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)

RESPONDENT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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INDEX

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1) This appeal is ultimately about the consequences of the Crown's choice to prosecute two separate and distinct criminal offences – "two incidents" - in a single count; a practice the late Chief Justice McEachern of the British Columbia Court of Appeal once called "a dangerous practice"[1]. In the language of the first question in issue, the Crown's decision to prosecute the case in that manner meant that the trial judge was required 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."[2]

2) The trial judge did not give that instruction; the jury was told exactly the opposite. The jury was wrongly told the Crown had to prove both incidents. Importantly, the wrong instruction was deeply embedded in the instructions on credibility. More particularly, it was embedded in the ***W.(D.)*** instruction. The first question in issue must be answered in the affirmative, the trial judge erred in 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".

3) The majority of the Court of Appeal correctly concluded that the wrong instruction on the nature of the indictment confused the jury, and the majority correctly concluded that it was that confusion which prompted the jury to ask its questions. Even the dissenting judge acknowledged that the "jury's question could have been directed at clarifying" the inaccurate instruction.[3]

4) The trial judge was concerned that the jury's question suggested it might not be correctly applying his instructions on credibility. The majority of the Court of Appeal shared that concern. The majority went further and concluded that, in

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1 ***R. v. G.L.M.***, 1999 BCCA 467 at para 45

2 Appellant's Record, Vol. I, pg. 87, Order of the Court of Appeal for British Columbia

3 Appellant's Record, Vol. I, pg. 16 – Reasons of Justice Savage at paragraphs 47- 48

light of his concerns, the trial judge ought to have re-instructed the jury on credibility to address the "possibility" that the jury was engaged in a reasoning process that was inconsistent with the instruction on credibility. A re-instruction on credibility was required and the trial judge erred in failing to provide it. The absence of a re-instruction on credibility meant that the trial judge failed to answer the jury's question correctly. The second and fourth questions in issue must also be answered in the affirmative.

5) Finally, the majority of the Court of Appeal correctly concluded that the trial judge failed to "clarify the question from the jury". The majority was rightly concerned that the colloquy between the trial judge and the jury foreperson suggested there might have remained an unanswered "part" to the jury's question. That alone is enough to support a finding that the second question in issue must be answered in the affirmative.

6) The appeal must be dismissed.

B. Statement of Facts

7) With the additions and clarifications which follow, the respondent generally accepts the appellant's statement of facts.

8) The first addition to note relates to paragraph 11 of the appellant's factum, where the appellant notes that, as originally drafted, the indictment alleged six counts against the respondent. The offences alleged in the original indictment included: "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."[4] The appellant goes on in its factum to note that, "[a]s a result of discussions with the judge who presided over a pre-trial conference", and following "discussions between counsel", the "original six-count indictment was replaced with the two-count indictment upon which the respondent was

4 Appellant's factum at para 11

ultimately tried". [5]

9) The respondent points out that, while he was tried on a two-count indictment, the jury had been aware since the beginning of the jury selection process that he had been facing six charges, not just two. When the entire panel of prospective jurors was assembled at the beginning of the jury selection process, and in accordance with the usual procedure, each count on the six-count indictment was read to the accused and he pleaded "not guilty" to each.[6] When the accused was "put into the charge of the jury" five days later, the clerk read out the two charges on the new indictment.[7]

10) The judge did not explain to the jury why the respondent faced only two charges at trial notwithstanding they had heard him enter pleas to six. In her opening address to the jury, Crown counsel simply noted the difference between the number of counts on the two indictments.[8] Defence counsel did not make any reference to the different indictments. There were no discussions between the court and counsel about what instructions the jury ought to have received to prevent them from speculating about the additional counts on the original indictment.

11) The problem arose again in the final instructions. In the "Introduction" to the written version of the final instructions the jury was told this:[9]

> Fifth, I will touch upon the essential elements which the Crown must prove in regards to **each of the four counts <u>in the indictment</u>**. (all emphasis added)

12) In his oral instructions, in contrast, the judge said this:[10]

> Fifth, I am going to touch upon the essential elements which the Crown must prove **in regards to each of the two counts** -- **and I am sorry, I**

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5 Appellant's factum at para 12
6 Appellant's Record, Vol V, pp. 10-13
7 Appellant's Record, Vol V, pg. 24
8 Appellant's Record, Vol V, pg. 37 ll. 37-40.
9 Appellant's Record, Vol. IV, pg. 96
10 Appellant's Record, Vol. I, pg. 44, ll. 40-43

> **have noticed already an error -- <u>in the indictment</u>**. (all emphasis added)

13) Almost immediately after giving that instruction, the judge gave the jury this instruction:[11]

> Now, as you will note, to assist you, I have prepared a written copy of my charge. I am going to read it out to you. You can follow along, but during the reading, I may, as I have already done, discovered some minor errors I did not catch when I checked it over. Therefore, the official charge you must follow is the one I am giving you orally, not the written one. So listen carefully and if anything leaps out at you as an error, then you might want to make a correction on there, but I will try and catch them as I go along.

14) While the judge told the jury how to deal with "minor errors" in the written version of the charge, he failed to tell the jury how to deal with "an error - - in the indictment" of the sort he "noticed" when delivering his oral instructions. In point of fact, the judge never told the jury precisely what error he "noticed ... in the indictment".

15) The relationship between the confusion about the number of counts the respondent faced and the questions in issue will be considered in the argument that follows.

16) The next part of the appellant's statement of facts which needs to be addressed relates to its characterization of the respondent's arguments at trial. At several places in its factum the appellant highlights or emphasizes defence counsel's use of the word "plausible" during his closing address. Defence counsel used the word in a forensic sense when describing the difference between the two alleged incidents.[12] Defence counsel's simple proposition was that the first incident was "plausible" in the sense that the complainant described a routine visit to her

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[11] Appellant's Record, Vol. I, pg. 45, ll. 3-13

[12] The respondent will refer to the "incidents" in the same way as the appellant – the "first incident" related to the events alleged to have occurred at the complainant's grandmother's and the "second incident" refers to the events alleged to have occurred on the camping trip to Harrison Hot Springs.

grandmother's house into which a false allegation of sexual assault could be "plausibly" inserted. For the sake of completeness, defence counsel's key submission on the point was this:

> And actually, with respect to this specific allegation, her story is plausible. That doesn't make it true. It's certainly detailed. A reasonably intelligent person can fabricate a plausible detailed story.[13]

17) The respondent's use of the word "plausible" should not be taken as any sort of concession.

18) The next point that deserves clarification relates to the breakdown of the relationship between the respondent and his sister (the complainant's mother) when the complainant was almost 14. As the appellant points out at para 9 of its factum, the mother testified that she and the respondent had a "large blowout" argument which led to their estrangement. The complainant's mother testified that, during that argument, "things were said about [her] character and [her] husband's character".[14]

19) In his testimony, the respondent explained that there were two underlying issues that blossomed into the fight. In the respondent's words, the first "topic of the fight was [complainant's mother and step-father] feeding their 12-year-old daughter [the complainant] marihuana"; the respondent "questioned their parenting skills".[15] The respondent testified that he was visiting the complainant's family "shortly after" the complainant's 12th birthday and her mother and step-father permitted her to smoke marijuana with them. The respondent "took exception to that", and "there's a heated fight that started"; the respondent was "told to mind [his] own business and not try to parent their children". The respondent testified that he "was threatened by [the complainant's step-father] and left".[16]

20) The second topic of the fight between the respondent and the complainant's

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13 Appellant's Record, Vol V, pg. 324, ll. 31-35
14 Appellant's Record, Vol V, pg. 173, ll. 25-34
15 Appellant's Record, Vol V, pg. 237, ll. 42-43; 238, ll. 18-21
16 Appellant's Record, Vol V, pg. 239, ll. 1-20

parents was money. More particularly, money which the respondent felt he was owed for taking care of the complainant's brother ["JH"] while he was in the respondent's "custody". According to the complainant's mother, when JH was "14, possibly 15" he was no longer living at home, and she said that having JH living with his father "did not work". She testified that they "were working with the Ministry", and arrangements were made for him to live with the respondent, and the respondent's mother under a "temporary arrangement".[17] The respondent testified that after his mother moved out, he "was on disability. [he] had no food, no job, ineligible for EI, welfare, everything, and [he] had a condo [he] had to move out of. [he] had no food; no place to live. So [he] was asking for monies owed to [him]."[18]

21) In addition to being estranged from the respondent, it appears that the complainant's mother was also estranged from her mother. Although the reasons for the estrangement are not clear on the evidence, it is clear that, as of the date of trial, the complainant's mother had not spoken with her mother "in about a year and a half".[19]

22) Very simply, while there was a "large blowout" argument as the appellant describes in its factum, it was not just an argument. It is apparent that the complainant's family was quite dysfunctional in the months and years preceding her disclosure of the allegations at issue in 2013.

23) The next issue raised by the appellant in its statement of facts which needs to be addressed relates to overarching theory about the nature of the relationship between the complainant and the respondent. At paragraph 18 of its factum the appellant relates some of the evidence given by the complainant and her mother:

> 18. Starting when she was very young, four or five, M.R.H. was very "hands-on", "cuddly" and "affectionate" with her. 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

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17 Appellant's Record, Vol V, pg. 188, ll. 36 – 189, ll. 37

18 Appellant's Record, Vol V, pg. 238, 1-8

19 Appellant's Record, Vol V, pg. 177, ll. 27-47; 178, ll. 1-15.

> herself when she was old enough that she did not need help. 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". [footnotes omitted]

24) The complainant's mother testified that when the complainant was "eight or nine" she talked to the respondent about the nature of his relationship with the complainant. The complainant's mother testified that she wanted the respondent to "start teaching [the complainant] her space for her own safety". On the mother's evidence, nothing changed as a result of that talk. She gave this evidence:

> Q Now, when you -- after you, sort of, addressed the issue of -- of his physical contact with [the complainant] with [the respondent], did you notice any -- or did you observe any change in the way he behaved around her?
> A No, and it was often an ongoing concern. You know, I was often, you know they would be laying on the couch cuddling, and I'm like, "You know, that's not really appropriate anymore." It was something that my current partner used to bring to me on a pretty regular basis --[20]

25) In addition to evidence about the "cuddling" etc. between the complainant and the respondent, the Crown also elicited a body of evidence in which the complainant suggested that she received birthday and Christmas gifts from the respondent that were better, and more valuable, than the ones her siblings received.[21] The respondent denied that suggestion and explained that they all received "pretty equal gifts."[22]

26) In his closing address, defence counsel collectively referred to these bodies of evidence with the suggestion that the complainant and her mother were "trying to portray [him] as the creepy uncle that can't keep his hands to himself".[23] In her closing address, Crown counsel reminded the jury of both the nature of the

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[20] Appellant's Record, Vol V, pg. 171, ll. 3-13.
[21] Appellant's Record, Vol V, pp. 43-44
[22] Appellant's Record, Vol V, pp. 236-237
[23] Appellant's Record, Vol V, pg. 319, ll. 26-47; 320, ll. 1-16

evidence about the relationship – the "touchy-feely" behaviour, the "cuddling" – and she reminded the jury that the respondent "didn't change his behaviour" when confronted by the complainant's mother.[24]

27) The first point to note about these bodies of evidence is that there were no discussions about the admissibility of the evidence. It has to be kept in mind that throughout the entire trial the Crown was very clear in its position that it was alleging only the two sexual acts. With that in mind, it is obvious that the "creepy uncle" evidence had the potential to be treated by the jury as character evidence that would support improper propensity-based reasoning.

28) Assuming, without conceding, that the "creepy uncle" evidence was admissible on some basis, the jury was <u>not</u> given any limiting instructions on its use. This point will be considered in greater detail below.

29) The next factual issue that needs to be addressed is the complainant's prior consistent statements. At paragraph 28 of its factum the Crown refers to two of the occasions on which the complainant made pre-trial disclosure of the allegations at issue – when the complainant "told a friend", and when she "told her mother". The evidence revealed that the complainant actually made at least eight, and possibly nine pre-trial disclosures.

30) The evidence about the complainant's pre-trial disclosures of her allegations included:

a) "The first person [the complainant] ever told about it was [her] best friend",[25]

b) In November 2012, the complainant told her aunt,[26]

c) In early March 2013, the complainant "disclosed to [her] mom",[27]

d) On March 27, 2013, the complainant provided a statement to Cst. Olson,[28]

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24 Appellant's Record, Vol V, pg. 333, ll. 1-21
25 Appellant's Record, Vol V, pg. 70
26 Appellant's Record, Vol V, pg. 70
27 Appellant's Record, Vol V, pg. 70

e) On August 28, 2013, the complainant provided a second statement to Cst. Olson,[29]

f) Although the precise date on which it happened is not clear, the complainant disclosed allegations referred to as the "second incident" to Crown counsel shortly before the preliminary inquiry,[30]

g) On March 4, 2015, the complainant gave a statement to Cst. Krewenchuk,[31] and

h) The complainant testified at the preliminary inquiry in mid-March 2015.

31) Additionally, the complainant testified that she spoke with a "counsellor" both before she disclosed to her mother, and again after she disclosed to the police. It is not entirely clear whether she disclosed any allegations to the counsellor.

32) As with the character evidence noted above, there were no discussions about the admissibility of the prior statements. Assuming, again without conceding, that the prior statements were admissible on some basis, the jury was not cautioned about the limited use that could be made of prior consistent statements. This point will also be considered in greater detail below.

33) The next point in the appellant's statement of facts that needs to be addressed arises from this passage:

> 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. [footnote at this point refers to *R. v. M.P.S.,* 2017 BCCA 231 at para. 6.] (emphasis added)

34) Leaving aside the legal issues and arguments raised in this passage of the

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28 Appellant's Record, Vol V, pg. 75

29 Appellant's Record, Vol V, pg. 75

30 Appellant's Record, Vol V, pg. 82

31 Appellant's Record, Vol V, pp. 76, 82

appellant's factum, the respondent respectfully submits that the position was not "premised on the complainant's failure to distance herself effectively from the respondent". Instead, "the defence position" was related to the complainant's credibility, and it was limited to demonstrating that, contrary to her evidence, the complainant did not distance herself as claimed.

35) Defence counsel dealt with the issue in his closing address this way:

> As part of her evidence [the complainant] tried to suggest that after June of 2009, because of the way that she was treated by her uncle, she tried to distance herself from him, basically [indiscernible/poor audio] if he contacted her, he would reply -- she would reply, but she would not initiate the contact.
>
> And with respect to that, [the respondent] provided Facebook chats that [the complainant] adopted as true. I'm not going to go through it with you. I think maybe you've probably had enough of that, so I'm not going to go through that with you, but she was trying -- she said she was trying to distance herself from her uncle, but if you review those chats, if you take a look at them, you will see it's quite the opposite.[32]
>
> • • •
>
> This isn't someone that is just passively accepting contact with him. This is someone that was angry that he stopped contact with her, at least deleted her from Facebook and wanted him back in her life. So, I'm going to suggest that any suggestion that [the complainant] began attempting to distance herself after June of 2009 is another misdirection.[33]

36) The simple point is that it would be wrong to conclude that "that the defence position was premised on the complainant's failure to distance herself effectively from the respondent" as suggested by the appellant at paragraph 47 of its factum. Defence counsel argued only that the complainant's claims of distancing were not borne out by the evidence.

37) The final point arising from the appellant's statement of facts that needs to be addressed is the appellant's characterization of this case as "an uncomplicated three-witness credibility case" where "[c]redibility was the central issue at trial"[34].

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32 Appellant's Record, Vol V, pg. 321, ll. 21-36

33 Appellant's Record, Vol V, pg. 322, ll. 6-13

34 Appellant's factum at paragraphs 3 and 8

While those broad statements might be accurate, it must be noted that Crown counsel at trial characterized the "central issue" of credibility in a very particular way for the jury. She said this:

> His Lordship is going to give you a direction in respect of credibility and how to weigh it. He's going to teach you or take you through some of the factors to be considered in terms of credibility. I think my friend mentioned credibility **in a case such as this where you essentially have two competing versions you're going to have to look at** those versions and the people who gave that evidence and decide what you believe and what you don't, what's been proven and what hasn't. (emphasis added)[35]

38) Unlike Crown counsel, defence counsel did <u>not</u> use the language of "competing versions" in his submissions on the issue of credibility. Instead, he focused on credibility in the context of the Crown's burden of proof. He said this:

> Now, as I informed you during my opening submissions this is a credibility based case. Crown's entire case rests on [the complainant's] credibility. ...[36]

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35 Appellant's Record, Vol V, pg. 328, ll. 34-44

36 Appellant's Record, Vol V, pg. 313, ll. 2-5

PART II – QUESTIONS IN ISSUE

39) Justice Savage dissented on four questions of law, repeated here for ease of reference:[37]

Did the trial judge err in law when instructing the jury by:

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;

2. Failing to clarify the question from the jury and permit counsel an opportunity to make further submissions;

3. Failing to correctly answer the question from the jury; and

4. Failing to re-instruct the jury on the issue of credibility?

40) In its factum, the appellant addresses the four questions of law within two separate "groups": the first group addresses questions 1, 2, and 3, while the fourth question is considered separately.

41) The respondent prefers to address the four questions on which Justice Savage dissented in slightly different groups than the appellant. The respondent will address questions 1,3, and 4 in one group, and will address question 2 separately.

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[37] Appellant's Record, Vol. I, pp. 87-88

PART III – ARGUMENT

Questions 1, 3 and 4

1. Did the trial judge err in law by 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?

3. Did the trial judge err in law in failing to correctly answer the question from the jury?

4. Did the trial judge err in law in failing to reinstruct the jury on the issue of credibility?

Overview

42) The respondent's position is that the trial judge did err in law by "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". The error was a significant error in the main charge; it was bound up in the ***W.(D.)*** instructions; and the error was the source of the jury's questions. The fact that the error was related to both the ***W.(D.)*** instructions, and the jury's question, required the trial judge to include a complete, and correct recharge on the issue of credibility in his answer to the question. His failure to give that recharge was reversible error.

Analysis

A. The legal error flows from the nature of the prosecution:

43) The question at issue arises only because of the way the Crown chose to prosecute this case. Notwithstanding the fact that each of the first and second incidents involved allegations of stand-alone criminal offences, the Crown chose to prosecute them as if they were a "single transaction" within the meaning of s.581(1) of the *Criminal Code*, RSC 1985, c C-46. That section requires that

"[e]ach count in an indictment shall in general apply to a single transaction". So far as the respondent has been able to determine, this Court has never addressed the correctness of the practice which has developed in British Columbia, and elsewhere, to prosecute two or more, clearly distinct, stand-alone offences as if they were a "single transaction".

44) In British Columbia, the practice finds support in the decision of Justice Ryan in ***R. v. G.L.M.***, 1999 BCCA 467. In that case, the accused was prosecuted and convicted on an Indictment alleging a single count of sexual assault which the evidence suggested occurred as four separate incidents over four years. There were two questions at issue on the appeal in ***G.L.M.*** The first was whether it was permissible to prosecute several distinctly separate criminal offences as a single transaction. The second question dealt with jury unanimity. At issue was whether the jury should have been instructed that, at a minimum, to convict the accused, all jurors must rely on proof of the same separate offence, or could individual jurors rely on proof of different separate offences.

45) In her reasons in ***G.L.M.,*** Justice Ryan held that the four separate incidents could be treated as a "single transaction", and she held it was unnecessary "to instruct the jury that they must be unanimous in their findings as to which incident or incidents had occurred".

46) In finding that s.581(1) allows the Crown to prosecute separate offences as a single transaction, Justice Ryan relied primarily on the decision of Justice Kelly in his reasons on behalf of the Ontario Court of Appeal in ***R. v. Hulan***, 1969 CanLII 306. In that case, Justice Kelly stated that the word ""[t]ransaction" as used in s. 492 [now s.581(1)] is not synonymous with "incident" or "occurrence", notwithstanding the fact that each of the incidents might, if the Crown so chose, have been the subject of a separate count." Justice Kelly went on to state he was "of the opinion that several acts of intercourse, involving the same parties, at successive times are capable of being treated as one transaction".

47) As far as the respondent can determine, the only time this Court has come close to considering the correctness of ***Hulan*** is in ***R. v. Whitter***, [1981] 2 SCR 606. In

his reasons for the Court in that case Justice McIntyre expressly declined to state "any view on" ***Hulan*** (and four other cases offered in support of a particular argument advanced by the parties in ***Whitter***). In other words, the correctness of the ruling in ***Hulan*** is still an open question.

48) Returning to ***G.L.M.***, Justice Ryan's conclusion that the jury need not be unanimous as to the guilt of an accused on any particular separate incident was based largely on the decision of Chief Justice Dickson in ***R. v. Thatcher***, [1987] 1 S.C.R. 652. In ***Thatcher,*** the accused was prosecuted for a single count of murder. The Crown offered alternate theories of guilt; one theory alleged that the accused was personally and directly involved as a principal in the physical act causing the victim's death, while the other theory postulated that the accused was guilty as a party by operation of s.21 of the ***Criminal Code***. At issue was whether the jury had to be unanimous on a particular theory of guilt.

49) Chief Justice Dickson rejected the need for unanimity on a particular theory on the basis that "s. 21 has been designed to alleviate the necessity for the Crown choosing between two different forms of participation in a criminal offence ... both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability".[38] Justice Ryan applied Chief Justice Dickson's conclusions developed in the context of party liability in ***Thatcher*** to cases involving multiple incidents alleged in a single count. She said this:

> [24] **In my view the *Thatcher* reasoning logically applies to continuing offences such as the offence in the case at bar**. **The principle that the jury need only be unanimous as to the verdict reached applies equally to cases where the indictment charges an offence that encompasses a number of discrete or separate incidents over a period of time**. If jurors are not required to be unanimous in their findings of fact or the evidentiary routes they follow in reaching a collective verdict, it follows that where the evidence comprises a number of incidents and proof of any one incident would be a sufficient finding of guilt, there is no legal requirement that individual jurors rely on the same incident in reaching a verdict of guilty. **The unanimity requirement applies only to the essential ingredients of the offence, not the facts which establish**

38 ***Thatcher*** at para 72

> **them. While the judgment in *Thatcher* dealt with the commission of one act, the unlawful killing of the accused's wife, the decision is grounded in principles that are not confined in their application to situations involving s. 21 or alternative theories of legal culpability.** The decision in *Thatcher* is a particular application of the principle that while jury unanimity is required on the verdict, the jurors may follow divergent paths involving different views of the facts that make up the offence in arriving at that verdict. (all emphasis added)

50) The respondent submits that the "***Thatcher*** reasoning" was developed in the context of an analysis of principles of party liability, and its application is limited to situations where the question is how the accused committed the offence, rather than whether the accused committed the offence. In other words, the "***Thatcher*** reasoning" should not apply where, as in the instant case, the Crown prosecutes multiple discrete incidents as a single transaction. Again, this Court has never considered this point.

51) In his dissenting judgment in ***G.L.M.***, Chief Justice McEachern made a point of noting that "[o]nly some judges and lawyers could possibly describe such [separate] incidents as "a single transaction", and he noted that "laying a single count in a case such this ... is obviously a dangerous practice."[39] He was "not prepared to agree that [***Hulan***] was correctly decided" - although he did not base his dissent on that issue.[40]

52) Instead, Chief Justice McEachern dissented on the question of jury unanimity. He was of the view that "it was essential for the jury to have been instructed that a verdict of guilty required at least that all the jurors be agreed on which one or more of the incidents was committed by the accused". He held that the prospect that the verdict of guilt was "reached with only three jurors being satisfied to the criminal law standard on each of the four incidents" was "repugnant to the concept of trial by jury."[41]

53) In her reasons concurring with Justice Ryan in the result in ***G.L.M.***, Justice

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39 ***G.L.M***. at para 45
40 ***G.L.M***. at para 49
41 ***G.L.M***. at para 47

Southin made a point of noting that she "appreciate[d] the logical force of the reasons of ... the Chief Justice". While she saw the logical force of Chief Justice McEachern's reasons, she nevertheless concurred with Justice Ryan because she was "of the opinion that the analysis in the reasons of Madam Justice Ryan is compelled by authority."[42] Justice Southin went on to conclude her brief reasons with this observation:

> [41] Only the Supreme Court of Canada can require that, in circumstances such as these, a jury be charged as the Chief Justice says the jury in this case ought to have been charged.

54) Notwithstanding the dissent on a question of law in ***G.L.M.***, there was no further appeal to this Court.

55) The relationship between the single transaction rule and jury unanimity arose again in ***R. v. Cadman***, 2017 BCCA 204. Like the instant case, ***Cadman*** involved a prosecution of multiple, distinct offences in a single count as a single transaction. In accordance with the governing practice in British Columbia, the appellant in ***Cadman*** asked the Chief Justice to order that the appeal be heard by a five-justice division of the court to have the court reconsider the correctness of ***G.L.M.*** The Chief Justice refused that request and the division which ultimately heard the appeal dismissed the ground of appeal in which it was argued that ***G.L.M.*** was wrongly decided.[43] Mr. Cadman's subsequent application for leave to appeal to this Court was dismissed.[44]

56) Although the correctness of the decisions in ***Hulan***, ***G.L.M***. and ***Cadman*** was not addressed in the courts below, the respondent respectfully submits that it would be appropriate for this Court to put an end to the "dangerous practice" of prosecuting multiple discrete offences in a single count. It would be appropriate for the Court to hold that, where, as in the instant case, the Crown is able to particularize distinct incidents, it must prosecute those distinct incidents as separate charges. Alternatively, it would be appropriate for the Court to declare

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42 ***G.L.M***. at para 39-40

43 Reasons for Judgment of Justice Kirkpatrick at para 22

44 ***Robert Edwin Cadman v. Her Majesty the Queen***, 2017 CanLII 80425

that juries must be instructed as suggested by Chief Justice McEachern in ***G.L.M.*** More particularly, if the Crown is permitted to prosecute multiple distinct offences in a single count, it is "essential for the jury to [be] instructed that a verdict of guilty require[s] at least that all the jurors be agreed on which one or more of the incidents was committed by the accused".[45]

57) Returning to the instant case, the decision of the British Columbia Court of Appeal in ***G.L.M.*** and ***Cadman*** permitted the Crown to engage in the dangerous practice of prosecuting multiple discrete offences in a single count. On the law in British Columbia as it stood when the respondent was tried, the jury was not required to be unanimous in concluding that the Crown had proved either of the two "incidents" beyond a reasonable doubt. Instead, on the law in British Columbia as it stood when the respondent was tried, the Crown was only required to prove the elements of the offence, and jurors could individually find the elements in either of the two incidents. But that is not how the jury was instructed. The jury received exactly the opposite instruction.

58) In his ***W.(D.)*** instruction, the trial judge gave the jury these instructions:

> 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 **at the condo owned by her grandmother and at Harrison -- sorry, and at the Harrison camping trip,** 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 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. (emphasis added)[46]

59) On the law as is stands in British Columbia, these instructions are wrong; they mis-state the burden on the Crown. These instructions are, in short, an error of law. Accordingly, the first question in issue on this appeal must be answered in the affirmative; the trial judge erred in law "by failing to adequately explain that the indictment charged two offences which covered a period of time during which

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[45] ***G.L.M***. at para 39-40

[46] Appellant's Record, Vol. I, pg. 51, ll. 19-25

two separate incidents were alleged to have occurred".

60) This is an appropriate time to recall the confusing information the jury was provided about the number of counts the respondent faced. It will be recalled that the accused was arraigned on six counts at the commencement of the jury selection process; he was then arraigned again on two counts when he was "put into the charge of the jury". The written instructions suggested he faced four counts, while the oral instructions referred to only two counts. This situation undoubtedly had the potential to confuse the jury, and, in the language of the question in issue, this situation provides another example of how the trial judge erred "by 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".

61) Before moving on, there are two recurring themes in the appellant's factum that can be addressed at this point. The first is the appellant's observation that the main charge to the jury was "a consensus jury charge".[47] The second recurring theme of interest is the repeated suggestion that instructions on credibility in the main charge were "correct".[48] With the error of law identified above in mind, it is apparent that, to the extent the charge was the product of a consensus, it was the product of a consensus which resulted in an error in the instructions on credibility.

62) The identified error in the instructions on credibility is not the only obvious error in the charge. There are at least two other significant errors. The first of which is the failure of the trial judge to provide any instructions on the limited use the jury could make of the character evidence tendered by the Crown.

63) It will be recalled that the complainant and her mother testified about the way the respondent interreacted with the complainant on occasions other than those involving the two specific incidents the Crown prosecuted. The conduct the complainant and her mother referred to included: the respondent being "touchy

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47 Appellant's factum at para 3, and paragraphs 48-52

48 Appellant's factum at paragraphs 3, 80, 81, 91, 97, and 105

feely", the respondent "cuddling" with the complainant inappropriately, and the respondent failing to respect "boundaries"- even after being requested to do so by the complainant's mother. As noted, defence counsel suggested this body of evidence was aimed at "trying to portray [him] as the creepy uncle that can't keep his hands to himself".

64) This body of evidence is undoubtedly the sort of discreditable conduct or bad character evidence that can result in prejudice to an accused in the absence of a limiting instruction. Justice Martin described the twin dangers associated with evidence of bad character in her dissenting reasons (but not on this point) in ***R. v. Calnen***, 2019 SCC 6. They are, "moral prejudice", where guilt is wrongly inferred from general disposition or propensity, and "reasoning prejudice which distracts the members of the jury from their proper focus on the charge".[49]

65) For present purposes, Justice Martin's most important observation in ***Calnen*** is that "the dangers of propensity reasoning can surface in any case in which the Crown seeks to introduce discreditable conduct on the part of the accused that may compromise the jury's ability to conduct a dispassionate analysis" (emphasis added)[50]. Justice Martin's comments echo Justice Moldaver's reminder in ***R. v. Hart***, [2014] 2 SCR 544, (at para 74) that, "[a]s this Court held in ***Handy***, the "poisonous potential" of bad character evidence cannot be doubted (para. 138)".

66) Once the bad character evidence was admitted in the instant case, and assuming it was properly admitted, the trial judge was obliged to provide a limiting instruction. As Justice Cory stated in ***R. v. G. (S.G.)***, [1997] 2 SCR 716 (at para 65):

> ... once the bad character evidence was admitted, it "cannot be used to determine guilt simply on the basis that the accused is the type of person to commit the crime: ***B. (F.F.)***, *supra*. The trial judge has a duty to charge the jury in this regard, and to warn them against the improper use of the evidence." (emphasis added).

67) There is no suggestion in the instant case that the failure of defence counsel to

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49 ***Calnen*** at paragraphs 175-176.

50 ***Calnen*** at para 177

seek a limiting instruction was any sort of tactical decision. The omission of the necessary limiting instruction was legal error – or more accurately, another legal error in the charge.

68) The next significant legal error in the charge relates to the complainant's prior consistent statements. More particularly, the trial judge erred in failing to provide a limiting instruction on the use that could be made of the complainant's prior consistent statements.

69) As noted earlier, the complainant testified that she told at least eight and perhaps nine people about the allegations before trial. The jury was also well aware that she testified at the preliminary inquiry. As Justice Abella noted in her reasons for the majority in ***R. v. Ellard***, [2009] 2 SCR 19 (at para 42), "because there is a danger that the repetition of prior consistent statements may bolster a witness's reliability, a limiting instruction will almost always be required where such statements are admitted". None of the exceptions to that general rule as described by Justice Abella (in para 43 of ***Ellard***) apply in the instant case. Moreover, as Justice Prowse noted in her reasons for the British Columbia Court of Appeal in ***R. v. R.I.L.***, 2005 BCCA 257 (at para 40):

> ... there is an obligation on trial judges dealing with evidence of prior complaints, even where that evidence is devoid of detail, to provide a caution to the jury with respect to its use (emphasis added).

70) Very simply, the failure of the trial judge to provide a limiting instruction on the prior consistent statements was an error of law.

71) In summary to this point, the main charge to the jury included a clear legal error in the instructions on credibility, or more precisely, within the ***W.(D.)*** instruction. In the language of the question in issue, the trial judge erred in law "by 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". The trial judge misdirected the jury on the Crown's burden of proof.

72) Moreover, as has been demonstrated, the charge included at least two other significant errors of law; the failure to provide a limiting instruction on the use of

character evidence and the failure to provide a limiting instruction on the use of the complainant's prior consistent statements.

73) In short, while it was a "consensus charge" as the appellant notes in its factum, it was a consensus charge that included significant legal error. That is true even if one looks at only the error identified in the question in issue.

B. The impact of the legal error:

74) Having answered the first question in issue in the affirmative, the next logical step is to consider the impact of that error on the trial. The majority of the Court of Appeal concluded that this error was the source of the jury's confusion, and it is what prompted it to ask the question at issue. Justice Garson said this: [51]

> [61] The only instruction the judge gave the jury on the issue of the two offences and two incidents was his brief statement that the jury had to be satisfied that the offence occurred "at a time and place referenced in the indictment or either of those times and places" (emphasis added). He did not go on to explain this statement. From other parts of the charge, the jury may have understood that it had to be satisfied that both incidents occurred in order to convict of either offence. In particular, I have emphasized the use of the conjunctive in the third paragraph (above) and the words "of each offence on each occasion" in the fourth paragraph. **From the question the jury later asked, it is evident that the jurors were indeed confused by this aspect of the charge**. (underlining in original, bold emphasis added)

75) Even the dissenting judge had to acknowledge that the "the jury's question **likely arose from the way the charges were laid**", and the "jury's question **could have been** directed at clarifying what the judge meant by proving "each offence on each occasion" (emphasis added).[52]

76) The respondent submits that the majority was correct; the failure of the judge to properly instruct the jury on the nature of the indictment and the burden of proof on the Crown is precisely what confused the jury and prompted its question.

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[51] Appellant's Record, Vol. I, pg. 21 – Reasons of Justice Garson at para 61 and see also para 64

[52] Appellant's Record, Vol. I, pg. 16 – Reasons of Justice Savage at paragraphs 47- 48

77) While it is plain that the identified legal error prompted the jury's question, understanding the true impact of the error requires an analysis of not just the source of the question, but also what the question revealed about the jury's understanding of both the law, and its task. As Chief Justice Lamer put it in reasons for the majority in ***R. v. Pétel***, [1994] 1 SCR 3 (at 14 – 15), "[t]he question will generally relate to an important point in the jury's reasoning...".

78) It is obvious that the trial judge in the instant case was concerned that the question raised the prospect that the jury was not considering the entire body of evidence in reaching its verdict. The best indication of the trial judge's concerns is found in the draft response he had "cobbled ... together" before he began discussing the question with counsel.[53] That draft response, which was not before the Court of Appeal, included the following proposed instructions:[54]

> You needn't find both incidents occurred to convict Mr. Humphrey; only one of them.
>
> You are the triers of fact and it is open to you to accept some or all of a witness's testimony.
>
> However, the evidence of a witness, in its entirety is used to assess the credibility and the reliability of that witness's testimony
>
> **The question you've posed causes me some concern as it appears to me that you are rejecting the detailed evidence of J.S. regarding the camping incident, or you are at least left with reasonable doubt as to its happening, while accepting, without reservation, J.S.'s her evidence concerning the incident at the condo.** Implicit in that is your rejection of the evidence of the accused.
>
> I, again, make clear it is your view of the evidence which prevails. In your discussions in the jury room you may have determined there is good reason for doing so. The only distinction readily apparent relating to the two incidents is the fact she did not report the camping incident until just before the preliminary.
>
> Other than that, there is no evidence other than that of J.S, which distinguishes one incident from the other. (emphasis added)

79) The judge's draft response reveals that, having heard all the testimony, the judge was obviously concerned that the jury might have <u>failed</u> to appreciate that "the

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53 Appellant's Record, Vol. I, pg. 71, ll. 9-15

54 Respondent's Record at pg. 1-2

evidence of a witness, in its entirety is used to assess the credibility and the reliability of that witness's testimony". The judge clearly remained of that view even after the foreperson clarified the narrower scope of question.

80) Following his colloquy with the foreperson the judge chose not deliver the draft response. Instead, after the question was clarified, the judge said this:[55]

> 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 a reasonable doubt -- or there is a reasonable doubt raised in your mind on the second.

81) Leaving aside for the moment the lack of precision and the lack of clarity in this instruction, it undoubtedly reflects the judge's continuing concern that the jury misunderstood the instructions on credibility even after the question was simplified.

82) Before moving on, it is worth taking a moment to consider whether there was actually a difference between the longer version of the question and the simplified version that was the product of discussion between the judge and the foreperson. The two versions were these:

a) If we believe the 1st incident, can we convict on this alone? Find him not guilty on the 2nd inc[ident].

b) If we believe the 1st incident, can we convict on this alone?

83) On either version of the question, the result would be the same, the jury would "convict" on "the 1st incident ... alone". A notional finding of "not guilty on the 2nd incid[ent]" is implicit in the use of the word "alone" in the first part of the question.

84) On either version of the question, the judge's concern that the jury misunderstood the instructions on credibility was valid. The question reflects at least two ways in which the jury might have misunderstood both the instructions

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55 Appellant's Record, Vol. I, pg. 75, ll. 17-28

on credibility, and its ultimate task. First, as the trial judge thought might be the case, the jury might have failed to appreciate that the assessment of credibility necessarily entails considering the evidence of a witness "in its entirety" (to use the language of the draft answer prepared by the judge). The second way the question reveals that the jury might have misunderstood its task is more pernicious. The question suggested that the jury might simply stop its consideration of the evidence at a finding that the first incident supported a conviction, without going on to consider whether the balance of the evidence undermined that conclusion.

85) As the trial judge recognized, either version of the question raised the concern that the jury did not understand the law. The majority of the Court of Appeal (correctly) came to exactly the same conclusion. Justice Garson said this:[56]

> [56] Third, the jury question raised the issue of whether the jury could reject the complainant's evidence about one of the incidents, but accept her evidence about the other. **The possibility that the jury was rejecting a significant part of the complainant's evidence should have led the judge to provide further instructions on credibility**.
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> • • •
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> [71] It was **apparent from the exchange with the foreperson that the jury or some members of it had accepted the complainant's evidence about one incident but not the other**. The jury was, of course, entitled to accept all, part, or none of her testimony. However, there was no obvious rational basis for making differential findings regarding her credibility with respect to each incident, and no other evidence that either incident occurred. **In these circumstances, the judge was rightly concerned that the jury might not have been considering the implications of an adverse credibility finding on the second incident in its assessment of the first**. It was therefore incumbent on the judge to repeat or amplify his instructions on credibility. (emphasis added)

86) To summarize, the trial judge's error in failing to properly instruct the jury on the nature of the indictment prompted the jury's question. That question revealed the true impact of the error – there was a legitimate concern that the jury

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56 Appellant's Record, Vol. I, pg. 25 – Reasons of Justice Garson at para 75

misunderstood the instructions on credibility, and that it misunderstood how it was to assess the evidence.

87) The appellant criticizes the majority of the Court of Appeal for concluding that a recharge on credibility was necessary. As the respondent understands the appellant's argument on this point, the appellant suggests that in paragraphs 56 and 71 of its reasons the majority wrongly engaged in an assessment of the reasonableness of a conviction based on an acceptance of the first incident but not the second. In support of its argument, the appellant relies on a number of cases which address issues such as the role of the trier of fact in assessing credibility, and the limits of appellate review of a jury verdict for reasonableness.[57]

88) The respondent takes no issue with any of the cases the appellant relies on to make its argument on this point. The respondent does submit, however, that the Crown's reliance on those cases is misplaced.

89) In paragraphs 56 and 71 of its ruling the majority of the Court of Appeal did nothing more than recognize and articulate its concern that, if the jury did "[accept] the complainant's evidence about one incident but not the other", the evidence was such that there was a real risk that, in doing so, "the jury might not have been considering the implications of an adverse credibility finding on the second incident in its assessment of the first".

90) To borrow from the language of one of the cases the appellant relies on, the majority simply recognized that, "in light of accumulated judicial experience,"[58] the paucity of confirmatory evidence and the fact that credibility was so important meant that there was a possibility that the jury was taking a wrong path in its analysis. The mere existence of a possibility that the jury was taking a wrong path necessitated a response from the trial judge. Coming to that conclusion is the result of a principled analysis of the situation that faced the trial judge when the jury asked its question; it is not an after-the-fact analysis of the

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57 Appellant's factum at paragraphs 95 through 104.

58 ***R. v. W.H.***, [2013] 2 SCR 180 at para 29

reasonableness of the verdict.

91) This is an appropriate point to note that there is more than a hint of irony in the fact that the appellant relies on cases relating to the assessment of the reasonableness of a jury verdict. It is ironic because the Crown's choice to employ the "dangerous practice" of prosecuting multiple incidents in a single count means that, even had he wanted to, the respondent could not have challenged the reasonableness of the verdict. Even if an appellate court concluded that there was simply no evidence to support a conviction on the second incident, the court could not intervene to set aside the conviction if it also concluded there was some evidence to support a conviction for the first incident. The appellate court would be forced to come to that conclusion even though there is no way of knowing which incident the jury – or individual members of it - relied on to convict. That is precisely the sort of result that Chief Justice McEachern was concerned with in his dissenting reasons in ***G.L.M.*** (supra).

C. The correct response to the jury's question:

92) With the underlying error and its impact identified, the next task is to determine the correct response. The overarching principle that guides trial judges when answering questions from a jury was described this way by Justice Cory in his reasons for the majority ***R. v. S. (W.D.)***, [1994] 3 SCR 521 (at 530):

> There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. **No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice**. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided. (all emphasis added)

93) In the instant case, the "issue[s] presented by the question" were the jury's understanding of the nature of the indictment, and the jury's understanding of its task when assessing credibility. A comprehensive answer would have addressed

both issues, and it would have related the one to the other.

94) A "correct and comprehensive" answer to a jury's question will recognize that answering a jury's question is necessarily a contextual exercise. It is not always possible to reduce an answer to a simple response that presents nothing more than a binary choice for the jury to make. As Justice Cory noted in his reason for the Court in ***R. v. Hebert***, [1996] 2 SCR 272 at para 20, "the trial judge will often have to repeat aspects of the main charge in order to provide the context for the response and to remind the jury of the initial instructions that had been given earlier."

95) With the obligation on the trial judge to provide a contextualized, "correct and comprehensive answer" in mind, the fourth question in issue in this case must be answered in the affirmative. The trial judge erred by "[f]ailing to reinstruct the jury on the issue of credibility". The respondent respectfully submits that answer the trial judge provided cannot be seen as either correct or comprehensive, nor was it properly contextualized.

96) The answer proposed by the majority in the Court of Appeal, in contrast, would have been correct and comprehensive, and would have framed the answer in the proper context:

> [72] As Wood J.A. explained in *C.W.H.*, *supra*, at 154, the judge must instruct the jury that the rule with respect to reasonable doubt applies to the issue of credibility. Here, **the judge ought to have reminded the jury that any reasonable doubt must be resolved in favour of the accused; that even if it did not accept all of the accused's testimony, it could still accept some of it; that it should not see its task as deciding between two competing versions of events; that it could not decide the case simply by choosing between the evidence of the complainant and that of the accused; and 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: *R. v. J.H.S.*, 2008 SCC 30 (CanLII) at para. 15.
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> [76] In summary the judge erred in his instructions in the following ways:

• • •

> • The judge **should have clarified that the two counts in the indictment did not correspond to the two incidents** but instead to the two offences based on the two incidents, because it was obvious that the foreperson remained confused about it.

(emphasis added)

97) The answer proposed by the majority would have addressed all issues raised by the jury's question, and it would have eliminated the possibility of the jury following the wrong analytical path.

98) This is an appropriate time to recall that, in her closing address, Crown counsel put the case to the jury as a case "where you essentially have two competing versions."[59] The jury was never told that the Crown's approach was flawed. The majority's answer would have dealt with that problem.

99) For all of these reasons, the respondent submits that the first and fourth question in issue must be answered in the affirmative.

100) Once it is accepted that the judge erred in his original charge by 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", and once it is accepted he ought to have re-instructed the jury on credibility, it is inevitable that the Court will conclude that the judge "failed to correctly answer the question from the jury". In other words, the third question in issue must also be answered in the affirmative. Nothing more needs to be said on this question.

Question 2

2. Did the trial judge err in failing to clarify the question from the jury?

101) The starting point for the analysis of this issue is the obvious, and unassailable proposition, that "it is incumbent on a trial judge to clarify a question that is

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59 Appellant's Record, Vol V, pg. 328, ll. 34-44

unclear or ambiguous so the answer properly addresses the precise nature of the jury's concerns or confusion"[60]. In the instant case, the trial judge very clearly failed to clarify the question.

102) In the instant case, the failure of the trial judge to properly clarify the question is best demonstrated in this passage from the analysis of the majority in the Court of Appeal:

> [68] The colloquy that followed the judge's initial answer to the question reveals that the foreperson at least remained confused. After hearing the answer, the foreperson again queried (at the passage marked C), "we would like to know if both – so they're – they're separate charges for each incident?" The judge answered, "No." The foreperson then repeated the question again, then interrupted the judge as he was giving his answer. Later in the colloquy (at the passage marked D), **counsel for the appellant restated his understanding of the question, to which the foreperson responded, "That was in part our query" (at the passage marked E). The foreperson did not say what the other part was. Neither the judge nor counsel sought clarification**. (emphasis added)

103) It will forever remain a mystery what the "other part" of the jury's question was. The trial judge had an obligation to "clarify the question" and find out exactly what the "other part" of the question entailed. The trial judge's failure to meet that obligation necessarily means that the second question in issue must also be answered in the affirmative; the judge "erred in failing to clarify the question from the jury".

104) There is one further related point flowing from the judge's colloquy with the foreperson that deserves mention. After the judge delivered his answer to the (simplified) question, the following exchange occurred:

> JURY FOREPERSON: May I ask another question?
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> THE COURT: Well, as long as it is a question on behalf of the jury, yes.[61]

105) The respondent submits that the trial judge was wrong to suggest that there were any limitations on the questions that could be asked. The suggestion that

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60 ***R. v. Penner***, 2019 BCCA 76 at para 40

61 Appellant's Record, Vol. I, pp. 75, ll. 45-46; 76, ln. 1

questions presented by the foreperson have to be "on behalf of the jury" is true in only the broadest sense. A trial judge has an obligation to answer any questions put to him or her, even if the question is "on behalf" of just the foreperson or any other individual juror. Having embarked on an informal exchange with the foreperson, the judge had to either field all questions the foreperson posed, or instruct the jury to retire and reformulate any further questions it had. While it might seem a picayune point, it is impossible to know if the foreperson held back any further question that was "on behalf" of less than the full jury. Perhaps the foreperson held back the unknown other "part" of the jury's question.

106) In any event, as noted, the judge failed to clarify the question from the jury.

Understanding why the majority and the dissenting judge disagreed:

107) Although the four questions in issue can all be answered in the affirmative, with the result that the appeal must be dismissed, it might be helpful to understand why the majority and the dissenting judge in Court of Appeal disagreed. The respondent submits that the answer to that question is found in their differing views on the scope of appellate review where answers to questions from a jury is in issue.

108) The dissenting judge took a narrow view of the appropriate scope of appellate review; a view which permits appellate intervention only where "...the jury was left with an erroneous view of the law ... [and] ... there is a reasonable possibility that the trial judge's erroneous instruction may have misled the jury".[62] It will not have escaped this Court's attention that the appellant's arguments in this Court hinge on an acceptance of the standard of review adopted by the dissenting judge.

109) The self-evident flaw in the dissenting judge's standard of review is that, even if an answer to a jury's question does not leave the jury "with an erroneous view of the law", the answer can still be flawed. The instant case provides an excellent illustration of this point. Once again, the jury's (simplified) question was this: "If we believe the 1st incident, can we convict on this alone?" The single word "yes"

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62 Reasons for Judgment of Justice Savage at para 42

would be a legally correct answer to that question. In the language of the dissenting judge, that would not leave the jury "with an erroneous view of the law". In the words of Justice Cory in ***S. (W.D.)***, however, that single word answer would be light-years away from being both "correct and comprehensive" (emphasis added).

110) The majority of the Court of Appeal took a broader view of the scope of appellate review than did the dissenting judge, and the majority's view reflects the notion that an answer to a jury's question must be both "correct and comprehensive". On the majority's approach, a court of appeal "should intervene where the instructions may have misled the jury **or failed to resolve the confusion that led it to ask the question in the first place**."[63] (emphasis added)

111) The respondent submits that the majority's approach is the correct one. It properly recognizes that an answer to a question from a jury must not only be legally correct, it must be contextually correct. A judge attempting to answer a question from a jury must necessarily take into account all of the evidence, and all of the legal issues raised in the case to ensure the question is understood, and answered, in its proper context. On this contextual approach, even the simplest question can require an answer that engages a multitude of legal and factual issues.

112) Again, the broad view of appellate review taken by the majority is simply a reflection of Justice Cory's observation in ***S. (W.D.)***, that answers to questions from juries, must be "correct and comprehensive". An answer which "failed to resolve the confusion that led it to ask the question in the first place" is manifestly not comprehensive.

113) In the instant case, the majority of the British Columbia Court of Appeal concluded that, in the context of the facts and legal issues raised, "the judge was rightly concerned that the jury might not have been considering the implications of an adverse credibility finding on the second incident in its assessment of the

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63 Reasons for Judgment of Justice Garson at para 75

first".[64] The majority correctly concluded that the judge failed to recognize that his concerns required further instructions on credibility.[65] Similarly, the majority correctly concluded that the context of the prosecution – the decision to prosecute two incidents as a single offence – required the judge to provide a clarifying instruction on that issue.[66]

114) Very simply, the answer given by the trial judge "failed to resolve the confusion that led it to ask the question in the first place", and the majority applied the correct standard of appellate review, and correctly intervened.

115) For all of these reasons, the appeal must be dismissed.

PART IV – SUBMISSIONS ON COSTS

116) The respondent does not seek an order for costs and asks that no costs be awarded against him.

PART V – NATURE OF ORDER SOUGHT

117) That this appeal be dismissed.

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64 Reasons for Judgment of Justice Garson at para 71

65 Reasons for Judgment of Justice Garson at para 76

66 Reasons for Judgment of Justice Garson at para 76

PART VI – IMPACT OF PUBLICATION BAN

118) The publication ban issued under s. 486.4 of the *Criminal Code* prohibits the publication of information that could identify the complainant. The Court should not publish the names of the respondent, complainant, complainant's mother, or any other information tending to identify the complainant.

June 25, 2019

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ROGER P. THIRKELL
BRENT BAGNALL
JOSEPH DOYLE
COUNSEL FOR THE RESPONDENT

PART VII – AUTHORITIES