry (which defence counsel had argued was "odd, very odd").[61]

58. The jury was sent to have dinner and counsel to ponder the question further. When they reconvened, the judge had "cobbled together" an answer for discussion purposes. He recognized that his role was not to reargue the defence case. He thought it should be "clear that it is the jury's purview to accept or reject evidence as they feel it is—as they should", and that while the case rested on the evidence of one witness, "if they are satisfied that they can distinguish between the two events", that was up to them.[62] He thought the furthest he could go beyond the simple answer without—"yes, which we all agree is the law"—without inappropriately entering

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[58] Appellant's Record, Vol. I, p. 67(33-35), p. 75(15-16). The second part of the question is illegible in the Appellant's Record, Vol. II, p. 123, Exhibit JQ1.
[59] Appellant's Record, Vol. I, pp. 67(11)-69(21).
[60] Appellant's Record, Vol. I, p. 68(5-41).
[61] Appellant's Record, Vol. I, pp. 68(41)-69(13); Vol. III, p. 318(10).
[62] Appellant's Record, Vol. I, pp. 71(9)-72(26).

the fray, was to remind the jurors of the fundamentals of the assessment of credibility, draw "this distinction" to the attention of the jury, "and let them go about doing the job of finding the facts in this case". In the end, the jury was, "of course, entitled" to accept that the first incident occurred while being left with a reasonable doubt about the second.[63]

(ii) The answer

59. This is what occurred when the jury was brought in:[64]

> THE COURT: Members of the jury, I apologize for the delay in responding to the question you posed, but it raised an issue I wanted to discuss with counsel and reflect on the proper instruction to give. I did not want to do that in either haste or without the benefit of counsel's assistance. We have been able to speak about that in your absence.
>
> And first of all, because the question, it appears somebody's pencil broke when the question was written, I want to make sure I have it correctly. I am reading from what you passed to me [as read in]:
>
> > If we believe the 1st incident, can we convict on this alone? Find him not guilty on the 2nd . . .
>
> -- and then it goes i-n-c-i, and I am assuming that should say "incident".
>
> JURY FOREPERSON: Your Honour, we withdrew the second part, we would just like to know if we can convict on the first incident alone for both counts.
>
> THE COURT: Well, the answer to that is a little bit different then. Yes, you may, but your – your question has posed a little bit of a difficulty in terms of you may convict on the evidence, if you find the constituent elements have all been proven, but as I say, I may have misinterpreted, because now I see it is an erasure. I just gathered that the pencil had run out of steam.
>
> So as a matter of law, if the Crown has proven beyond a reasonable doubt the constituent elements of each of the offences, they need not prove both incidents, one is sufficient.
>
> But I should carry on to say that if you are having difficulty or rejecting the evidence of the complainant on the second offence, that raises a bit of a problem in terms of reconciling the acceptance of her evidence on one if you have rejected or raise reasonable doubt – or there is a reasonable doubt raised in your mind on the second.
>
> So I took your question to be that you had reached different conclusions. If that is not the case, and I do not want to go into the deliberations you are having in the jury room, but I need to tell you, I think, counsel, this is – I am taken a bit by

[63] Appellant's Record, Vol. I, pp. 72(39)-74(5).
[64] Appellant's Record, Vol. I, pp. 74(32)-76(43).

surprise by the retraction of the second question. But as a matter of law, the Crown needs prove only one of the incidents, not both, for you to convict, and the two separate charges relate to separate offences. One is of sexual interference, the other is of sexual assault, and it is not incumbent upon the Crown, and I had hoped my charge had made clear earlier, to demonstrate beyond a reasonable doubt or prove beyond a reasonable doubt that each happened. One of them is sufficient.

JURY FOREPERSON: May I ask another question?

THE COURT: Well, as long as it is a question on behalf of the jury, yes.

JURY FOREPERSON: Yes, it pertains to the same. So we would like to know if both – so they're – they're separate charges for each incident?

THE COURT: No.

JURY FOREPERSON: Are both charges relevant to each – or for both incidents.

THE COURT: The charges, and again if you look at the indictment, it will become clear to you, the indictment embraces a period of a number of years, and I do not – I do not have it in front of me, it embraces the years between 2006 to 2011. The evidence would tend to demonstrate, at least the allegations arise from 2007 or 8 and 2009, and they are separate offences. But each is evidence – sorry, each –

JURY FOREPERSON: We did suspect this, Your Honour, but we just needed clarification. Some of our jurors were not clear on this and we wanted clarification.

THE COURT: All right. These charges do not relate to the incidents separate, one from the other. The incidents are simply evidence underlying each of two separate charges, one of sexual interference, one of sexual assault.

And counsel, if either of you take any umbrage with those remarks, then now is the time to stand up. I was not expecting a free flow discussion here.

MR. REDEKOPP: I appreciate that. If I may, My Lord, from what I understand the juror to say is, is they were wondering if each of the counts relate to each of the incidents. Is that – was that the question?

JURY FOREPERSON: That was in part our query.

MR. REDEKOPP: All right, yes, then Your Honour's answer to – or Your Lordship's answer was fine.

THE COURT: All right. Does that answer the question then? As I say, I am – I was unfortunately – fortunately reading more into it than perhaps I should have, because of, as I say, what was at the bottom and it was not clearly erased, so –

JURY FOREPERSON: That clear – that clears it up for us.

60. The jury resumed its deliberations at 10 a.m. the following morning and, at 11:19 a.m., returned guilty verdicts. The judge ultimately entered a conviction on count 2 (sexual assault) and directed a stay of proceedings on count 1 (sexual interference).

VII. Judgment of the Court of Appeal for British Columbia

61. M.R.H. appealed his conviction. He argued, first, that the main jury charge as to credibility and reasonable doubt was deficient in that the judge ought to have augmented his instructions on reasonable doubt as applicable to credibility issues with an instruction, never requested at trial, in the specific language of *R. v. C.W.H.*[65] He argued, second, that the judge failed to answer the jury question adequately. In particular, he said, once it was clear that the question was not as initially understood, the judge ought to have invited counsel to make further submissions in the jury's absence and ought to have recharged the jury on the burden and standard of proof in relation to credibility.

62. Neither the majority of the Court of Appeal nor the dissenting judge acceded to the argument that the jury instructions upon which the parties and the judge had agreed were inadequate as to credibility and the application of the principle of proof beyond a reasonable doubt to credibility.

63. The dissenting judge concluded that there "was no realistic risk that the jurors would think they had to choose between two contradictory versions of events. The charge made clear that the burden of proof was always on the Crown and that any reasonable doubt had to be resolved in favour of the appellant, including a reasonable doubt based on credibility".[66]

64. The majority of the Court of Appeal found that the trial judge's charge to the jury "failed to adequately explain…that the indictment charged two offences which covered a period of time during which two separate incidents were alleged". Confusion over that issue led the jury to ask a question which the judge "did not clearly answer". And because the question also raised the possibility that one or more jurors did not accept "a significant part of the complainant's evidence", the judge should have addressed "the credibility issue that would arise if the jury accepted the complainant's evidence about one incident but not the other" because, in the

[65] (1991), 68 C.C.C. (3d) 146 (B.C.C.A.) [*C.W.H.*]
[66] Appellant's Record, Vol. I, p. 11, BCCA Reasons, para. 31.

majority's view, there was "no obvious rational basis for making differential findings regarding her credibility".[67]

PART II – QUESTIONS IN ISSUE

65. This appeal as of right is based on Savage J.A.'s dissent on the following questions of law, as set out in the order of the Court of Appeal:

> Did the trial judge err when instructing the jury by:
>
> [Issue] (1) Failing to adequately explain that the indictment charged two offences which covered a period of time during which two separate incidents were alleged to have occurred;
>
> [Issue] (2) Failing to clarify the question from the jury and permit counsel an opportunity to make further submissions;
>
> [Issue] (3) Failing to correctly answer the question from the jury; and
>
> [Issue] (4) Failing to re-instruct the jury on the issue of credibility?

PART III – STATEMENT OF ARGUMENT

66. The four issues set out in the order of the Court of Appeal fall into two groups. Issues (1), (2) and (3) relate to the way in which the judge handled the jury question and whether, by the end of the recharge, the jury would have understood how the two incidents of which they had heard evidence related to the two charges on the indictment. These issues are addressed together in the next section (paras. 67-77 below). Issue (4) deals with whether it was an error for the judge not to re-instruct the jury on the issue of credibility. That issue is dealt with separately in section II (paras. 78-109 below).

I. The majority of the Court of Appeal erred in holding that the judge failed to correctly answer the jury question (Issues 1, 2 and 3)

67. The majority of the Court of Appeal and the dissenting judge expressed no disagreement as to the legal principles applicable to appellate review of a trial judge's response to a jury question, which were summarized by the dissenting judge as follows:

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[67] Appellant's Record, Vol. I, pp. 19, 24-25, BCCA Reasons, paras. 54-56, 69, 71.

> [42] (1) if a question indicates the jury did not understand part of the main charge, the response to the question should be clear, careful and correct; (2) unclear or ambiguous questions should be clarified by the judge, as such questions cannot be given clear and correct answers; (3) while jury questions should be answered fully and carefully, on appeal the reviewing court should focus on whether the jury was left with an erroneous view of the law. The reviewing court should intervene if there is a reasonable possibility that the trial judge's erroneous instruction may have misled the jury.[68]

68. The majority and the dissenting judge agreed that the question "If we believe the first incident, can we convict on this alone?" required the judge to clarify whether the jury could convict based on the first incident alone for both counts. For the dissenting judge, the question "likely arose from the way the charges were laid, with each count encompassing two discrete incidents", and the actual question, as clarified, "was whether the jury could convict on one incident alone for both counts".[69] To the majority, the question demonstrated that at least some jurors "were at some point confused about the difference between the two offences (sexual assault and sexual interference) and the two incidents (at Surrey and Harrison)".[70] This interpretation is supported by the jury's initial clarification ("we would just like to know if we…can convict on the first incident alone for both counts") and follow-up questions ("so they're—separate charges for each incident?" and "[a]re both charges relevant to each—or for both incidents?").[71]

69. The Court of Appeal majority found that the trial judge erred in failing to clarify the question, and in failing to give counsel an opportunity to make further submissions, and in failing to correctly and completely answer the question.

70. In fact, the first thing the judge did was read the question back to the jury "to make sure I have it correctly", and the last thing he did was ensure he had answered the jury's question

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[68] Appellant's Record, Vol. I, pp. 14-15, BCCA Reasons, paras, 42, 74, citing *R. v. W.(D.)* [1991] 1 S.C.R. 742 [*W.(D.)*]*; R. v. Naglik*, [1993] 3 S.C.R. 122 [*Naglik*]; *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521 [*S.(W.D.)*]; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Brydon*, [1995] 4 S.C.R. 253; *R. v. Layton*, 2009 SCC 36, [2009] 2 S.C.R. 540; *R. v. Kahnapace*, 2010 BCCA 227; and *R. v. Shannon*, 2011 BCCA 270.
[69] Appellant's Record, Vol. I, p. 15-16, BCCA Reasons, paras. 44, 47.
[70] Appellant's Record, Vol. I, p. 21, BCCA Reasons, para. 64.
[71] Appellant's Record, Vol. I, p. 78(5-8), p. 76(1-6).

("Does that answer the question then?" "That…clears it up for us").[72] The jury foreperson immediately clarified that the jury had intended to erase the second part of the question ("find him not guilty on the second") and ask only the following: "If we believe the first incident, can we convict on this alone?" Or as the foreperson *further* clarified, "we would just like to know if we…can convict on the first incident alone for both counts"?[73]

71. This question was straightforward. It was not unclear, ambiguous, or complex. Nor was it a question which the judge required further assistance from counsel to answer. The correct answer had been apparent to everyone from the outset of their discussions about how to respond to the question, even before it was clarified by the foreperson.

72. As set out above, immediately upon hearing the question read out, defence counsel had said, "Well, I think we know the answer to that, My Lord". The judge agreed: "we know the legal answer". The judge was "not looking for guidance on the legal question", which he had "no doubts about" as soon as he read the question: "I know the answer". Defence counsel subsequently repeated that "we know the legal answer" and the judge again agreed: "there's no question"; the "simple answer to the question is, of course, yes, you can".[74]

73. The dissenting judge rightly ascertained that the trial judge's response to the question as clarified was correct. There was no reasonable possibility that the jury was left with an erroneous view of the law. By the conclusion of the proceedings, the judge had correctly explained to the jury that:

- they could convict if they found that the constituent elements of each of the offences had been proven;[75]
- as a matter of law, the Crown needed to prove the constituent elements of each of the offences, but need not prove both incidents—one was sufficient;[76]
- as a matter of law, the Crown needed to prove only one of the incidents, not both, for the jury to convict;[77]

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[72] Appellant's Record, Vol. I, pp. 74(40)-75(4); p. 76(37-43).
[73] Appellant's Record, Vol. I, p. 75(5-8).
[74] Appellant's Record, Vol. I, pp. 67(4)-69(25); p. 70(5-6).
[75] Appellant's Record, Vol. I, p. 75(9-14).
[76] Appellant's Record, Vol. I, p. 75(17-20).
[77] Appellant's Record, Vol. I, p. 75(35-38).

- there was not a separate charge for each incident;[78] and
- the two incidents were "simply evidence underlying each of two separate charges, one of sexual interference, one of sexual assault".[79]

74. The majority faulted the trial judge for not consulting with counsel after clarifying the erasure. Yet the judge invited counsel to speak up if they took any issue with what he had said. Defence counsel sought confirmation that the jury's question had been whether "each of the counts relate[s] to each of the incidents". The jury foreperson confirmed that had been, "in part", the question. Neither party objected to the answer, sought an opportunity to make further submissions, or asked that the jury be given any further instructions; defence counsel thought the judge's answer was "fine".[80] In short, both parties were satisfied that the judge had conveyed the answer that everyone had known from the outset was the legally correct one. Lastly, the judge confirmed with the jury foreperson that he had answered their intended question: "Does that answer the question then?" "[T]hat clears it up for us."[81]

75. In the Court of Appeal majority's view, the foreperson's reply that the question had been "in part" about the relationship of the two incidents to the two counts should have been a cue to seek clarification as to what the other "part" was.[82] But the original question encompassed aspects that defence counsel's restatement of it did not: whether both counts covered both incidents, *and if so* whether the jury could convict on the first incident alone.

76. Some features of the judge's answer were admittedly not ideal. He acknowledged being taken "a bit by surprise" by the revelation that the jury had intended to erase the second part of the question.[83] It might have been preferable if he had taken a moment to collect his thoughts before embarking on his answer. At one point, he used the term "offence" when, the appellant submits, it would have been clear that he meant "incident".[84] Maximum prudence might have dictated confirming with the parties that everyone still agreed on the correct legal answer to the question before, rather than after, giving his answer. He need not have favoured the defence by

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[78] Appellant's Record, Vol. I, p. 76(1-4).
[79] Appellant's Record, Vol. I, p. 76(5-24).
[80] Appellant's Record, Vol. I, p. 76(25-35).
[81] Appellant's Record, Vol. I, p. 76(37-43).
[82] Appellant's Record, Vol. I, p. 24, BCCA Reasons, para. 68.
[83] Appellant's Record, Vol. I, p. 75(32-35).
[84] Appellant's Record, Vol. I, p. 75(23).

adverting to a non-existent problem with the jury's acceptance of *some* rather than *all* or *none* of the complainant's evidence.[85] The fullest possible answer would also have advised the jury that not only was one incident sufficient for them to convict, they did not all even have to agree on which incident had occurred, so long as they were all satisfied that the elements of the offences were proven beyond a reasonable doubt—an omission which also favoured the defence, and perhaps seemed unnecessary in the context of the evidence and the parties' positions.[86]

77. But the focus on appellate review is not whether the judge handled the situation perfectly or whether his answer was ideal. The focus is on whether the jury realistically could have been left with an erroneous understanding of the applicable legal principles or a misconception of its task. Realistically, the answer to that question is no.

II. The majority of the Court of Appeal erred in holding that the trial judge should have reinstructed the jury on the issue of credibility (Issue 4)

78. The majority of the Court of Appeal erred in holding that it was necessary to repeat the correct and complete instructions the jury had received on reasonable doubt vis-à-vis credibility because of its own mistaken perception that there was "no obvious rational basis" for the jury to accept *part* of the complainant's evidence rather than *all* or *none* of it—particularly when the parties there and then accepted the judge's answer as adequate.

79. As the dissenting judge recognized, the question did not suggest the jury "had a misunderstanding of the law that needed to be rectified, or that would have been assisted by recharging on credibility. The judge gave clear, complete instructions on credibility in his initial charge, and given this initial charge, I do not think the jury could have been left with an erroneous view of the law".[87]

80. Rather, the question concerned, at most, the *implications* of what a properly instructed trier of fact *may* have found, in accordance with instructions that everyone agreed were correct and complete, for the verdicts it could render.

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[85] Appellant's Record, Vol. I, p. 75(20-28).
[86] *S.(H.S.)* at para. 31.
[87] Appellant's Record, Vol. I, p. 17, BCCA Reasons, paras. 49-50.

81. That the question seemed to be predicated on factual findings for which a "rational basis" was not "obvious" to two appellate judges does not support the conclusion that the jury misunderstood the judge's correct and complete instructions on credibility and therefore had to hear them again.

82. Moreover, as discussed below, the Court of Appeal majority was incorrect that there was no "rational basis" upon which a juror might have accepted that the first incident occurred but been left with a reasonable doubt regarding the second. The defence position, underscored by its cross-examination of the complainant, was that the second incident was markedly less plausible than the first, and that the jury's assessment should take into account the much later disclosure of the second. With respect, it is trite that a jury may accept some, all or none of a witness's evidence.

(i) The jury instructions regarding the onus and burden of proof in relation to credibility were correct and complete

83. The adequacy of the main charge as to the burden and standard of proof, including in relation to credibility was not at issue between the parties at trial and is not at issue on this appeal. No judge of the Court of Appeal accepted the argument that the jury was inadequately instructed in this regard—yet the majority ordered a new trial because the judge did not repeat his instructions.

84. Because that is the essential starting point of the appellant's argument, the appellant will set out the undisputed core principles that apply and the relevant portions of the jury instructions.

85. The prosecution bears the burden of proving the guilt of a criminal accused beyond a reasonable doubt. In a credibility case, what has come to be called the "*W.(D.)* instruction" "unpacks for the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts", such as the conflicting testimonial accounts of M.R.H. and his niece.[88]

86. The point that must be made "crystal clear" to the jury is that "the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt" and that a

[88] *W.(D.)*; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152 [*J.H.S.*] at para. 9.

"lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt". A criminal trial is not a "credibility contest".[89]

87. No particular form of words is necessary as long as the "essence" of the instruction is given, such that the jury's deliberations are not framed as an "either/or" choice between the evidence of the prosecution and that of the defence. The instructions must not exclude the "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".[90]

88. Ultimately, in any case where credibility is important, "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of the events".[91]

89. Neither party contended at trial that the jury charge came up short when measured against these undisputed core principles. The parties collaborated with the judge in constructing the charge, to which neither party objected, either in draft form or as delivered. On appeal, M.R.H. argued for the first time that the judge should have augmented the jury charge with a "*C.W.H.* instruction", but no judge of the Court of Appeal acceded to the argument that any further instruction on the burden or standard of proof as applicable to credibility issues was required in the main charge.[92] The dissenting judge saw "no realistic risk that the jurors would think they had to choose between two contradictory versions of events. The charge made clear that the burden of proof was always on the Crown and that any reasonable doubt had to be resolved in favour of [M.R.H.], including a reasonable doubt based on credibility".[93] The majority expressed no disagreement on that point.

90. Again, no fault was found with the main jury charge as to credibility; the error found by the Court of Appeal majority was in the judge's failure to *repeat* what he had already told the jury. As set out below, the trial judge gave as part of the main charge *all* of the "clear

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[89] *J.H.S.* at paras. 9, 13.
[90] *S.(W.D.)* at p. 533.
[91] *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745 at para. 19.
[92] *C.W.H.*; see also *J.H.S.*
[93] Appellant's Record, Vol. I, p. 11, BCCA Reasons, para. 31.

instructions on credibility" which the majority of the Court of Appeal said he should have given again in response to the jury question:[94]

- *CA majority:* "the judge must instruct the jury that the rule with respect to reasonable doubt applies to the issue of credibility".

  Jury charge: "You should know that the rule of reasonable doubt also applies to the issue of credibility or reliability. You need not definitely decide on the reliability or credibility of a witness or group of witnesses. You need not fully believe or disbelieve one witness or a group of witnesses. If you have a reasonable doubt as to the guilt of [M.R.H.] arising from the reliability or credibility of the witnesses, then you must find him not guilty".[95]

- *CA majority:* "the judge ought to have reminded the jury that any reasonable doubt must be resolved in favor of the accused".

  Jury charge: "The burden or onus of proving the guilt of [M.R.H.] beyond a reasonable doubt rests upon the Crown and never shifts. You must not find him guilty if you have a reasonable doubt about his guilt after you consider all of the evidence as it relates to the charges against him."[96]

  "If, on all of the evidence, you have a reasonable doubt as to the Crown's discharge of its burden, then you will acquit."[97]

  "If you have a reasonable doubt as to the guilt of [M.R.H.] arising from the reliability or credibility of the witnesses, then you must not find him guilty."[98]

  "If [the evidence of M.R.H.] raises a reasonable doubt as to whether he did what J.S. says…you must acquit him."[99]

  "If…you conclude the Crown has discharged its burden with respect to all of the ingredients…then you will convict….If you find the Crown has failed to prove beyond a reasonable doubt any of the elements…you will acquit."[100]

  "If, on all of the evidence, you have a reasonable doubt as to the Crown's discharge of its burden, then you will acquit."[101]

- *CA majority:* "the judge ought to have reminded the jury…that even if it did not accept all of the accused's testimony, it could still accept some of it".

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[94] Appellant's Record, Vol. I, p. 25, BCCA Reasons, paras. 72-73
[95] Appellant's Record, Vol. I, p. 48(34-43).
[96] Appellant's Record, Vol. I, p. 47(27-32).
[97] Appellant's Record, Vol. I, p. 64(3-5).
[98] Appellant's Record, Vol. I, p. 48(40-43).
[99] Appellant's Record, Vol. I, p. 51(14-18).
[100] Appellant's Record, Vol. I, p. 63(32-42).
[101] Appellant's Record, Vol. I, p. 64(1-5).

Jury charge: "Generally, I would suggest you use your common sense and experience to assess the reliability and credibility of each witness. Keep the following points in mind. When you consider the evidence of a witness, please understand that you do not have to accept or reject everything a particular witness said. You may, of course, decide to accept or reject everything a witness said in the witness box, but you may also decide to accept only some of what a witness said and reject the rest. In other words, you may accept all, part or none of a witness's evidence. That decision is yours."[102]

- *CA majority:* "the judge ought to have reminded the jury…that it should not see its task as deciding between two competing versions of events".

  Jury charge: "When deciding whether the accused is guilty or not guilty, you should not weigh the theory or position of the Crown against the theory or position of the accused, since it is always the duty of the Crown to prove the guilt of the accused beyond a reasonable doubt before he can be convicted".[103]

- *CA majority:* "the judge ought to have reminded the jury… that it could not decide the case simply by choosing between the evidence of the complainant and that of the accused".

  Jury charge: "If you believe the evidence of [M.R.H.]...you must acquit him. Even if you do not believe his evidence, if it raises a reasonable doubt in your mind as to whether he did what J.S. says…you must acquit him. Finally, even if you disbelieve him and find his testimony raises no reasonable doubt, you must still acquit him if you find the evidence tendered by the Crown does not meet its burden of proving the elements of each offence on each occasion set out in the indictment beyond a reasonable doubt."[104]

- *CA majority:* "the judge ought to have reminded the jury…that it had to consider all the evidence and decide whether the Crown had proven beyond a reasonable doubt that the events that formed the basis of the crimes charged had in fact taken place".

  Jury charge: "You may only find [M.R.H.] guilty after you consider all of the evidence, if you are satisfied that the Crown has proven its case beyond a reasonable doubt."[105]

  "[Y]ou must still acquit [M.R.H.] if you find that the evidence tendered by the Crown does not meet its burden of proving the elements of each offence on each occasion set out in the indictment beyond a reasonable doubt."[106]

  "I remind you that the Crown must prove each of these ingredients beyond a reasonable doubt. You must return a verdict of not guilty…if the Crown has not proven each of these ingredients beyond a reasonable doubt."[107]

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[102] Appellant's Record, Vol. I, p. 49(5-17).
[103] Appellant's Record, Vol. I, p. 62(11-17).
[104] Appellant's Record, Vol. I, p. 51(10-25).
[105] Appellant's Record, Vol. I, p. 47(15-18).
[106] Appellant's Record, Vol. I, p. 51(20-25).

> "In summary, if, based upon the evidence before the court, you are sure that [M.R.H.] committed the offences with which he has been charged, you should convict since this demonstrates you are satisfied of his guilt beyond a reasonable doubt. If, on the other hand, you are left with a reasonable doubt, you must acquit."[108]

- *Jury charge:* this point was not mentioned by the Court of Appeal majority as something that should have been included in the recharge, but it should be noted here that the trial judge also made it clear to the jury that the "case against [M.R.H.] rests entirely on the evidence of the complainant".[109]

- *Jury charge:* similarly, it should be clear that the jury was given a "special warning" about the complainant's evidence. The jury was told that if it concluded the complainant's prior sworn evidence was inconsistent with her evidence at trial, it would be "very dangerous" for the jury to accept her evidence unless it was satisfied with her explanation because it would indicate that she did "not take a solemn oath seriously".[110]

91. The appellant submits that the parties to the respondent's trial, the trial judge, and the Court of Appeal were all correct: the jury was properly instructed as to the burden and standard of proof, including as it related to credibility.

92. This is a significant point. It means that so far as the burden and standard of proof were concerned, the jury could properly have rendered verdicts on the evidence in accordance with the instructions it was given.

93. It means that but for the need of some jurors to obtain clarification about the relationship between the two specific incidents of which they heard evidence and the counts on the indictment, the jury would simply have delivered guilty verdicts—verdicts no judge of the Court of Appeal would have set aside.

94. And it means that if some jurors were sure about the first incident but unsure about the second, they had reached that conclusion *in accordance with* the very instructions the Court of Appeal majority said they should have been given again *because* they had reached that conclusion.

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[107] Appellant's Record, Vol. I, p. 61(39-44).
[108] Appellant's Record, Vol. I, p. 48(18-24).
[109] Appellant's Record, Vol. I, p. 50(22-23).
[110] Appellant's Record, Vol. I, p. 52(19-40).

(ii) The majority of the Court of Appeal erred in concluding that a recharge was necessary on the basis that what it perceived as the factual predicate of the jury question was unreasonable

95. A question from the jury identifies the issue upon which it requires direction. It says, "on this issue, there is confusion, please help us".[111] A question about an issue addressed in the main charge indicates that at least some jurors did not understand or remember that part of the charge, even if the original charge was exemplary, and that further guidance is required.[112] The jury will rely on the answer to the question to resolve the confusion or uncertainty that motivated the question.[113] The recharge "on the issue presented by the question" must be "correct and comprehensive".[114]

96. But the majority of the Court of Appeal concluded that a credibility recharge was necessary *not* because the question "If we believe the first incident, can we convict on this alone?" indicated confusion or uncertainty about the application of the burden or standard of proof in relation to credibility, or a misconception on the part of the jury that it faced an either/or choice between the evidence of the respondent and that of his niece. In the majority's view, the question indicated the "possibility" that some jurors were accepting *some* rather than *all* or *none* of the complainant's evidence, and for this, in the majority's view, there was "no obvious rational basis".[115]

97. In other words, the majority treated the factual findings it saw as *implicit in* the question as the issue *presented by* the question or as the confusion *motivating* the question. It effectively asked whether what it saw as the factual predicate of the question was *reasonable* and concluded that it was *unreasonable.* The majority then held that the judge's failure to reissue the *same instructions* the jury had followed in reaching that conclusion, which both parties at trial and all judges of the Court of Appeal agreed were correct, was therefore an error warranting a new trial.

98. For four reasons, the majority erred in concluding that it was reversible error for the judge not to have recharged the jury on credibility.

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[111] *S.(W.D)* at 530.
[112] *Naglik* at 139.
[113] *Naglik* at 139.
[114] *S.(W.D.)* at 530.
[115] Appellant's Record, Vol. I, pp. 19, 25; BCCA Reasons paras. 56, 71.

99. First, and most obviously, any juror who accepted that the first incident occurred but was left with a reasonable doubt about the second was in no danger of committing the "credibility contest" error that the instructions the majority said should have been repeated were designed to avoid.

100. Second, in assessing whether the conclusion it thought some jurors had possibly reached lacked an "obvious rational basis", the majority of the Court of Appeal was insufficiently mindful of the deference owed to the jury. Credibility determinations are within the exclusive province of the trier of fact.[116] Credibility is a question of fact which in the end must be left to the jury's common sense.[117] As the trial judge correctly told the members of the jury, they were the "sole judges" of "all questions of fact".[118] It was for the jury to decide how much, if any, of any witness's testimony it accepted, and it had "a very wide latitude in its assessment of the evidence",[119] to which assessment, along with the jurors' collective good judgment and common sense, the Court of Appeal should have showed "great deference".[120] An appellate court cannot interfere with a jury's credibility assessments as unreasonable unless they "cannot be supported by any reasonable view of the evidence" or where "judicial fact-finding precludes the conclusion reached by the jury".[121] The appeal court must not usurp the jury's fact-finding function, act as a thirteenth juror, or substitute its own views on matters of credibility for those of the jury. "Trial by jury must not become trial by appellate court on the written record."[122]

101. Third, in effectively reviewing the perceived factual predicate of the jury question for reasonableness and holding that "differential" findings with respect to the two incidents lacked an "obvious rational basis", the Court of Appeal was insufficiently mindful that so long as factual findings by a jury are "supportable on any theory of the evidence consistent with the legal instructions given by the trial judge", they are not unreasonably inconsistent. A jury is entitled to accept or reject some, all or none of any witness's testimony, even where the rational basis for

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[116] *Mezzo v. The Queen*, [1986] 1 S.C.R. 802 at p. 844; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 32.
[117] *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180 [*W.H.*] at paras. 31, 33.
[118] Appellant's Record, Vol. I, pp. 45(21)-46(3).
[119] *W.H.* at para. 32.; *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381 [*Pittiman*] at paras. 6-7.
[120] *W.H.* at paras. 32-33.
[121] *W.H.* at paras. 33-34, citing *R. v. Burke*, [1996] 1 S.C.R. 474 at para. 7; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 10; and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 at para. 39.
[122] *W.H.*, [2013] 2 S.C.R. 180 at para. 34

what the jury has found is "not readily apparent" to the appellate court.[123] As this court has put it in the context of review for inconsistent verdicts, only where, "on *any* realistic view of the evidence", the jury's findings "cannot be reconciled on *any* rational or logical basis", are the findings unreasonable.[124]

102. Finally, the majority of the Court of Appeal was simply wrong that on the evidence there was no rational basis on which a juror might have accepted the evidence of the first incident and still have been left with a reasonable doubt about the second. Addressing the jury, defence counsel *conceded* that the complainant's detailed evidence with respect to the first incident at her grandmother's house in Surrey was "plausible", but forcefully maintained that her account of the second incident on the camping trip to Harrison was "not plausible". In fact, he said, it was "almost impossible" for the second incident to have occurred as described—because the conversation would have been overheard, and because it was unlikely that the respondent could have forced his niece to perform oral sex in the manner she described.

103. Moreover, counsel maintained that it was "odd, very odd" that the complainant made "absolutely no mention whatsoever" of the camping trip incident until two years after her initial disclosure, just before the preliminary inquiry.[125] All of this underscored his earlier cross-examination of the complainant, which had been limited with respect to the first incident but comparatively extensive regarding the second, including as to her failure to disclose the latter until the preliminary inquiry.[126] The respondent gave limited evidence in chief regarding the first incident ("no") but offered a more detailed recollection of the weekend camping trip.[127] A juror acting judicially may well have said, "I'm sure M.R.H. assaulted his niece at her grandmother's. I'm not sure I can be satisfied beyond a reasonable doubt he did on the camping trip. Do I need to be?" Answer: no.

104. Thus it cannot be said that the factual conclusions the majority of the Court of Appeal saw as possibly implicit in the jury question were irreconcilable on *any* logical basis,

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[123] *Pittiman* at paras. 7-8.
[124] *Pittiman* at paras. 7, citing *R. v. McShannock*, 1980 CanLII 2973, 55 C.C.C. (2d) 53 (Ont. C.A.) (emphasis added).
[125] Appellant's Record, Vol. III, p. 317(39)-318(19); p. 324(31-45); pp. 325(6)-326(21).
[126] See references accompanying paras. 30-33 above.
[127] Appellant's Record, Vol. III, pp. 205(27)-206(45).

unsupportable by *any* realistic view of the evidence, or precluded by judicial fact-finding within the proper instructions given to the jury regarding the burden and standard of proof. Again, "as juries are routinely instructed, it is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness".[128] Simply because the trier of fact accepts or rejects a witness's testimony on some points does not mean it must do the same on all or any other points. Here there was a "clear and logical basis in the record" for the trier of fact to accept the complainant's evidence about one act, "yet have a reasonable doubt about another act attested to by the same complainant".[129]

(iii) It was unnecessary for the trial judge to repeat his correct instructions on reasonable doubt as applicable to credibility

105. It is true that the trial judge initially ruminated as to whether there was a "problem" with the jury's potential acceptance of the complainant's evidence about one incident and not the other, and invited submissions about how such a "problem" might be addressed in his response to the question.[130] He also recognized, however, that the first incident was "as plausible as one can be" while the second was "maybe a little less so", and was reminded by Crown counsel that the second incident was disclosed much later than the first incident, on the eve of the preliminary inquiry.[131] In view of these points, he commented that while "there is an element of—that seems apparent to me of rejecting some of the complainant's evidence", that was something "they are well entitled to do", as he had correctly instructed them.[132]

106. Having taken a break and a further opportunity to consider the question, the judge returned with a possible answer he had "cobbled together" for discussion.[133] At this point, he recognized that it was not for him to reargue the defence case or enter the factual fray. He felt he should: "make clear that it is the jury's purview to accept or reject evidence as they feel … they should"; remind the jury that "the whole of the case rests upon the evidence of J.S. and that if they are satisfied that they can distinguish as between the two events, but there you have it"; and "remind the jury of at least the fundamentals of the assessment of credibility". Crown counsel

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[128] *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at para. 65.
[129] *R. v. Abdallah*, 1997 CanLII 1814, 125 C.C.C. (3d) 482 (Ont. C.A.), aff'd [1998] 1 S.C.R. 980. See also *R. v. Best*, 2016 NLCA 10 at paras. 6-7.
[130] Appellant's Record, Vol. I, p. 68(2-24).
[131] Appellant's Record, Vol. I, p. 68(38-13).
[132] Appellant's Record, Vol. I, p. 70(11-19).
[133] Appellant's Record, Vol. I, p. 71(9-10).

characterized the proposed answer as essentially restating the instructions contained in paragraphs 24 and 28 of the written charge (that the rule of reasonable doubt applies to credibility; that a reasonable doubt arising from credibility should result in an acquittal; and that the jury could accept all, part or none of a witness's evidence).[134] The most the judge thought he could do was to "draw this distinction to the attention of the jury" and "let them go about doing the job of finding the facts in this case".[135]

107. When it became clear that the question was focused on how the two incidents in evidence related to the two counts on the indictment ("we would just like to know if we…can convict on the first incident alone for both counts"), the judge opted not to repeat his credibility instructions—though he did draw the jury's attention to a potential difficulty in reconciling their acceptance of her evidence on one incident with having a reasonable doubt about the other, a point which favoured the respondent.[136]

108. In the end, for the reasons set out above, and notwithstanding the judge's initial openness to doing so, it was unnecessary for the judge to repeat his instructions on credibility, reasonable doubt, and the jury's right to accept some, all, or none of anyone's evidence. The judge had fully instructed the jury on all this in his main charge. Any juror who was convinced by the evidence as to the first incident but not the second had reached that view in accordance with correct legal principles. As the judge recognized, absent the need to clarify the relationship between the counts and the incidents, the jury would simply have returned guilty verdicts.[137]

109. And for the judge to go further and signal that a factual conclusion reached (if it was reached) in accordance with correct principles was, in his view, problematic, would have risked encroaching on the exclusive province of the jury.

III. Conclusion

110. This was an uncomplicated three-witness trial at which credibility was the central issue. The jury was instructed in accordance with what all parties agreed were the legal principles governing that central issue and unanimously concluded that the elements of the offences were

[134] Appellant's Record, Vol. I, pp. 72(12) – 73(22); Vol. 3, pp. 100-101.
[135] Appellant's Record, Vol. I, p. 73(23-41).
[136] Appellant's Record, Vol. I, p. 75(4-28).
[137] Appellant's Record, Vol. I, p. 73(3-6)

proven beyond a reasonable doubt. The judge correctly responded to the jury's actual question as clarified. Ordering a new trial because the trial judge did not also repeat correct instructions in response to a jury question about something else was a mistake.

PART IV – SUBMISSIONS ON COSTS

111. The appellant does not seek costs and asks that no costs be awarded against it.

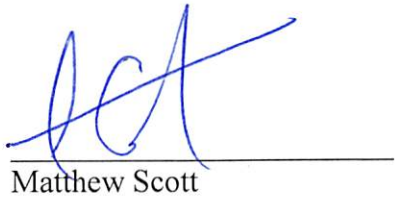
PART V – NATURE OF ORDER SOUGHT

112. The appellant submits that this court should allow the appeal, set aside the order of the Court of Appeal, and restore the respondent's conviction for sexual assault restored and the judicial stay on the count of sexual exploitation.

PART VI – PUBLICATION BAN

113. The publication ban under s. 486.4 of the *Criminal Code* prohibits publication of information that could identify the complainant. The court should not publish the name of the respondent, the complainant, or the complainant's mother, or any other information tending to identify the complainant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Matthew Scott
Counsel for the appellant

April 30, 2019
Vancouver, B.C.

PART VII – TABLE OF AUTHORITIES

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