SCC File No. 39466

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

B E T W E E N:

ERIK OSWALDO RAMOS

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT
(ERIK OSWALDO RAMOS, APPELLANT)

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The foundation of our criminal justice system is built on principles of trial fairness, the presumption of innocence, and the rule of law. A trial is a means of truth seeking, while maintaining those principles. A judge (or jury) stands as the fact finder with the important task of determining whether the offence has been proven beyond a reasonable doubt. There is no doubt that this is often a formidable task.

2. The crux of this appeal is the credibility analysis that must be undertaken by trial judges to deliver a fair and reasoned verdict. Enunciated in the seminal case of *R. v. W.D.,* 1991 SCR 742, and the case law that has followed, the key principles that are continually confirmed is that an accused person is entitled to have their trial decided on more than simply a decision on whose evidence is preferred. The standard of proof: beyond a reasonable doubt, is the benchmark. If convicting an accused on that standard, a trial judge should be able to provide a legally sound basis for doing so.

3. In this matter the Appellant was charged in 2013 with a count of sexual assault and sexual interference relating to the daughter of his then partner. The factual bases of the charge relate to multiple incidents of sexual touching in three residences over a span of several years. At trial, credibility and reliability were live issues as the evidence of the offending behaviour came from the complainant's evidence alone and was denied by the Appellant. The trial proceeded before a judge alone and the evidence was heard over the course of a year and a half. The trial commenced on February 27, 2017 and the decision was rendered on June 15, 2018.

4. The Learned Trial Judge rejected the Appellant's evidence as it was contrary to the complainant's evidence which he believed. There was no explanation, that was supported by the evidence and law, that justify this conclusion. This case raises specific concerns about the weight afforded observations of demeanour, and the absence of a motive to lie.

5. On appeal to the Manitoba Court of Appeal, arguments focussed on the credibility analysis and on the issue of ineffective assistance of counsel. The claim of ineffective assistance of counsel leading to a miscarriage of justice was dismissed and forms no part of this appeal. On the issue relating to credibility, Justice Steel, in dissent, would have granted a new trial. Her reasons provide a compelling roadmap, highlighting the errors in the Trial Judge's rationale for conviction and support a new trial being granted.

B. Facts and Procedural History

6. The Appellant moved in with the complainant's mother D.A. as a tenant in 2010 and later continued to reside at the residence on Redwood as her partner. Approximately a year later they moved to an apartment on Donald. D.A. had three children who resided in the home at various times, including the complainant. During the material times, the complainant was between the ages of 6 and 10 years old. At one point, the Appellant moved out of the residence and lived at Hector Lemos' residence. He subsequently returned to the Donald address and resumed a relationship with D.A.

7. On November 20, 2013, after returning from Colombia, the complainant and her mother attended the police station and provided a video statement outlining allegations of sexual abuse. In that statement the complainant described that her mom's boyfriend (the Appellant) came into her room and touched her vagina with his hand and sometimes his penis when she was sleeping. She would punch him and then he would stop. She doesn't really remember the first time. The complainant described it happening at both the Redwood and Donald residences and that the Appellant would sometimes tell her "don't tell your mom or she'll go to jail and then you'll be alone." The Appellant would take his pants off and put his penis on her vagina. His penis was soft and sperm came out of it onto her body. She would punch and push him out of her room. The complainant also described the Appellant licking her vagina, and that she would hit him in the head and pull his hair. She would be laying on a Queen bed, and he would be standing up when this happened. Additionally, she shared with police that the Appellant would tell

her brother to hit her and he would. She was asked twice by the police "is there anything else?" to which she shook her head in the negative.[1]

8. The Appellant was arrested and charged. The matter proceeded through a preliminary inquiry in October of 2014 and the Appellant was committed to stand trial. On February 29, 2016 the complainant provided a further video recorded statement to the Winnipeg Police. In that statement the complainant disclosed that the Appellant would take her to his friend Hector's house. While there he would touch her and try to insert his penis into her vagina. In response she would kick at him. She told the police this happened more than once, and she recalled Hector and his girlfriend being at the house. The complainant also told police that he would give her candy so she wouldn't tell anyone. Later in her statement, she told police that what usually happened is that he would touch her vagina with his hand, in a rubbing motion and then would try to insert his finger but was unsuccessful. He would then keep rubbing till he stopped and said "it's time to go." The Appellant would keep his clothes on while this occurred. He would then drive her back home. The complainant then said to police he never tried to insert his penis into her vagina at his friend's house, that was at Donald. Additionally, in the statement, the complainant told police that he would give her pet hamsters so she wouldn't tell anybody. Further she described that the Appellant directed her to "do stuff" to her brother and said he would video it. The complainant told police that the Appellant would show her pornography on his laptop. She wasn't aware of him taking any pictures.[2]

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[1] Record of the Appellant, Volume III, Statement of M.A., Dated November 20, 2013
P 113 L 12-13; P 114 L. 9-19, L24-25; P 115 L4-13;
P 119 L15-16; P 120 L8-14; P 125 L 20-21;
P126 L14-24; P 127 L 2-9,19-24; P 136 L 9, 22-23;
P 138 L5-7; P 139 L10-14; P 140 L 3;
P 142, L 19-24; P 145 L 5-6

[2] Record of the Appellant, Volume III Statement of M.A., dated February 29, 2016
P 152 L 22; P 156 L 8-14; P 157 L 3-4, 14-17;
P 159 L 20-24; P 160 L7-20; P 161 L 3-6 L15-20;
P 166 L 18-21; P 170 L 1-6; P 171 L 12-15;
P 178 L1-9; P 182 L 1-3

9. Both of these videos were admitted into evidence pursuant to section 715.1 (1) of the *Criminal Code* and were played in court. During the course of the complainant's trial testimony the complainant testified that it happened two times at Hectors, possibly 4 times at Redwood and more than 5 times at Donald. She couldn't recall any details about the timing of the first time. When asked by the Appellant's counsel, she stated that she did not struggle when the Appellant touched her. Later on, in response to questions from the Trial Judge the complainant stated that she would push the Appellant away when he tried to insert his finger or penis. The complainant agreed that when living at Redwood there were many people visiting or staying at the house.[3]

10. The complainant testified that the Appellant would pick her up by car and drive her to Hector's residence. He did not say anything to her at the residence. When she was at Hector's residence he tried to lick her vagina. In cross examination, the complainant testified that the Appellant took a nude photo of her at the Donald residence. When he provided her with candy, he never said anything. When he gave her hamsters he didn't say anything to her.[4]

11. The only other witness called by the prosecution at the trial was the complainant's mother. She had lived on Redwood for less than a year before moving to the Donald Street apartment with the Appellant, her daughter and her son, Kevin. Her evidence set out that her daughter had disclosed to her the abuse while they were in Colombia in October 2013. It had not been disclosed previous to that time. She testified to her work history and to the times where the Appellant would have been alone with the complainant. Additionally, she testified that her daughter had disclosed further details to her in Toronto before attending to Winnipeg for court in December 2015. In her police interview she confirmed that she didn't believe the Appellant had sexually assaulted her daughter on Redwood because there was always someone in the house with her daughter.

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[3] Record of the Appellant, Volume II, T.O.P, February 27, 2017 P 27 L 16-22; P 45 L1-15; P 68 L31-34; P 75 L 15-34; P 99 L10-16

[4] Record of the Appellant, Volume II. T.O.P., February 28, 2017 P 128 L5; P 144, L 17-24; P 155 L 25-29; P 156 L16-18; P 122 L9-13

At trial she testified that she had taken her daughter to Hector's house, but they never went inside.[5]

12. After the prosecution closed their case, the Appellant discharged his counsel citing loss of confidence and sought an adjournment to secure new counsel. A motion to re-call witnesses or declare a mistrial was denied. The trial continued on April 11, 2018

13. The Appellant testified in his defence. He denied the allegations of any improper touching of the complainant. He described the evolving role he had within the home. He described domestic issues between himself and the complainant's mother but denied any sexual assault. He did not recall being alone with the complainant when they lived at Redwood but acknowledged it was possible. They moved from Redwood to Donald street. At Donald there were times that he was alone with the complainant. The Appellant testified that the complainant had attended to his residence where he resided with Hector Lemos, but she did so in the presence of her mother. The Appellant denied having shown the complainant child pornography, directing her to touch her brother or threatening her if she told anyone. The Appellant acknowledged buying pet hamsters for the complainant, having done so with her mother. He described an abusive relationship with the complainant's mother and that he decided to leave the relationship when they attended to Colombia. On cross examination the Appellant disagreed that he had shaped his evidence to support his denials.[6]

14. Final submissions of counsel were made following the Appellant's testimony. As argued by his counsel, "he was un-assailed in cross-examination." Further, it was argued that "there was no attempt to cross-examine him on the allegations before the court, with the

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[5] Record of the Appellant, Volume II. T.O.P., February 28, 2017 P 180 L9-10;
P 181 L7-9; P 192, L 17-20; P 193 L 1-2;
P 209 L4-14; P 230 L27-29

[6] Record of the Appellant, Volume II. T.O.P., April 11, 2018, P 13 L1-21;
P 14 L 22-28; P15 L 11-16; P 18 L1-4; P 19 L 35-41
P 20 L 23-37; P 21 L22-28; P 24 L 1-12; P 67 L 37-41

exception of two questions where my friend suggested that Erik was not telling the truth and Erik responded that that wasn't so."[7]

15. On June 15, 2018, the Learned Trial Judge convicted the Appellant of both charges. A judicial stay of proceedings was entered on the offence of sexual assault. A sentence of 40 months incarceration was imposed on February 26, 2019.

16. The Appellant appealed his conviction to the Manitoba Court of Appeal seeking to have a new trial ordered. The appeal was heard on April 20, 2020 and was dismissed on November 19, 2020 by a majority of two and a dissent of one.

C. The Learned Trial Judge's Decision

17. The Learned Trial Judge convicted the Appellant of sexual assault and sexual interference. He released a nineteen-page decision in which he outlined that he believed the entirety of the complainant's evidence. The analysis portion of his decision consisted of seven pages and began with an assessment of the credibility of the complainant. At paragraph 42 of the decision, the Trial Judge wrote "As a result of the review of this material, and specifically the testimony and evidence of the complainant, I am satisfied in the credibility of this complainant and the truth of the allegations she makes." He goes on at paragraph 48 to state: "The complainant struck me as a polite, intelligent and honest child without any motivation to lie about these incidents."

18. In addressing the evidence of the Appellant, the Learned Trial Judge set out at paragraph 50, "Dealing specifically with the evidence of the accused, and the first step of the W.(D.) test, I find that I do not believe the evidence of the accused."

19. The trial judge concluded at paragraph 53 of the decision writing: "I find that the very credible evidence of the complainant, while admittedly containing some peripheral

[7] Record of the Appellant, Volume II. T.O.P., April 11, 2018, P72 L 41; P 73 L1-5

inconsistencies, is believable and provides a context which leads me to the conclusion that the accused's denial of these allegations is not believable."

D. The Manitoba Court of Appeal Decision

20. On November 19, 2020, the Manitoba Court of Appeal dismissed the Appellant's appeal and upheld the conviction. Justice Steel, in dissent, would have ordered a new trial. The issue which divided the panel was the Trial Judge's application of the principles of *W.(D.)* to the credibility analysis in this case. The panel was unanimous on dismissing the grounds related to ineffective assistance of counsel and the failure to grant a mistrial.

21. Justice Steel found that the Trial Judge erred in his application of the principles of *W.(D.)* to the credibility analysis in this case. She recognized at paragraph 152 that a "trial judge was entitled to reject the accused's evidence 'based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence.'" However, in regards to the Trial Judge's decision, she noted at paragraph 156:

> But what was it in the evidence that satisfied the trial judge that the events described occurred as the complainant described them? The trial judge must draw a link from the evidence to his findings of fact and from his findings of fact to his conclusion. Repeating that the trial judge is satisfied that the events described by the complainant is a conclusion. It does not tell us why or which evidence adduced at trial persuaded the trial judge beyond a reasonable doubt, as opposed to simply deciding to choose the evidence of the complainant over that of the accused.

22. Further, Justice Steel noted that the Trial Judge relied heavily on demeanour evidence to found the conviction and did not address major inconsistencies in the evidence of the complainant. At paragraph 164 she wrote, "however, in this case, the additional details revealed in the second video statement were hardly peripheral. The complaint evolved over time with details that significantly changed from the first video statement to the second video statement. These are inconsistencies on material issues as they went to the core element of the offences. The additional location of sexual assault, the bribery, the

sexual touching of her brother, the pornography and the taking of a photograph cannot be said to be insignificant or peripheral."

23. Justice Steel then turned her attention to the Trial Judge's reasons for not believing the Appellant's evidence. She recognized two errors: the shifting of the burden of proof onto the accused to show why the complainant would be lying, and the Trial Judge's misapprehensions of the evidence "which was material and substantive in terms of the accused's defence."

24. Justice Mainella, writing for the majority, held that the reasons were sufficient to permit Appellate review, noting at paragraph 90 "In summary, the trial judge's reasons were sufficiently articulate in explaining how the credibility concerns were resolved on the only live issue in the case. His reasons were not "generic", nor did he display a "laconic style" in them." It was held that "it was evidence from the trial judge's reasons that he did not decide this case simply by choosing a version of events as the accused argues" and further that the trial judge did not shift the burden of proof on to the accused to show why she was lying about the accused sexually touching her. Justice Mainella concluded that there was no misapprehension of the evidence relating to the Accused's opportunity to be alone with the complainant holding that this was a fact in dispute throughout the trial.

25. In regard to demeanour evidence, Justice Mainella stated at paragraph 116, "I am not convinced that demeanour evidence was the sole or dominant basis for how the trial judge assessed credibility." In conclusion, he wrote at paragraph 117 "with great respect to the contrary view of my colleague, I see no legal error in the trial judge's assessment of credibility."

26. The Appeal was dismissed.

PART II – QUESTIONS IN ISSUES

27. The decision of the Court of Appeal of Manitoba is appealed on the following ground:

    a. The Trial Judge erred in law in his application of the principles arising from the case of *R. v. W.(D.)*, [1991] 1 S.C.R. 742 to the credibility analysis in this case.

PART III – STATEMENT OF ARGUMENT

28. The Appellant is entitled to a fair and impartial trial, with a meaningful analysis undertaken of the evidence to reach a just verdict. Anything less is a failure of our system. A judge must not only conduct a meaningful review of the evidence, mindful of the relevant principles of law, but must also display that process to allow an individual to understand the verdict and to provide for meaningful review. Conclusory statements alone are not a meaningful analysis.

29. The trial decision raises several concerns that were the subject of the dissenting opinion by Justice Steel. They include: the appropriate standard upon which to review a credibility case, the misapprehension of fact and argument and the use of demeanour evidence. All are examples of errors made by the Trial Judge that undoubtedly impacted upon the final conclusion.

A. Appropriate Standard upon which to Review for a Credibility Case

30. Our system of justice must operate to protect an individual accused. The stigma of a criminal conviction and the penal consequences have long term impacts on an individual. A conviction must not be imposed on a basis of "it might have happened", or "it's more likely than not." The standard of proof beyond a reasonable doubt creates a high threshold, which is appropriate given what is at stake. This Honourable Court in *R. v. W.(D).,* [1991] 1 SCR 742 is most often cited for the framework that must be applied in a case where the Accused person has testified. While in *W.(D.), supra* the issue was the instructions given to a jury, the approach and the concerns are equally applicable in a

Judge alone trial. It has been the subject of countless decisions at the appellate level and before this Honourable Court. The instructions set out the following:

> The trial judge should instruct the jury that: (1) if they believe the evidence of the accused, they must acquit; (2) if they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit; (3) even if not left in doubt by the guilt of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the evidence which they do accept.

31. Strict adherence to the formula in *W.(D.)* is not required.[8] However, maintaining the standard of proof beyond reasonable doubt remains the principle goal. Justice Fish, in *R. v. C.L.Y.*, 2008 SCC 2 outlined the purpose of the *W.(D.)* formula noting at paragraph 25 "the very purpose of adhering to the procedure set out in *W. (D.)* is to foreclose an inadvertent shifting of the burden of proof where the complainant and the accused have both testified and the outcome of the trial turns on their credibility as witnesses."[9]

32. The shifting of a burden onto an accused is a live issue of which trial judge's must be mindful if they opt to take a different route than that set out in *W.(D.)*. This Honourable Court in *R. v. Vuardin,* 2013 SCC 38 upheld convictions where the reasons were sparse, and the Appellant's evidence was not directly addressed. While on the facts of that

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[8] As noted in *R. v. W.(D.). and subsequent cases*

[9] In dissent, Justice Fish noted at paras. 26-27:

> [26] That was the case here. And the risk of an inadvertent shift in the burden of proof materialized, as the reasons of the trial judge make plain. The trial judge accepted the evidence of the complainant without taking into account *at all* the contrary evidence of the appellant. Before even considering the appellant's evidence, the trial judge had concluded not only that the complainant's evidence was "credible", but that it was in fact true: "I believe the complainant", she stated (at para. 6).
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> [27] This conclusion, premature at best, amounted to a finding that the appellant was guilty as charged. As a matter of law, the appellant was presumed innocent; as a matter of fact, his fate had been sealed *without any consideration at all* of his evidence under oath at trial.

particular case, the reasons were sufficient and there was no error found in the application of the burden of proof, it is respectfully submitted that it should not be seen as the appropriate approach in every case and it shouldn't be seen as lowering the bar as to what is required. On those facts, this Court upheld a conviction. The Court did not change the standard or offer a preferred alternate route.

33. Reasons must be sufficient to allow the accused person to understand how the trier of fact reached a particular verdict. What will be sufficient in any given case will differ depending on the factual circumstances and the issues. The length of a decision is not indicative of whether it is sufficient. However, merely re-stating conclusory statements does not allow for sufficient review and understanding. A logical and supported explanation is required. As noted by this Honourable Court in *R. v. R.E.M.* 2008 SCC 51, a trial judge's reasons serve three main functions: to explain the decision to the parties, to provide accountability and to permit effective appellate review.[10]

34. There is little insight provided from the reasons in the instant case. As discussed in further detail below, the reasons do not provide anything more than a series of conclusory statements based upon a misapprehension of the evidence. Meaningful Appellate review is limited due to the insufficiency of reasons. The points raised by the Trial Judge in this decision merely identify erroneous approaches. They do not permit the necessary explanations that would be required to uphold the ultimate finding.

35. It can reasonably be stated that while there is no precise formula that needs to be followed, at its core, the principle of proof beyond a reasonable doubt can not be displaced. It should never become a question of simply whose evidence the trier of fact prefers. The danger in the approach of evaluating the complainant's evidence first is that the trier of fact may reach a conclusion on the evidence of the complainant, without considering the evidence of the accused, which can never then be displaced. To determine that a complainant is credible and believable before considering the entirety of the evidence (including defence evidence) will potentially place an accused in a position

[10] *R. v. R.E.M.* 2008 SCC 51, at paragraph 11

where they are required to provide, through evidence that is evaluated in the context of the entirety of the case, evidence that would overcome this initial conclusion. In this case, the Trial Judge, having made a conclusion that he believed the complainant, then turned to the Accused's evidence and noted that there was no evidence providing a motive for the complaint to lie. This supports the concern that the burden was shifted onto the Accused.

36. The evidence of the complainant came before the court through the playing of two police statements and her evidence on cross examination at Trial. In between the first and the second police statements she had testified at a preliminary hearing. It is only in her second statement, taken several years later, that she discloses incidents at a third location; that there was bribery involved; that there was sexual touching of her brother; and that she was shown child pornography.

37. At trial she gave evidence as to the approximate number of occurrences at each location and added that the Appellant had taken a nude picture of her in her bedroom closet.

38. There was no significant detail provided about each individual incident. They were largely testified to as a general theme of what would occur. The evidence disclosed by the complainant changed over time and these changes were significant. It is submitted that they were also the subject of inconsistencies at the trial. These issues needed to be examined in detail.

39. The allegation of the assault at a third location involved the Appellant having picked the complainant up from her residence, while he was separated from her mother, and driving her to his new house before sexually assaulting her while others were present at the residence. The nature of the assault is originally described as "he would try to like insert like his thing in like—in my vagina. He would try and I would like kick at him." When asked if she had another name for his thing she replied, 'his penis." [11] Later in that same

[11] Record of the Appellant, Volume 3, Statement of M.A., Dated February 29, 2016 Page 156 Line 8-14

statement, she described that he would just try to insert his finger."[12] In cross examination at trial she described him trying to lick her vagina during these assaults at Hector's residence.[13]

40. The actions relating to her brother were relevant because, once again, this was an example of incremental disclosure after a significant passage of time. In the first statement, the complainant does discuss her brother with police. Without prompting, when asked "Is there anything else you can think of [M.] that…" She cuts in and states "Oh, and like he bothers me. Like for just kidding, he tells my brother, "go hit your sister." And my brother just comes and hits me." There was no suggestion of any further concerns and nothing in relation to sexual touching between her and her brother at the Appellant's direction, notwithstanding her raising the issue of her brother in the above context.

41. The details provided in the subsequent statement are significant as they relate to the directions she supposedly received from the Appellant. These were inconsistent details which became even more so at the trial. On the first day of Trial the complainant testified that she had told her mother that her brother had touched her and that he had put his finger in her vagina.[14] Further in cross examination, on the following day, the complainant testified that her brother did not touch her vagina.[15]

42. Whether a picture was ever taken of the complainant was discussed at length in the second video statement. She told police that she wasn't aware of him taking any pictures.[16] However during trial testimony she provided a distinct example of a time

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[12] Record of the Appellant, Volume 3, Statement of M.A., Dated February 29, 2016 Page 160 Line 1-25; Page 161 Line 1-17
[13] Record of the Appellant, Volume 2, T.O.P, February 28, 2017 P 122 L9-13
[14] Record of the Appellant, Volume 2, T.O.P, February 27, 2017 P 39 L22-24
[15] Record of the Appellant, Volume 2, T.O.P., February 28, 2017 P 139 L 24-26
[16] Record of the Appellant, Volume 3, Statement of M.A., dated February 29, 2016, Page 176 Line 20-22, Page 182 Line 1-3

where she had taken off all her clothes and had posed for a nude photograph in her bedroom. [17]

43. In February 2016 the complainant first told police about the Appellant showing her "like kid's pornography."[18] At trial, when questioned about it, she testified that it happened less than five times and would occur in her mom's room. When asked why she never told the police the amount of times it had occurred, she answered "She didn't ask me, and I didn't know at the time."[19] (emphasis added)

44. The February 2016 statement was also the first time that the complainant disclosed that he would bribe her to stay quiet with candy and hamsters. When asked by the police officer: "How do you know he gave you those things so you wouldn't tell?", she responded: "Cause he would tell me like, "I'm going to get you these things, so like— so I don't tell anybody. "So I'm going to get them for you so you won't tell anybody what I'm doing to you."" However, in cross examination at trial, the complainant confirmed that nothing was said when she was given the candy or the hamsters.[20]

45. As outlined above, these later disclosures were significant. There was extensive detail that was not provided until after a preliminary hearing and some two years after the original report was made. These were significant details that went to the core of the charge before the court. At paragraph 165, Steel J.A. aptly stated in the court below:

> Moreover, no explanation was given as to the more than two-year delay between statements and the evolving disclosure. The first video statement was taken in November 2013. The preliminary hearing was held in October 2014. The second video statement was taken in February 2016. Thus, the second video statement and additional disclosure arose after court preparation and direct and cross-examination at the preliminary hearing. These were issues that the trial judge should have dealt with when assessing credibility. Instead,

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[17] Record of the Appellant, Volume 2, T.O.P., February 28, 2017 Page 144 Line 14-22, Line 31-34, Page 145 Lines 1-18
[18] Record of the Appellant, Volume 3, Statement of M.A., dated February 29, 2016, Page 178, Lines 1-22
[19] Record of the Appellant, Volume 2, T.O.P, February 28, 2017, Page 149 Line 14-31
[20] Record of the Appellant, Volume 2, T.O.P, February 28, 2017 Page 155 and 156

> the only comments made by the trial judge are conclusory and do not deal with these significant issues.

The above observation offered by Steel J.A. highlights the lack of any meaningful critical analysis of the complainant's evidence. In place of any scrutiny, the Trial Judge asserts a conclusion as to his satisfaction of the evidence; while mislabelling inconsistencies instead of examining them. Simply put, while mentioning the test in *WD,* the Trial Judge failed to actually engage in its direction.

46. As Steel J.A. further observed in conclusion at paragraph 171, "A proper evaluation of a witness's evidence needs to be undertaken when assessing credibility. It must be a reasonable explanation. The trial judge acknowledged that 'the task of the trial judge is not simply to choose one version of events over another' but, in his reasons, it appears that is exactly what he has done."

47. The Trial Judge further elevated the complainant's testimony by erroneously crediting her with the Appellant's lack of evidence of the complainant's motive to lie. It should never be up to an accused to explain why the complainant was making up allegations. To require such is a clear shift of the burden of proof. A person who has a motive to lie, may be truthful. In contrast, a person with no apparent motive to lie, may be untruthful. Motive to lie is but one factor that may be taken into account when assessing the credibility of the witness is question. However, inability on the part of an accused to provide that motive should not be a factor in assessing the credibility of a Crown witness.

48. Steel J.A. wrote at paragraph 168:

> So, what reason is given for not believing the accused? The trial judge referred to the fact that the relationship seemed to be a good one between the two, implying that there was no reason for the complainant to lie. While motive or absence of motive can be a factor to be taken into account when assessing the credibility of the person in question, it should not be up to the accused to explain why the complainant was making these allegations (see *R v TM*, 2014 ONCA 854; and *R v Bartholomew*, 2019 ONCA 377 at para 23). This shifts the burden of proof onto the accused to show why the complainant would be lying.

49. Clearly, to demand of an accused to offer evidence as to a complainant's motive to lie is an impermissible shifting of the evidentiary burden. Crown evidence needs to satisfy the burden of proof. It is never incumbent on the accused to offer reasons why a complainant or Crown witness is lying or risk some finding against that accused for failing to do so. But here, the Trial Judge not only uses the Appellant's lack of asserting any such explanation to elevate the complainant's credibility, the Trial Judge further utilizes this lack of explanation as a tool to find the Appellant incredible. It is not without irony that one could opine that this impermissible shifting of the burden is the only incident where the Trial Judge employs the context of "the evidence as a whole" to evaluate the evidence of the complainant.

B. Misapprehension of Evidence

50. The Trial Judge made two key misapprehensions of fact that contributed to his ultimate conclusion. The first related the Appellant's evidence. The second was in relation to the complainant's evidence.

51. The Trial Judge's discussion of the Appellant's evidence began at paragraph 50 and concluded at paragraph 52. It began with the conclusion that "I do not believe the evidence of the accused." Three points were raised in these paragraphs: the absence of a motive to lie (discussed above), the disclosure that the Appellant told the complainant that he was leaving her mother, and the lack of opportunity defence. The Trial Judge specifically noted that the disclosure is not a basis for disbelieving the accused.[21] It is on the third point where the judge misapprehended the evidence.

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[21] Record of the Appellant, Volume 1, Reason for Judgment, page 19 at paragraph 51 – "I would also note that it appears very odd that he would tell the complainant at the airport before her trip to Columbia that he was leaving her mother, but that he did not tell the mother that hew as leaving the relationship. However, that disclosure by itself, does not demonstrate any improper relationship between the two."

52. The Trial Judge, in discussing the Appellant's evidence, concluded that "there were more than enough opportunities for the accused and the complainant to have been alone together without being concerned that the mother or some other family member would have disturbed the two together." However, lack of opportunity was not something argued before the Trial Judge. The Appellant did not deny that there was opportunity, he denied that sexual touching had occurred. [22] It was readily acknowledged in closing submissions that this could have happened, but that it did not.[23] The opportunity for this to have happened was clearly conceded in submissions. There was support for the Appellant's testimony that there was more limited opportunity at the first address, on Redwood, in the evidence of the complainant's mother.[24] Further, it is logically supported by the fact that more people lived at the Redwood address and at that time it was a new relationship.

53. The Trial Judge, somehow, took evidence limiting opportunity at one location as giving rise to reliance on a defence of lack of opportunity. None was raised. But having found evidence that overcame this "defence", the Trial Judge took this as reason to disbelieve the Appellant. This was a clear misapprehension of the evidence that warrants appellate intervention. This Honourable Court in *R. v. C.L.Y.,* 2008 SCC 2, ordered a new trial. Justice Abella, writing for the majority noted:

> [19] This Court has said a material misapprehension of the evidence may justify appellate intervention. In *R. v. Lohrer*, [2004] 3 S.C.R. 732, 2004 SCC 80, at para. 1, Binnie J. cited, with approval, the following analysis by Doherty J.A. in *Morrissey*:
>
> > Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. . . . If an appellant can demonstrate that the conviction

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[22] Record of the Appellant, Volume 3, T.O.P., April 11, 2018, P 14, P34

[23] Record of the Appellant, Volume 3, T.O.P., April 11, 2018, P 73 L12-20 Closing submissions of the Appellant's counsel: "The Crown will argue and much of the evidence that was put before this Court was that there was opportunity. But that's not going to assist you to a great deal."

[24] Record of the Appellant, Volume 2, T.O.P., February 28, 2017, P 102 L. 3-13

> depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction. [Emphasis added; p. 221.]

As Binnie J. pointed out, this represents a stringent standard, and the misapprehension must "play an essential part not just in the narrative of the judgment but 'in the reasoning process resulting in a conviction'" (para. 2).

[20] In my view, the threshold has been met in this case.

[21] In reaching this conclusion, I am keenly aware that a trial judge occupies a singular perch in assessing credibility (*R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, at p. 131; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at paras. 20-21). However, based on the record in this case, it is clear that the trial judge's bases for disbelieving *C.L.Y.* rested on misapprehensions of his evidence and played a critical role in the convictions, rendering them insupportable.

54. There is limited transparency in the Reasons for Judgment to conclude precisely what impact this had on the overall analysis, but it is clear that it was one of the only reasons identified by the Trial Judge for dis-believing the accused and/or concluding that his evidence didn't raise a reasonable doubt. It was a material and substantive misapprehension. Opportunity for the Appellant to have committed these offences was a clear focus of the Trial Judge's, but lack of opportunity was not the accused's defence, nor the focus of his testimony. As Steel J.A. set out at paragraph 170:

> However, the accused never denied that he was alone with the complainant at various times and had the opportunity. When questioned, the accused agreed that it was feasible he was alone with the complainant at the Redwood residence at times and readily agreed that was the case at the Donald residence. He simply denied that it ever occurred. Lack of opportunity was not his defence and the trial judge misapprehended the evidence on this point. In reaching this conclusion, I am keenly aware that a trial judge occupies a singular perch in assessing credibility; however, based on the record in this case, it is clear that part of the trial judge's basis for disbelieving the accused rested on a misapprehension of his evidence and played a critical role in the conviction, rendering it insupportable.

55. The Trial Judge stated that the evidence of the complainant "provided the context which leads me to the conclusion that the accused's denials of these allegations is not

believable."[25] As such, the complainant's evidence then becomes a key focus of Appellate review. When one turns to the Trial Judge's evaluation of the complainant's evidence it is clear he misapprehended the nature of the disclosures, and the contradictions and inconsistencies therein. As noted by Justice Steel, these were not insignificant peripheral matters.

56. The nature of the evidence in this case, and the manner in which the complainant's evidence was disclosed, was a relevant factor that required close scrutiny. The statement by the Trial Judge that her testimony was consistent and clear in the central allegations relating to the accused sexually assaulting her and touching her for a sexual purpose in all of the three locations does not address or even acknowledge this evolving narrative. The Appellant concedes that incremental disclosure, in and of itself, will not be a basis for automatically rejecting the evidence. However, where the evolutionary nature of the evidence goes directly to the central issue at trial, that evolution, as well as the whole of the evidence, requires scrutiny.

57. Through the decision the Trial Judge used phrases such as "only insignificant peripheral inconsistencies",[26] that she was "consistent and clear in the central allegations relating to the accused sexually assaulting and touching her for a sexual purpose in all of the three locations"[27] and lastly, "some peripheral inconsistencies".[28] When one examines the "inconsistencies" as Justice Steel did, and as discussed above, it is clear that they are not insignificant nor were they on peripheral matters. [29]

58. Failure to recognize that these details are not "insignificant" or on "peripheral matters" is a clear misapprehension of the evidence. This failure played a critical role in the

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[25] Record of the Appellant, Volume 1, Reason for Judgment, Page 30, Paragraph 53
[26] Record of the Appellant, Volume 1, Reason for Judgment, Page 17, Paragraph 45
[27] Record of the Appellant, Volume 1, Reason for Judgment, Page 16, Paragraph 43
[28] Record of the Appellant, Volume 1, Reason for Judgment, Page 20, Paragraph 53
[29] These inconsistencies included: the additional location of sexual assault, the bribery, the sexual touching of her brother, the pornography, and the taking of photographs cannot be said to be insignificant

conviction and cannot be upheld. Mischaracterizing them as peripheral or insignificant offers an explanation for why the Trial Judge failed to scrutinize these inconsistencies. It does not, however, excuse his failure to do so.

C. Demeanor Evidence

59. The Trial Judge relied heavily upon how the complainant presented in court, specifically noting that she was "a polite, intelligent and honest child without any motivation to lie." The absence of a motive to lie is commented upon throughout the decision. It is raised both on the evaluation of the complainant's evidence and the evidence of the Appellant and the error in this has been discussed in detail above. The reliance on demeanor evidence is problematic. To assess the credibility of a witness based solely on how they present is an erroneous approach.

60. The Ontario Court of Appeal in the *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, cited with approval in subsequent cases, noted at paragraph 66: "Furthermore, while demeanour is a relevant factor in a credibility assessment, demeanour alone is a notoriously unreliable predictor of the accuracy of evidence given by a witness." In *R. v. Rhayel,* 2015 ONCA 377, Justice Epstein, wrote at paragraph 85 and following:

> It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom. One of the dangers is that sincerity can be and often is misinterpreted as indicating truthfulness.
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> In *R. v. G.(M.)* (1994), 1994 CanLII 8733 (ON CA), 93 C.C.C. (3d) 347 (C.A.), at p. 355, this court quoted with approval the following passage from *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-57:
>
> > If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness.

> For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

61. The Alberta Court of Appeal in *R. v. Giroux,* 2017 ABCA 270 stated at paragraph 26:

> Demeanour during testimony is a legitimate consideration when assessing credibility. Over-reliance is an error of law. Both verbal and non-verbal communication are relevant. As did Renke, J. in *R. v. J.A.B.*, 2016 ABQB 362 at para. 20, I endorse the following summary of the proper approach to credibility assessment on the basis of demeanour as set out by Ferguson, J. at para. 78 in *R. v. Storey*, 2010 NBQB 86:
>
> > No longer are judges encouraged to consider demeanour evidence to be a determining or even central tool in credibility assessment. *R. v. R.G.L.* 2004 CanLII 32143 (ON CA), [2004] O.J. No. 1944 (O.C.A.); *R. v. F. (S.)* (2007), 2007 PESCAD 17 (CanLII), 223 C.C.C. (3d) 1 (P.E.I.S.C.A.D.) and also *R. v. T.E.* 2007 ONCA 891 (CanLII), [2007] O.J. No. 4952 (O.C.A.). Rather, the proper approach is to consider the evidence of a particular witness against the backdrop of the rest of the evidence led or other evidence tendered, searching for connectors that may not necessarily rise to the level of legal corroboration between witnesses, the other evidence tendered or a combination of the two in deciding what worth should be attributed to it. In the final analysis it becomes a matter of determining the veracity of the evidence utilizing the age old tools of logic, reason and common sense in measuring the probability, if it is deducible from the evidence, that the witness or witnesses' honesty on the central issue or issues is assailable.

62. The Trial Judge's reasons demonstrate that the demeanour of the complainant was a central tool used in the credibility assessment. This decision to use her demeanour detracted from a meaningful analysis of the evidence in the context of the rest of the evidence. Further, in this particular case, the Appellant's first language was Spanish and an interpreter was present throughout the Trial. It would be inherently dangerous to evaluate the evidence of each solely in the manner in which it was presented when there is a language barrier. Of note in this case, there was nothing mentioned in regard to the Appellant's demeanour on the witness stand.

63. The use of the witness's demeanour is just one of several errors that occurred in the Trial Judge's approach to reaching a verdict. It formed an integral part of the conclusory

statements that the complainant's evidence was credible which formed the foundation for the conviction.

D. Overall Impact of the Errors

64. The errors identified above, alone and cumulatively, demonstrate a fatal flaw in the application of the principles arising from *W.(D.)*. to the credibility analysis in this case. The analysis can not stand. Fairness to the Appellant requires a new trial be ordered to allow these issues to be properly considered in the context of the case.

PART IV – SUBMISSIONS CONCERNING COSTS

65. There is no application for costs.

PART V – ORDER SOUGHT

66. The Appellant respectfully request that this Appeal be allowed, that the decision of the Court of Appeal of Manitoba be set aside, and a new trial ordered.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

67. A publication ban pursuant to section 486.4(1) of the *Criminal Code* applies to this case. Any information that could identify the person described as the complainant in this judgment shall not be published, broadcast or transmitted in any manner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of February, 2021

as agent for

Richard J. Wolson, Q.C.
Evan J. Roitenberg
Laura C. Robinson
Counsel for the Appellant

PART VII – TABLE OF AUTHORITIES

Cases **Paragraphs**

Legislation