Court File No. 38870

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

THOMAS SLATTER

RESPONDENT
(Appellant)

WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAD), DISABLED WOMEN'S NETWORK OF CANADA (DAWN) and ARCH DISABILITY LAW CENTRE (ARCH), CANADIAN ASSOCIATION FOR COMMUNITY LIVING, BARBRA SCHLIFER COMMEMORATIVE CLINIC and CRIMINAL LAWYERS' ASSOCIATION

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FACTUM OF THE INTERVENER
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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Where the state deprives an individual of his or her liberty, the public must have confidence in the justice of the result. This essential quality of *legitimacy* has different sources depending on the composition of the trial court.

2. Jury verdicts gain their legitimacy in large part from the jury's representativeness.[1] Assuming proper legal instructions, the public can be confident in a unanimous verdict rendered by 12 fellow citizens drawn from a cross-section of the community. An unarticulated "guilty" or "not guilty" verdict from a properly instructed jury will rightly be accepted as legitimate.

3. Where the trial is by judge alone, by contrast, legitimacy flows principally from the trial judge's duty to justify the result in reasons for judgment. As Justice Binnie observed in *Sheppard*, "the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public."[2] A jury's verdict must simply be announced. A judge's verdict must be *explained*.

4. The Criminal Lawyers' Association of Ontario ("CLA") submits that Trotter J.A., speaking for himself and Doherty J.A. in the court below, articulated the correct test for evaluating the sufficiency of reasons in a case where the word of the complainant is pitted against that of the accused. By contrast, the approach of Pepall J.A. asks too little of trial judges. In so doing, it compromises public confidence in the result and, worse still, risks wrongful conviction.

5. The CLA will focus its submissions on two contentions implicit in the majority judgment.

6. First, where the complainant's reliability - as distinct from credibility - is realistically at issue, it should be meaningfully addressed in the reasons for judgment. After all, in our courts, honestly mistaken witnesses likely outnumber outright perjurers. Their mistaken evidence may be all too believable; accordingly, the risk of wrongful conviction is always present. Where

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[1] *R. v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398, at para. 55

[2] *R. v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, at para. 4. See also: Michael Plaxton, "Thinking about Appeals, Authority, and Judicial Power after *R. v. Sheppard*" (2003), 47 Crim. LQ 59 at 67 [Book of Authorities (*"BOA"),* Tab 1]

testimonial reliability forms no part of the trial judge's analysis, neither the accused nor the public can be confident that the potential sources of reasonable doubt were evaluated and eliminated.

7. Second, where the trial judge finds that the *accused's* evidence fails to raise a reasonable doubt, the trial judge should generally explain why. The convicted accused, and the appellate court, should not have to sift through the trial record for some implicit indication of why the accused was not believed. If the trial judge *cannot* explain why the accused's evidence failed to raise a reasonable doubt, this may be a good indication that the conclusion is unsustainable. If the reasons "just won't write," the contemplated result might well be wrong.[3] Accuracy and transparency both favour a general requirement that the trial judge articulate his or her reasons for rejecting an accused's denial of guilt.

8. These are modest, practical expectations. They enhance the legitimacy of the process, especially where the accused's liberty is at stake. Moreover, they facilitate appellate review and guard against wrongful convictions by exposing the judge's reasoning to scrutiny.[4] Unexpressed reasons cannot be evaluated for logical and practical rigour. Furthermore, reliance on inappropriate stereotypes and assumptions can only be rooted out if the judge's reasons for conviction are adequately articulated.

9. These basic expectations are fulfilled in the vast majority of cases that come before the trial courts. They pose no obstacle to Canada's world-class judiciary efficiently carrying out its work.

10. The CLA makes no submissions on the facts of this appeal.

PART II – POSITION ON QUESTIONS IN ISSUE

11. It is the position of the CLA that:

i. Where reliability (as distinct from credibility) realistically arises as a potential concern, a trial judge's failure to conduct a reliability analysis amounts to a failure to "seize the substance of the matter,"[5] and frustrates proper appellate review; and

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[3] *R. v Maharaj* (2004), 186 CCC (3d) 247 (ONCA), at para. 22, *per* Laskin J.A.
[4] *R. v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, at para. 51, *per* Deschamps and Fish JJ. (dissenting)
[5] *R. v R.E.M.*, 2008 SCC 51, [2008] 3 SCR, at para. 43, *per* McLachlin C.J.

ii. An accused who testifies is entitled to a meaningful explanation as to why his or her evidence failed to raise a reasonable doubt. Read properly, *J.J.R.D.* and its progeny do not counsel otherwise.

PART III – STATEMENT OF ARGUMENT

A. Reliability may require particularized analysis

12. It has been said that the most important person in the courtroom is the litigant who is going to lose. According to the distinguished British jurist Sir Robert Megarry:[6]

> It is to him that the judgment of the court must primarily be addressed. Even if the reasoning does not convince him, it should demonstrate that his case was properly understood and his arguments duly considered.

13. An accused person facing a loss of liberty is surely entitled to at least that much.[7] So is the community against whom the offence was allegedly committed.

14. In many cases where the word of the complainant is pitted against that of the accused, a proper demonstration that the case was "properly understood" will entail an analysis of the complainant's reliability. Appellate deference is the starting point, but the presumption of deference will be displaced where the trial judge has not "sufficiently explained how significant discrepancies that could undermine credibility and reliability have been resolved."[8]

15. Justice Pepall, in dissent, properly recognized that credibility and reliability are different concepts raising distinct concerns.[9] While credibility is concerned wit veracity, reliability is concerned with the accuracy of the witness's testimony. It engages an analysis of their ability to accurately observe, recall, and recount events in issue.[10] Long experience with wrongful convictions shows the risks posed by the too-easy acceptance of incriminatory evidence from honest (i.e. credible), but mistaken witnesses.[11]

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[6] Sir Robert Megarry, "The Judge" (1983), 13 Manitoba LJ 189, at 193-194, quoted by Catzman J.A. in *R. v Brown* (2002), 170 CCC (3d) 37 (ONCA) at para. 33 [BOA, Tab 2]
[7] *R. v Brown* (2002), 170 CCC (3d) 37 (ONCA) at para. 34
[8] *R. v D.H.*, 2016 ONCA 569, at para. 34, *per* Feldman J.A.
[9] Reasons of Pepall J.A., at para. 117; *R. v Joudrie*, [1997] OJ No 1619, 100 OAC 25 (CA), *per* Moldaver J.A.; *R. v Morrissey* (1995), 22 OR (3d) 514 (CA), at p. 526, *per* Doherty J.A.
[10] *R. v H.C.*, 2009 ONCA 56, 241 CCC (3d) 45, at para. 41
[11] *R. v Hibbert*, 2002 SCC 39, [2002] 2 SCR 445 at para. 51

16. Nonetheless, Pepall J.A. appeared to conflate reliability and credibility in observing, *apropos* of reliability, that the complainant "never wavered on the core issue" of whether the Respondent had sexually assaulted her. With respect, a witness' level of certainty bears little relation to his or her reliability. That is precisely the problem: confident and credible witnesses are sometimes badly mistaken.

17. Granted, a separate analysis of the complainant's reliability is not legally required in every case, as sometimes there is no practical sense in which the complainant could be sincere but mistaken.[12] However, where the complainant's reliability is realistically at issue, the accused is entitled to know how the trial judge satisfied herself beyond a reasonable doubt of the complainant's accuracy in perceiving, recalling, and recounting the relevant events. While a trial judge need not "review and resolve every inconsistency in a witness' evidence, nor respond to every argument advanced by counsel,"[13] once something is flagged as a significant inconsistency in the evidence of a material witness, it must be addressed.[14] Failure to do so compromises the ability of the public, much less the accused, to have confidence in the result. It also frustrates the appellate court's task of determining whether the finding of guilt was based on legally proper and factually defensible reasons.

18. Certain kinds of witnesses may pose particular reliability concerns in the sense that their state of cognitive development may impede their ability to accurately observe, recall, and recount the events in question. None of this will mean that their evidence is necessarily unreliable; it simply means that the evidence needed to be scrutinized with the witness' particular vulnerabilities in mind. Children are one obvious example.[15] Witnesses with mental disabilities may be another. Contrary to the Crown's apparent contention, it is neither a "myth" nor a "stereotype" to relate a witness' cognitive limitations to his or her ability to accurately communicate evidence to the court.[16] A realistic, fact-specific assessment of the witnesses' reliability is the *antithesis* of stereotyping. Downplaying reliability concerns of vulnerable witnesses may appear politically

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[12] *R. v Sanichar*, 2013 SCC 4, [2013] 1 SCR 54
[13] *R. v A.M.*, 2014 ONCA 769, 123 OR (3d) at para. 14.
[14] *R. v D.H.*, 2016 ONCA 569, 338 CCC (3d) 251 at para. 35
[15] Nicholas Bala et al, "Judicial Assessment of the Credibility of Child Witnesses," 2005 42-4 Alta. L. Rev. 995 at p. 999
[16] Appellant's Factum, at para. 10

virtuous to some, but it is profoundly dangerous in a context where the first priority must be to avoid convicting the innocent.

19. More broadly, some prior authorities can be read to suggest that there should be a lower threshold for adequacy of reasons for judgment in credibility cases due to the difficulty of articulating the reasons for credibility determinations and the privileged position of the trial judge.[17] The CLA submits that this position is no longer persuasive. In recent years, courts have become more attuned to the ways in which invalid myths and stereotypes can find their way into judicial fact-finding.[18] Rooting out these improper assumptions is impossible if the trial judge's reasoning remains elusive. Moreover, the kinds of considerations that are most resistant to articulate expression – most notably, those about demeanour – are often precisely those which are *least* reliable as markers of testimonial truthfulness.[19] Familiar rote statements that a witness "testified in a straightforward manner" or "had the ring of truth"[20] are of little value compared to a logical analysis of the objective consistency and plausibility of the witness' evidence.[21]

20. Practical concerns about the feasibility of requiring reasonably detailed reasons in criminal cases have not panned out. *Sheppard* was decided 18 years ago, longer than most active judges have been on the bench. The requirement to give meaningful reasons is neither new nor daunting. Technology allows reasons to be researched and prepared more efficiently than ever before.[22]

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[17] *R. v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, at para. 20

[18] *R. v Lacombe*, 2019 ONCA 938; *R. v A.B.A.*, 2019 ONCA 124; *R. v Cepic*, 2019 ONCA 541; *R. v. C.M.G.*, 2016 ABQB 368, at para. 60, *per* Martin J. (as she then was)

[19] *R. v Rhayel*, 2015 ONCA 377, at paras. 85-89; *R. v Hemsworth*, 2016 ONCA 85, at paras. 44-45. As Lord Atkin once stated, "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour": *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 LI. L. Rep. 140 (Eng. C.A.) at 152, quoted in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd.*, [1999] HCA 3, at para. 88

[20] Trial Judgment, p. 32, line 20

[21] *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA), at p. 357

[22] See Nordheimer J.A.'s persuasive dissenting comments on this score in *R. v W.O.*, 2020 ONCA 392, at para. 91

21. Additionally, this Court should make clear that it is the *trial judge's* responsibility to explain why key evidence was accepted or rejected, not the appellate court's job to reconstruct or reverse-engineer the analysis. As Nordheimer J.A. has aptly observed, "[i]t is not sufficient that an appellate court may be able to dig through the record and figure out a route to explain the result that the trial judge did not express[.]" The appellate court should not be placed in the role of armchair detective, ferreting out the implicit basis for the conviction. An accused person "is entitled to a proper explanation in the first instance."[23] After all, as Hamish Stewart has noted, "[a] finding that is not expressed in the reasons for judgment cannot justify the decision to the parties or to the public, or explain the decision to an appellate court."[24]

22. In the case at bar, Pepall J.A. placed considerable weight on the extent to which the reliability issue was discussed during closing submissions.[25] Without opining on the merits of this case, the CLA submits that this will rarely be a good reason to overlook the absence of analysis in the reasons for judgment. Colloquies with counsel during closing submissions provide an opportunity for the trial judge to test out propositions and obtain counsel's input. This exercise is no substitute for proper reasons once submissions have been received and deliberation completed. Indeed, appellate complaints that a trial judge improperly pre-judged an issue by expressing a tentative view during submissions are routinely and properly rejected.[26] Submissions are part of the "input" for the judicial decision-making process; reasons are the most important "output." Where an issue like the complainant's reliability is canvassed extensively in submissions, it is *more*, not less, important that it receives adequate treatment in the reasons for judgment.

23. A trial judge's credibility and reliability findings are entitled to deference, but "that does not mean they are immune from review".[27] As Trotter J.A. pointed out below, where no finding is made, there is nothing to defer to.[28] In any event, deference is not the same as blind faith that the judge must have considered something when his reasons disclose no evidence of it. The omission

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[23] *R. v W.O.*, 2020 ONCA 392, at para. 89, *per* Nordheimer J.A. (dissenting)
[24] Hamish Stewart, "The Trial Judge's Duty to Give Reasons for Judgment in Criminal Cases" (2009), *Can. Crim. L. Rev.*, Vol 14, No 1, 19-35, at 33 [BOA, Tab 3]
[25] Reasons of Pepall J.A., at paras. 125-129
[26] See, e.g., *R. v Kinkead* (2003), 178 CCC (3d) 534 (ONCA), at para. 53
[27] *R. v W.O.*, 2020 ONCA 392, at para. 84, *per* Nordheimer J.A. (dissenting)
[28] Reasons of the Court of Appeal, at para. 70

of reliability from the trial judge's analysis in a case where it realistically arises as a concern amounts to a failure to "seize the substance of the matter" and requires the conviction to be set aside.[29]

B. An accused who testifies is entitled to an explanation of why his or her evidence was rejected

24. An accused who chooses to testify voluntarily gives up the *Charter* right to remain silent.[30] In so doing, the accused subjects their account of events to the rigours of cross-examination and place their trust in the trier of fact to resolve any reasonable doubt in their favour. In return, an accused person whose testimony is rejected is "entitled to know why the trial judge is left with no reasonable doubt."[31]

25. This is straightforward and largely uncontroversial. Nonetheless, a misreading of Justice Doherty's reasons in *R. v. J.J.R.D.* has sometimes been invoked to defend a conviction where the trial judge has provided no coherent evaluation of the accused's testimony. In the oft-quoted passage from that judgment, Doherty J.A. observed:

> An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.[32]

As far as it goes, this cannot be gainsaid: after all, even believable-sounding testimony from an accused may not be sufficient to extricate him from a web of seriously incriminating evidence.

26. In other words, if the incriminating evidence is properly scrutinized and found to prove the case to the requisite standard, even facially plausible testimony from the accused may well fail to raise a reasonable doubt. *J.J.R.D.* merely recognizes that in such cases, the trial judge does not

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[29] *R. v R.E.M.*, 2008 SCC 51, [2008] 3 SCR, at para. 43, *per* McLachlin C.J.
[30] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982 c11 sections 7 and 11(c)
[31] *R. v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, at para. 21
[32] *R. v J.J.R.D.* (2006), 215 CCC (3d) 252 (ONCA), at para. 53

have to identify some flaw in the accused's testimony itself in order to make a defensible finding of guilt.

27. However, Justice Doherty did *not* say that a trial judge's failure to analyze the accused's testimony should be overlooked simply because the trial judge has expressed a strong belief in the conflicting testimony of the complainant. Indeed, elsewhere in *J.J.R.D.,* Doherty J.A. acknowledged that:

> In some circumstances, a trial judge's failure to adequately explain the reasons for rejecting an accused's denial will make it impossible for the appellate court to satisfy itself that the conviction was based on an application of the correct legal principles to findings of fact that were reasonably open to the trial judge.[33]

28. In *Dinardo*, to date the only case in which this Court has cited *J.J.R.D.*, a unanimous Court held that the trial judge "erred in law by failing to explain how he resolved the significant issues of credibility concerning the complainant's testimony, particularly in light of Mr. Dinardo's evidence at trial."[34] The Court reaffirmed that "where the charge is a serious one and where, as here, the evidence of a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt."[35]

29. Relatedly, the Ontario Court of Appeal has confirmed that *J.J.R.D.* will only justify upholding a conviction where the trial judge's acceptance of the complainant's testimony was truly "considered and reasoned."[36]

30. Nonetheless, the view that *J.J.R.D.* somehow absolves a trier of fact from scrutinizing the accused's evidence in its own right appears to have become widespread. Indeed, the *J.J.R.D.* formula has even found its way into jury instructions, a practice that the Ontario Court of Appeal recently had occasion to discourage.[37] *J.J.R.D.* shows how an apparently deficient treatment of the accused's evidence in the reasons for judgment need not always require reversal of a conviction where the complainant's evidence is subject to a reasoned analysis and found to prove the case

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[33] *R. v J.J.R.D.* (2006), 215 CCC (3d) 252 (ONCA), at para. 37
[34] *R. v Dinardo*, 2008 SCC 24, [2008] 1 SCR 788, at para. 2
[35] *Ibid*, at para. 26 *per* Charron J., quoting *R. v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, at para. 21, *per* Bastarache and Abella JJ.
[36] *R. v A.N.*, 2017 ONCA 647, at paras. 15-19; *R. v J.W.*, 2014 ONCA 322, at para. 31
[37] *R. v C.L.*, 2020 ONCA 258, at para. 34, *per* Paciocco J.A.

beyond a reasonable doubt. It does *not* purport to encourage the practice of judges or juries simply omitting a reasoned consideration of the accused's testimony.

31. In other words, *J.J.R.D.* establishes remedial guidelines for appellate courts; it does not set out aspirational norms for fact-finding at first instance. This is as it should be. Over-reliance on *J.J.R.D.* practically invites the very errors *W.(D.)* was meant to avoid: namely, convictions based on a finding that the complainant was more credible than the accused; and convictions based on a finding that the accused lacked credibility *without* a further assessment of whether the evidence as a whole establishes guilt beyond a reasonable doubt.[38]

32. An accused in the position of the Respondent, having given up his right to silence and testified in his own defence, would be justly aggrieved by reasons for judgment finding him guilty without engaging with the substance of his evidence at all. When that happens, how can anyone – including the appellate court – be sure that the accused's testimony was rejected on legally proper grounds? If the trial judge cannot articulate why the accused's evidence failed to raise a reasonable doubt, how can anyone else have confidence in the result?

33. This Court should make clear that accused persons, and the public, are entitled to a proper explanation commensurate with the evidence led and the issues raised. In an enlightened justice system, this is not too much to ask.

C. Conclusion

34. Although at one time trial judges were permitted to simply announce a result in the manner of a jury, societal expectations and the law have both evolved. Trust in public institutions like the courts is not just bestowed; it must be earned. For trial courts, this means reasoned justifications of decisions, especially where a person's liberty hangs in the balance.

35. It is no longer good enough for appellate courts to simply defer to a trial judge's ineffable intuition about a witness' trustworthiness. Requiring a meaningful explanation of how key issues

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[38] *R. v W.(D.)*, [1991] 1 SCR 742. Professor Stewart develops this criticism in "The Trial Judge's Duty to Give Reasons for Judgment in Criminal Cases" (2009), *Can. Crim. L. Rev.*, Vol 14, No 1, 19-35, at 34-35 [BOA, Tab 3]. See also: *R. v. Dick*, 2018 BCCA 343, at para. 31.

were resolved is not an onerous or unworkable burden to place upon trial judges. The accused, the alleged victim, and the public at large have a right to expect a reasoned explanation of the result – especially where it will likely lead to someone's loss of liberty. To the extent that passages in earlier decisions (including this Court's decisions in *Vuradin*[39] and *R.E.M.*[40]) appear to countenance minimal engagement with the substance of the accused's testimony, they should be overruled.

36. As O'Halloran J.A. observed long ago in *Faryna v. Chorney*, "[t]he law does not clothe the trial Judge with divine insight into the hearts and minds of the witnesses."[41] That is why we require trial judges to justify their findings. Judgments about witness credibility and reliability that are not grounded in reasoned analysis do not inspire public confidence. Worse still, they risk inaccurate results that can evade appellate correction. The CLA submits that trial judges are up to the task of adequately explaining their resolution of conflicting testimony. Requiring articulated findings on key issues does not import the kind of "esoteric dissection" of trial judge's words warned against by Binnie J. in *Sheppard*,[42] nor does it counsel a "standard of perfection" as alleged by the dissenting justice below and the Appellant in this court.[43] To the contrary, these are modest and practical expectations that our judiciary already fulfills in the vast majority of cases.

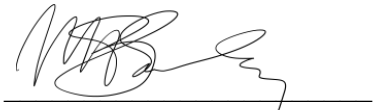
PART IV -- SUBMISSIONS ON COSTS

37. The CLA makes no submissions regarding costs.

PART V – ORDER REQUESTED

38. The CLA makes no submission on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 24th day of July, 2020.



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[39] *R. v Vuradin*, 2013 SCC 38, [2013] 2 SCR 639, at para. 13
[40] *R. v R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3, at para. 66
[41] *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA), at p. 357
[42] *R. v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, at para. 60
[43] Reasons of Pepall J.A., at para. 152; Factum of the Appellant, at para. 62

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