**File No. 39466**

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

**BETWEEN:**

**ERIK OSWALDO RAMOS,**

**APPELLANT**
**(Appellant),**

**- and -**

**HER MAJESTY THE QUEEN,**

**RESPONDENT**
**(Respondent).**

# FACTUM OF THE RESPONDENT
# HER MAJESTY THE QUEEN

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


**MANITOBA JUSTICE**
Prosecution Service
510 – 405 Broadway
Winnipeg, Manitoba R3C 3L6

**Jonathan W. Avey**
**Craig Savage**
Tel: 204-945-2852
Fax: 204-948-1260
E-mail: jonathan.avey@gov.mb.ca
E-mail: craig.savage2@gov.mb.ca

Counsel for the Respondent

**GOWLING WLG (CANADA) LLP**
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3

**D. Lynne Watt**
Tel: 613-786-8695
Fax: 613-788-3509
E-mail**:** lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent

**GINDIN WOLSON SIMMONDS ROITENBERG**
1200 – 363 Broadway Avenue
Winnipeg, Manitoba R3C 3N9

**Richard J. Wolson, Q.C.**
**Evan Roitenberg**
**Laura Robinson**
Tel: 204-985-8184
Fax: 204-956-4146
E-mail: rwolson@gwsr.ca
E-mail: eroitenberg@gwsr.ca
E-mail: lrobinson@gwsr.ca

Counsel for the Appellant

**SUPREME ADVOCACY LLP**
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3

**Thomas Slade**
Tel: 613-695-8855
Fax: 613-695-8580
E-mail: tslade@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant

**File No. 39466**

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

**BETWEEN:**

**ERIK OSWALDO RAMOS**

**APPELLANT**
**(Appellant),**

**- and -**

**HER MAJESTY THE QUEEN,**

**RESPONDENT**
**(Respondent).**

---

**FACTUM OF THE RESPONDENT**
**HER MAJESTY THE QUEEN**

---

# TABLE OF CONTENTS

## Part I – Overview and Statement of Facts

### *A. Overview*

1. The Appellant repeatedly molested his girlfriend's daughter while she was between six and ten years old. He rubbed his penis and fingers against her vagina, performed oral sex on her, and at times ejaculated on her body. After abusing the victim, the Appellant gave her gifts of candy and small pets, and told her that if she ever told anyone, her mother would go to jail and the victim would be alone. The victim told her mother anyway.

2. The Appellant's trial before Toews J. turned on credibility. The Learned Trial Judge was not left in doubt by the Appellant's denials, and accepted the victim's evidence. He convicted the Appellant. The Manitoba Court of Appeal (Steel J.A. dissenting) affirmed the conviction and dismissed the appeal. The Appellant appeals as of right to this Honourable Court.

3. The Court of Appeal was not divided on a novel legal issue, but on the application of principles regarding the trial judge's assessment of the Appellant's credibility. The appeal therefore reduces to a single question: did the Learned Trial Judge sufficiently explain why he rejected the Appellant's denials and accepted the victim's evidence?

4. A majority of the Court of Appeal (Mainella and Burnett JJ.A.) correctly concluded that he did. As this Court has held, trial judges are not required to "detail the precise path that led from disparate pieces of evidence to his conclusions on credibility and guilt." While it is useful for a trial judge to attempt to articulate the reasons for believing one witness and disbelieving another, it is not always possible. Acceptance of a complainant's evidence can be reason enough for rejecting an accused's plausible denial.

*R v R.E.M.*, 2008 SCC 51 at para 24.

*R v R.A.*, 2017 ONCA 714 at paras 4, 55-56, aff'd 2018 SCC 13.

5. When the Learned Trial Judge's reasons are considered in the context of the proceedings as a whole, they clearly illustrate that he rejected the Appellant's denials after a considered and reasoned acceptance of the victim's testimony. The majority recognized this, applied the deferential standard of review applicable to credibility and factual findings, and dismissed the appeal.

6. The dissenting judge held the reasons were insufficient, finding that the Learned Trial Judge did not explain what it was about the victim's evidence that caused him to accept it. She concluded that the Learned Trial Judge had therefore erred in his consideration of the principles articulated in *R v W.(D.)*.[1] In doing so, she ignored the principle this Court has repeatedly affirmed that judges are presumed to know the law and apply it, and imposed a standard on the trial judge's reasons that was higher than required given that the analysis is a functional one. She was wrong to do so. The appeal should be dismissed.

### *B. Facts and Procedural History*

7. The victim was born on March 13, 2003. She has three siblings. For part of 2010, the victim and her mother lived in Winnipeg, MB, on Ellen Street before moving to a home on Redwood Avenue.

> Transcript, February 27, 2017, Appellant's Record, Tab 6, p. 13; Transcript, February 28, 2017, Appellant's Record, Tab 7, pp. 175-77.

8. The Appellant and his friend, Hector Lemos, lived in the basement of the home on Redwood Avenue. The victim, her mother, and her siblings occupied the main floor and top floor. In late 2010, the victim's mother started a romantic relationship with the Appellant.

> Transcript, February 28, 2017, Appellant's Record, Tab 7, pp. 177-79.

[1] [1991] 1 SCR 742.

9. Shortly before November 2011, the victim, her family, and the Appellant moved out of the home on Redwood Avenue and into a home on Donald Street.

Transcript, February 28, 2017, Appellant's Record, Tab 7, pp. 180-81.

10. In October 2013, the victim and her mother travelled to Columbia. The Appellant remained in Canada. During the visit, the victim told her mother that the Appellant had touched her sexually. She also said the Appellant promised her candy, and told her that her mother would kill him and wind up in jail if the victim told her mother about the abuse. This was the first time the victim had disclosed the abuse to her mother.

Transcript, February 28, 2017, Appellant's Record, Tab 7, pp.192-95.

11. On November 20, 2013, the same day they returned from Columbia, the victim's mother took her to speak to the police.

Transcript, February 28, 2017, Appellant's Record, Tab 7, pp. 136, 194-95.

12. A Winnipeg Police Service investigator interviewed the victim. The interview was video-recorded and admitted into evidence at the Appellant's trial by consent, pursuant to s. 715.1 of the *Criminal Code*. In her statement, the victim said:

- She is ten years old and in grade five. She was born in Columbia and moved to Canada about seven years ago. [2013 Video Statement, Appellant's Record, Tab 9, pp. 101-02.]
- When it was just the two of them in the house, the Appellant would come into her bedroom, take off some of her clothes and leave her wearing only a shirt. He would be standing up and she would be laying down on her bed. [2013 Video Statement, Appellant's Record, Tab 9, pp. 122-23, 139, 141.]
- The Appellant would try and put his penis or fingers inside her vagina. Sometimes they would go inside her vagina. Sometimes he would lick her vagina, she would hit him in the head and he would stop. [2013 Video Statement, Appellant's Record, Tab 9, 136-37.]

- Sometimes sperm would come out of his penis and go onto her body but not in it. [2013 Video Statement, Appellant's Record, Tab 9, pp. 126-27.]

- The Appellant would tell her "Don't tell your mom because she'll go to jail and you don't want to be alone, right?" [2013 Video Statement, Appellant's Record, Tab 9, p. 112.]

- The Appellant started doing this to her shortly after he started dating her mom. She does not remember the exact date when it started but recalls they were living on Redwood Avenue. For this school year (grade five), it has happened three times or more. [2013 Video Statement, Appellant's Record, Tab 9, pp. 112, 128, 135.]

13. A preliminary inquiry was held on October 15, 2014. The victim testified and the Appellant was committed for trial before the Queen's Bench on charges of sexual interference and sexual assault.

Transcript, February 27, 2017, Appellant's Record, Tab 6, p. 46.

14. The victim and her mother moved to Toronto in August 2015. A few months later, when the victim was informed she needed to return to Winnipeg to testify again, she became upset and disclosed to her mother additional details about what had occurred. Her mother told the police.

Transcript, February 28, 2017, Appellant's Record, Tab 7, pp. 181, 197.

15. The victim provided a second video-recorded statement to police on February 29, 2016, when she was twelve years old. That video statement was also admitted into evidence by consent, pursuant to s. 715.1 of the *Criminal Code*. The victim said:

- The Appellant would take her to his friend Mr. Lemos's place, where the Appellant would "do stuff" to her and then afterwards give her candy and pet hamsters so she would not tell anybody. [2016 Video Statement, Appellant's Record, Tab 10, pp. 153, 170.]

- The Appellant took her into a room inside Mr. Lemos's house. He locked the door, had her lay on a mattress and rubbed her vagina. He put a little bit of his finger inside her vagina as she kicked and pulled away. He pulled his finger out, kept rubbing then stopped and said "Let's go." This happened more than once,

when she was 9 or 10 years old, while living on Donald Street. [2016 Video Statement, Appellant's Record, Tab 10, pp. 155-63.]

- On more than one occasion, the Appellant told the victim to go into her brother's room and touch his penis. The Appellant said "I'm going to go in later and take pictures of you guys." She did touch her brother's penis, but she never saw the Appellant go into the room. [2016 Video Statement, Appellant's Record, Tab 10, pp. 171-76.]

- The Appellant would show her "kids pornography… like little girls with like old men." [2016 Video Statement, Appellant's Record, Tab 10, p. 178.]

16. At trial, the Crown called two witnesses: the victim and her mother. The victim testified that she was sexually abused by the Appellant:

- twice at Mr. Lemos's house;

- probably four times while living on Redwood Avenue; and,

- more than five times while living on Donald Street.

Transcript, February 27, 2017, Appellant's Record, Tab 6, p. 27.

17. The victim was unshaken on material points despite a lengthy and comprehensive cross-examination that took place over two days. When challenged on how the Appellant could have assaulted her while she was laying on the bed and he was standing, she explained that he leaned over. When confronted on how she was able to push an adult man out of the room, she described being able to do so since he did not resist.

Transcript, February 27, 2017, Appellant's Record, Tab 6, pp. 71, 85.

18. The Appellant took the stand and denied the offences. He confirmed that he was dating the victim's mother and that he lived with the victim's family. When asked if he recalled ever being alone with the victim while at the house on Redwood, he answered, "No, I don't recall anytime I've been alone with [her]…" He denied driving the victim to or from school except when her

mother was there. He also said that he traveled for work, and indicated "I would go for 21 days and then come back for a few days and then go back again."

Transcript, April 11, 2018, Appellant's Record, Tab 8, pp. 12-17.

19. The Appellant asserted that he was a victim of domestic violence at the hands of the victim's mother, testifying that she beat him more than fifty times, and that she sometimes used weapons – "whatever was in her hands." Notwithstanding this abuse, the Appellant said that his relationship with the victim was good. In fact, he testified that the victim repeatedly stepped in to defend him. According to the Appellant, it was the victim – not her mother – whom he told that he had decided to end the relationship and move out of the house.

Transcript, April 11, 2018, Appellant's Record, Tab 8, pp. 14, 20-21, 50-53, 59-60.

### *C. The Trial Judge's Decision*

20. The Learned Trial Judge devoted more than six pages to summarizing the evidence. He dedicated a further six pages to his credibility analysis. He instructed himself on the *W.(D.)* framework, reminding himself that "the task of the trial judge is not simply to choose one version of events over another[.]" He also quoted Karakatsanis J.'s decision in *R v Vuradin* for the principle that credibility assessments may be expressed in any order, "as long as the principle of reasonable doubt remains the central consideration." He identified the "central allegation" as being whether the Appellant touched the victim sexually at the three residences.

Reasons for Conviction, Appellant's Record, Tab 2, paras 33, 36, 43; *R v Vuradin*, 2013 SCC 38 at para 21.

21. His assessment of the victim was that she was polite, intelligent but unsophisticated, and honest. He observed that when questions were clearly put to her, she was able to provide details about the incidents, and that she demonstrated "a forthright willingness to truthfully answer the questions she was asked." He acknowledged that her evidence contained some inconsistencies, but

attributed them to the passage of time or that they were peripheral in nature. He concluded that her evidence, notwithstanding the inconsistencies, was "very credible."

Reasons for Conviction, Appellant's Record, Tab 2, paras 44, 46, 48-49, 53.

22. His careful review of all of the evidence led him to conclude that the Appellant's denial of the offence was not believable, did not raise a reasonable doubt, and the evidence that was accepted was sufficient to prove the Appellant's guilt beyond a reasonable doubt.

Reasons for Conviction, Appellant's Record, Tab 2, paras 53-55.

23. The Learned Trial Judge convicted the Appellant of sexual interference. Applying the *Kienapple* principle, he entered a judicial stay on the sexual assault charge.

### *D. The Manitoba Court of Appeal's Decision*

24. The Appellant appealed his conviction. He alleged ineffective assistance of his initial counsel, that the Learned Trial Judge erred in denying his application for a mistrial, and in applying *W.(D.)* principles. The Manitoba Court of Appeal (Steel J.A. dissenting) affirmed the conviction and dismissed the appeal. The Court of Appeal was divided only on the application of principles regarding the trial judge's credibility assessments. The panel unanimously dismissed the other grounds.

25. Steel J.A. criticized the reasons for conviction, impugning them as being merely conclusory. In her view, the Learned Trial Judge was obliged to "draw a link from the evidence to his findings of fact and from his findings of fact to his conclusion." She also held that he (i) relied inappropriately on the victim's demeanour, (ii) failed to resolve inconsistencies in her evidence that "cannot be said to be insignificant or peripheral" and (iii) misapprehended the Appellant's

evidence when he held that the Appellant's opportunity to commit the offences was a live issue at trial.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, paras 154-57, 164, 169-70.

26. Mainella J.A. (Burnett J.A. concurring) held that a functional, contextual review of the Learned Trial Judge's reasons permitted meaningful appellate review and disclosed no errors. After reviewing this Court's jurisprudence regarding appellate interpretation of reasons, he observed that, "The record in this case is extensive in relation to the only live issue… Given the context of the accused's evidence being a bare denial that any sexual touching occurred, there was little the trial judge could have said as to why the accused was disbelieved."

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, paras 48-58.

27. The majority recognized that the Learned Trial Judge made several comments that explained his credibility findings. He found that the Learned Trial Judge "grappled with the substance of the live issues on the trial" and was entitled to reach the conclusions he did.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, paras 61, 63, 96-100.

28. The majority also appropriately applied a deferential approach to the manner in which the Learned Trial Judge dealt with the victim's incremental disclosure, the inconsistencies in her evidence, his observations regarding the victim's demeanour, and his view that the Appellant had put his opportunity to commit the offences at issue. The majority recognized that simply because another judge may have viewed the evidence differently, that did not render the Learned Trial Judge's findings unreasonable. Upon reviewing the record, the majority recognized that the Learned Trial Judge's findings were reasonable, and declined to interfere.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, paras 78-79, 106-11, 116.

## Part II – Issues

1. Did the Learned Trial Judge's credibility assessment reflect an error in principle?

The Appellant appeals as of right, pursuant to section 691(1)(a) of the *Criminal Code*.

## Part III – Argument

### *A. Introduction*

29. This appeal is not about the sufficiency of the evidence. It is not alleged that the verdict was unreasonable or cannot be supported. Rather, the issue is whether the Learned Trial Judge's reasons for conviction were sufficient. They were. With respect, the Appellant's – and the dissenting Justice's – interpretation of the reasons are inconsistent with the principles governing their appellate review.

30. All three judges on the Court of Appeal agreed that the Learned Trial Judge was entitled to reject the Appellant's evidence based on his acceptance of the complainant's beyond a reasonable doubt. The disagreement stemmed from their respective interpretations of the reasons for conviction and whether those reasons were sufficient to support the verdict. The majority's approach was the correct one: it considered the reasons having regard for the context of the trial, and viewed the Learned Trial Judge's credibility assessments and factual findings from a position of deference.

### *B. The Standard of Review*

31. This Honourable Court should be hesitant to interfere in this facts-based appeal. As the majority recognized, "[a]lthough the allegations were serious, this was a simple case." Appellate review of credibility and factual findings is extraordinarily deferential. This must be borne in mind when reviewing a trial judge's reasons on such findings.

Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 74.

32. The majority found no error and dismissed the appeal. This Court may reverse that order if there was a legal error on the part of the majority, but it should not assess the trial judge's reasons as if this were an appeal directly from the trial judgment. This Court must also be careful not to

second-guess discretionary findings that flow from the trial judge's "overwhelming advantage" of seeing the witnesses and hearing the evidence firsthand.

> *R v N.S.*, 2012 SCC 72 at para 25.

### *C. The Principles Governing Appellate Review of a Trial Judge's Reasons*

33. Reasons are reviewed for adequacy; not perfection. Viewed in a functional and context-specific manner, so long as they (i) inform the parties of the basis of the verdict, (ii) provide public accountability, and (iii) permit meaningful appellate review, they are sufficient.

> *R v R.E.M.*, 2008 SCC 51 at para 15.

34. There is no rule mandating the extent or content of a trial judge's reasons. Much like jury instructions, a minute parsing of any given set of reasons would likely lead to the conclusion that something more could have been said. This does not render them insufficient. As this Honourable Court has repeatedly held, what is required will depend on the exigencies of each case.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 46, citing *R v Dinardo*, 2008 SCC 24 at para 24 and *R v Sheppard*, 2002 SCC 26 at para 24.

35. It is clear, however, that a judge is not required to prove their knowledge to the parties or an appellate court by engaging in a lengthy discourse about well-settled legal principles. As McLachlin J. (as she then was) explained, "Trial judges are presumed to know the law with which they work day in and day out." Thus, a succinct analysis – or even silence – on a particular issue is not an error of law.

> *R v Burns*, [1994] 1 SCR 656 at paras 18-19. See also *R v R.E.M.*, 2008 SCC 51 at para 19.

### *(i) Writing reasons is not a "watch me think" exercise*

36. The Appellant asserts that the Learned Trial Judge's reasons were inadequate because he merely expressed conclusory remarks and did not give specific reasons why the Appellant's evidence did not raise a reasonable doubt. This, however, is not the law. On the contrary, appellate courts have repeatedly emphasized that such details need not form part of a judge's review:

> The object of reasons is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. Rather, reasons show *why* the judge made that decision.
>
> *R v R.E.M.*, 2008 SCC 51 at para 17 (underlining added, italics in original).[2]

37. Reasons are not jury instructions, nor are they reviewed on a stand-alone basis. Rather, they are read in the context of the arguments and evidence raised, which judges are presumed to have understood and acted upon. As Watt J.A. observed, "reasons need not establish that the trial judge was alive to and considered every crumb of evidence, or answered each and every argument advanced by counsel."

> *R v Doodnaught*, 2017 ONCA 781 at para 80.

### *(ii) Credibility findings are entitled to significant deference*

38. That a trial judge is not required to provide a mental roadmap of his decision-making process is particularly true in credibility cases where judges have made findings with which one side or the other disagrees. Appellate courts have been careful to ensure that parties cannot avoid

[2] See also para 18, quoting *R v Morrissey*, 2007 ONCA 770 at para 30: "[Reasons] explain why [the trial judge] arrived at a particular conclusion. They are not intended to be, and should not be read as, a verbalization of the entire process engaged in by the trial judge in reaching a verdict."

the deferential standard of review applicable to such findings by characterizing their disagreement as a complaint about the sufficiency of reasons:

> In our review of reasons for sufficiency, we begin from a position of deference towards the trial judge's findings of fact. Absent palpable and overriding errors by a trial judge in his perception of the facts, his or her findings are to be respected… We look at the reasons in their entire context to see whether the trial judge appears to have seized the substance of the matter.
>
> *R v Doodnaught*, 2017 ONCA 781 at para 81 (emphasis added, citations omitted).

39. Further to that, "[w]here credibility is a determinative issue, a judge's findings are subject to deference and appellate intervention should be rare." This reflects the deferential standard of review for credibility assessments: as this Honourable Court has repeatedly stated, an appellate court may only interfere when it is established that they "cannot be supported on any reasonable view of the evidence."

> *R v Doodnaught*, 2017 ONCA 781 at para 80.
>
> *R v R.P.*, 2012 SCC 22 at para 10 (citations omitted, emphasis added).

40. Fundamentally, the question is whether the reader – including the parties or a reviewing court – can ascertain the basis for the trial judge's conclusion. In that regard, "the sufficiency of reasons in credibility cases should be determined generously and holistically, rather than focusing on minor or technical omissions that do not ultimately prevent the judge's reasoning from being understood."

> *R v Griffen*, 2018 ABCA 277 at para 2.

### *D. Application to this Case: the Learned Trial Judge's Reasons were Sufficient and his Findings Entitled to Deference*

#### *(i) The reasons explain the basis for the verdict*

41. There is no error in the majority decision holding that the Learned Trial Judge's reasons, viewed in the context of the exigencies of the case, sufficiently explained the result.

42. This case is unlike that in *R v Dinardo*, where the victim "wavered on *the* central issue at trial: that is, whether Mr. Dinardo committed the acts for which he was charged, or whether the story was invented." In those circumstances, the trial judge was obliged to explain how he resolved this difficulty in order to reach a conclusion of guilt beyond a reasonable doubt.

> *R v Dinardo*, 2008 SCC 24 at para 29 (emphasis in original).

43. This case is better compared to *R v Vuradin*, in which the trial judge's reasons were "sparse" but the complainant's evidence was unshaken on cross-examination. The trial judge held that the inconsistencies in the complainant's evidence were minor and to be expected (particularly from a child witness), and the appellant's argument's with respect to the physical impossibility of the incidents were merely conjecture. Karakatsanis J., for a unanimous panel, held:

> [T]he reasons were sufficient – they allow for meaningful appellate review because they tell the appellant why the trial judge decided as he did. The trial judge found the complainant's evidence compelling, the problems in her evidence inconsequential, and the appellant's concoction theories speculative. The reasons reveal that the trial judge accepted the complainant's evidence where it conflicted with the appellant's evidence. No further explanation for rejecting the appellant's evidence was required.
>
> *R v Vuradin*, 2013 SCC 38 at paras 4-5, 19.

44. As in *Vuradin*, the Learned Trial Judge's reasons explain the basis for the verdict: he accepted, beyond a reasonable doubt, the evidence of the victim. Having done so, he rejected the

Appellant's evidence where is contradicted the victim's – specifically in respect of the allegations of sexual touching. As in *Vuradin*, nothing more was required.

### *(ii) Considered and reasoned acceptance of a victim's evidence does not require perfect testimony*

45. Steel J.A. acknowledged that a reasoned acceptance of a complainant's evidence can ground rejection of an accused's. She went on to qualify this:

> However, "the credibility of inculpatory evidence must be particularly impressive before that evidence can be credited beyond a reasonable doubt in the face of facially unassailable exculpatory evidence."
>
> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 161.

46. In doing so, she relied on a scholarly article by David Paciocco, writing extrajudicially. However, Steel J.A. quoted selectively, beginning from the middle of the paragraph, and presented the quote in a manner that altered the meaning of Paciocco's writing. The full paragraph says:

> Trial fact-finders must, of course, act on their own honest appraisal of whether they are in reasonable doubt after bearing in mind the *W.(D.)* principles, but there are obvious risks in rejecting exculpatory evidence that is immune from criticism. One would think that the credibility of inculpatory evidence must be particularly impressive before that evidence can be credited beyond a reasonable doubt in the face of facially unassailable exculpatory evidence.
>
> David Paciocco, "Doubt about Doubt: Coping with *R. v. W. (D.)* and Credibility Assessment" (2017) 22:1 Can Crim L Rev 31 at 48. [Respondent's Authorities, p. 13.]

47. Paciocco's comment was not intended as a standard for appellate courts to apply. Rather, it was a warning: he was saying that trial judges must be wary, and must carefully consider whether a complainant's evidence alone rises to proof beyond a reasonable doubt. The Learned Trial Judge did. He was convinced of the Appellant's guilt, and he was entitled to make that finding.

48. There are two problems inherent in Steel J.A.'s use of this article. First, she ignores that the trial judge did act on his own honest appraisal of whether he had a reasonable doubt. Second, her reasoning is dangerous: it risks appellate courts not showing appropriate deference simply because they would not find evidence "particularly impressive."

49. The standard of proof in criminal matters is "beyond a reasonable doubt" not "beyond a reasonable doubt because the evidence was particularly impressive." There is no qualification as to the type of evidence that must be presented in order to reach proof beyond a reasonable doubt. On the contrary, the jurisprudence is clear that the evidence of a complainant alone may satisfy this burden.

50. If this comment was applied by judges in the manner that Steel J.A. did, the practical effect would be that in the absence of near-perfect testimony from a child witness, any well-spoken child molester would be effectively immune from prosecution. That cannot be the law.

### *(iii) The victim's testimony on the core allegations did not waver*

51. The victim was candid and forthright; when she did not know, or was not sure of, an answer to a question, she said so. Her account on material points, that is, the sexual touching alleged, was consistent. She admitted details that were not flattering to her – she even admitted to sexual contact with her brother. It was put to her numerous times over two days of cross-examination that she was making up the allegations. Her answer was consistent: "No, sir."

52. The victim was eminently credible. The Learned Trial Judge was entitled to accept her evidence and did not err in doing so.

#### *a) The Learned Trial Judge did not inappropriately rely on demeanour*

53. The Appellant did not appeal to the Court of Appeal on the basis that the Learned Trial Judge inappropriately considered demeanour evidence in his assessment of the victim's credibility.

He did not raise such an argument in his factum. He did not mention it in oral argument. The subject of reliance on demeanour was not raised in any questions from the panel.[3] Instead, it was mentioned for the first time in Steel J.A.'s reasons for dissenting.

54. In light of that backdrop, it seems opportunistic of the Appellant to assert before this Honourable Court that the Learned Trial Judge's comments in this regard were so problematic and so integral to the result that they warrant appellate intervention.

55. Moreover, the assertion itself is devoid of merit. The Learned Trial Judge was entitled – arguably required – to rely on his observations of the victim's demeanour. As McLachlin C.J.C. explained:

> It is a settled axiom of appellate review that deference should be shown to the trier of fact on issues of credibility because trial judges (and juries) have the "overwhelming advantage" of seeing and hearing the witness – an advantage that a written transcript cannot replicate. This advantage is described as stemming from the ability to assess the demeanour of the witness, that is, to see how the witness gives her evidence and responds to cross-examination.
>
> *R v N.S.*, 2012 SCC 72 at para 25 (citations omitted, emphasis added). See also *R v T.D.A.*, 2017 ONCA 910 at para 19.

56. Contrary to the Appellant's assertion that "absence of a motive [for the victim] to lie is commented upon throughout the decision,"[4] the Learned Trial Judge only referred to it only once, and it was not the focus of his assessment. As both counsel referred to demeanour evidence in closing submissions – each properly pointing out that the defence was not required to prove that the victim had such a motive – this passing reference was appropriate and does not call his assessment into question.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 48.

---

[3] See Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 115.

[4] Appellant's Factum at para 59.

*b) <u>The fact of incremental disclosure was reasonably weighed and inconsistencies in the victim's testimony were peripheral</u>*

57. Delayed and/or incremental disclosure is a common occurrence in cases of sexual abuse against a child. That is especially true when the abuser occupies a position of trust vis-à-vis their victim. The jurisprudence is abundantly clear that there is no inviolable rule dictating how a victim will react to sexual trauma. Indeed, to ground a credibility assessment on an expectation of how a victim should behave would amount to applying rape myths and stereotypes.

58. The Learned Trial Judge was faced with a child who was abused by her mother's boyfriend – a person who was a father figure for several years – whom she had a positive relationship with otherwise. The Appellant threatened that she would be all alone if she told anyone. She did not disclose the abuse for the first time to her mother until she was on a different continent from the Appellant. She was then interviewed about the abuse in detail by a stranger. It is hardly surprising that she did not provide an exhaustive accounting of her abuse.

59. The Learned Trial Judge was entitled to weigh the consistency of the victim's core allegations against any credibility and reliability concerns which may have arisen from inconsistencies in other areas of her evidence. Whether or not the victim was credible based on the entirety of her evidence was the trial judge's judgment call to make. This is a weighing exercise with which an appellate court should be loathe to interfere. The majority recognized this, and appropriately deferred to the Learned Trial Judge's advantageous position of hearing the evidence firsthand.

> Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 79, citing *R v H.(W.)*, 2013 SCC 22 at para 32. See also *R v Roy*, 2017 ONCA 30 at para 14.

60. It must also be borne in mind that the Learned Trial Judge was dealing with the evidence of a child. The victim was 14 years old when she testified, and she was discussing events that

occurred while she was between six and ten years of age. Her evidence had to be viewed through that lens.

Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 71.

61. The Learned Trial Judge acknowledged that there were inconsistencies in the victim's testimony, but found them to be peripheral to the allegations before the Court. Steel J.A. impugns this conclusion, commenting that "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."

Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 164.

62. Firstly, it was reasonable to characterize the inconsistencies as peripheral. Regarding the bribery, the sexual touching of the victim's brother, the pornography and the photograph, they are not issues related to the charges the Appellant faced. The addition of a third location was arguably not peripheral, but as the majority pointed out, the nature of the allegations from one location to the next remained consistent. Thus, the "where" takes on less significance when the "what" is the same.

Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 72.

63. Secondly, as the majority pointed out, it is not the place of an appellate court to challenge the trial judge's findings: "It is not the role of this Court to re-weigh the significance of difficulties with the complainant's evidence and come to a different conclusion on credibility."

Reasons of the Manitoba Court of Appeal, Appellant's Record, Tab 3, para 91.

64. The issue of incremental disclosure and the content of the victim's evidence was thoroughly argued in closing submissions and the Learned Trial Judge was alive to the issues. It

was his call to make as to whether the incremental disclosure affected his view of the victim's credibility as a whole. His conclusion that it did not is entitled to deference.

### *(iv) 'Unassailable' testimony does not necessarily equate to a reasonable doubt*

65. Throughout these proceedings, the Appellant has placed great emphasis on the fact that he stood firm in his denial of the allegations and that he was unassailed on cross-examination. As an initial matter, the Appellant's testimony was not unassailable: in direct examination, the Appellant declared that he did not recall ever being alone with the victim at the Redwood house. In cross-examination he agreed it was possible that he had been alone with her there, and admitted being alone with her at the Donald residence.

> Transcript, April 11, 2018, Appellant's Record, Tab 8, pp. 12, 34.

66. More importantly, even if the Appellant had been entirely consistent and unwavering, nobody is entitled to a reasonable doubt. As quoted above, "Trial fact-finders must, of course, act on their own honest appraisal of whether they are in reasonable doubt…"

> David Paciocco, "Doubt about Doubt: Coping with R. v. W. (D.) and Credibility Assessment" (2017) 22:1 Can Crim L Rev 31 at 48. [Respondent's Authorities, p. 13.]

67. The Ontario Court of Appeal addressed this in *R v R.A.*, explaining:

> The trial judge found that the appellant "testified in a straightforward manner, that he was not evasive and did not exaggerate, embellish or colour his evidence", and that he "withstood cross-examination without a blemish." However, the trial judge accepted the complainant's evidence in its entirety and found the appellant guilty beyond a reasonable doubt…
>
> The appellant was not entitled to an acquittal simply because his evidence did not raise any obvious problems… The trial judge was entitled to reject the appellant's evidence "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting credible evidence."
>
> *R v R.A.*, 2017 ONCA 714 at paras 4, 55-56 (emphasis added, citations omitted), aff'd 2018 SCC 13.

*a) Lengthy explanations are not required to reject a blanket denial*

68. The Appellant's testimony to the core allegations consisted of a blanket denial. In such cases there is no need for a trial judge to provide extensive reasons as to why that does not raise a reasonable doubt. Indeed, there was little that could be said. Ultimately, the Learned Trial Judge was not required to explain why he rejected the Appellant's evidence at all:

> [The trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged." It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.
>
> *R v R.E.M.*, 2008 SCC 51 at para 66 (citations omitted, emphasis added). See also *R v Vuradin*, 2013 SCC 38 at para 13; *R v Smith*, 2011 BCCA 362 at para 42.

*b) The Learned Trial Judge did not misapprehend evidence*

69. As with the Appellant's arguments regarding demeanour evidence, his argument that the Learned Trial Judge parallels Steel J.A.'s dissent: he asserts that he did not dispute that he had the opportunity to commit the offences; but that he simply denied the sexual touching itself.

70. As this Court has explained, a misapprehension is not found by parsing the minutia of the evidence. Rather, a misapprehension is "readily obvious" and goes to the substance of the evidence's material portions. That the Court of Appeal disagreed as to whether there was an error suggests in itself that there was no readily obvious error.

> *R v Sinclair*, 2011 SCC 40 at para 53; *R v Lohrer*, 2004 SCC 80 at paras 1, 4, 9.

71. A review of the record further supports that the Learned Trial Judge was entitled to view the evidence as he did. When asked if he recalled ever being alone with the victim while at the house on Redwood, the Appellant answered, "No, I don't recall anytime I've been alone with [her]…" He denied driving the victim to or from school except when her mother was there. He also said that he traveled for work, and indicated, "I would go for 21 days and then come back for a few days and then go back again." He entirely denied being alone with the victim at the Spence residence.

Transcript, April 11, 2018, Appellant's Record, Tab 8, pp. 12-17 (emphasis added).

72. The Appellant was not required to expressly declare, "I never had the chance to touch her," in order to put opportunity at issue. Considering the evidence as a whole, it is clear that it was. The Learned Trial Judge did not err in viewing his evidence in this manner.

### *(v) There is no indication of a credibility-contest error*

73. An appeal is not a retrial. Appeal courts must show deference to trial judges in matters of credibility where the trial judge has the advantage of seeing and hearing the witnesses.

74. The reasons, read in context, show why the Learned Trial Judge decided the case as he did. He was entitled to consider all the evidence when assessing the Appellant's denial. As the Manitoba Court of Appeal said in *R v Menow*, "It is impossible for an accused's evidence to be considered without a factual or contextual backdrop for the charge itself."

*R v Menow*, 2013 MBCA 72 at para 23.

75. The Appellant expresses concern because the Learned Trial Judge first dealt with the victim's evidence and asserts that when this occurs there is a risk that the burden of proof shifts, as, "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." The Appellant further

argues that the Learned Trial Judge made the mistake of choosing between versions of events, leading him to disbelieve the Appellant solely because he believed the victim.

> Appellant's Factum at para 35.

76. As an initial matter, the Appellant's concern surrounding the order in which the Learned Trial Judge considered the evidence is predicated on a false assumption: he assumes that the Learned Trial Judge conducted his credibility analysis of the victim immediately after she testified, and did not wait until the Appellant had the opportunity to call evidence. There is no indication this occurred. Indeed, to find an error on this basis would be contrary to longstanding legal principle. As Doherty J.A. stated more than 26 years ago:

> Trial judges are presumed to know the law… Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law.
>
> *R v Morrissey*, [1995] 22 OR (3d) 514 (CA) at para 27 (citations omitted, emphasis added).

77. There is no rigid formula when applying *W.(D.)* and it is was appropriate for the Learned Trial Judge to consider the victim's evidence first. As Rowe J.A. (as he then was) explained:

> A trial judge should generally first consider the evidence offered by the Crown in support of the charges, especially that of the complainant. That sets out the case that the accused has to meet. Only if there is sufficient strength in that evidence is it necessary to consider the evidence (if any) led by the accused. That sequence accords with the burden of proof resting with the Crown.
>
> *R v J.C.H.*, 2011 NLCA 8 at para 13 (emphasis added).

78. The Learned Trial Judge explicitly commented that, "the task of the trial judge is not simply to choose one version of events over another[.]" Having thus instructed himself, there is no indication that he transgressed this rule. He did not simply "prefer" one witness's evidence over

the other's. As an experienced criminal jurist, the Learned Trial Judge was eminently familiar with assessing credibility and determining whether the Crown had met its burden; that the Appellant disagrees with his decision does not mean that he erred in making it.

Reasons for Conviction, Appellant's Record, Tab 2, para 33.

### *E. Conclusion*

79. The Crown wholeheartedly agrees with the Appellant's assertion that he was entitled to a fair and impartial trial, with a meaningful analysis undertaken of the evidence. That is precisely what he received. What the Appellant was not entitled to was a detailed accounting of the Learned Trial Judge's thought and reasoning process.

80. The Appellant knew why he was convicted: the complainant's evidence satisfied the Learned Trial Judge of the Appellant's guilt beyond a reasonable doubt, despite his denial of the allegations. The reasons also allowed for effective appellate review, as the majority was able to conduct a functional and contextual review of them. Neither the majority reasons, nor the Learned Trial Judge's, were vitiated by legal error.

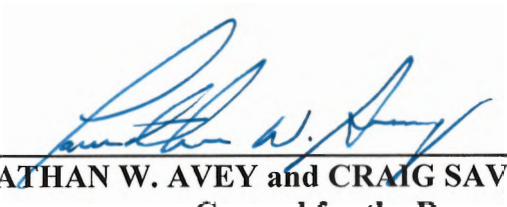
## Part IV – Costs

81. The Respondent does not seek costs and requests that no costs be ordered against it.

## Part V – Order Sought

82. The Appellant has not demonstrated that the majority of the Manitoba Court of Appeal erred in its assessment of the Learned Trial Judge's reasons. Nor has he established that the Learned Trial Judge's credibility assessment was tainted by error. The appeal ought to be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



**JONATHAN W. AVEY and CRAIG SAVAGE**
**Counsel for the Respondent**
**Her Majesty the Queen**

## Part VI – Impact of any Order, Restriction or Ban

83. The victim's identity is subject to a ban on publication pursuant to s. 486.4 of the *Criminal Code*.

84. The Respondent's materials do not include any information that would tend to identify the victim.

## Part VII – Table of Authorities

### CASES

| **Authorities** | **Cited at Paragraph No.** |
|---|---|
| *R v Burns*, [1994] 1 SCR 656 | 35 |
| *R v Dinardo*, 2008 SCC 24 | 34, 42 |
| *R v Doodnaught*, 2017 ONCA 781 | 37, 38, 39 |
| *R v Griffen*, 2018 ABCA 277 | 40 |
| *R v J.C.H.*, 2011 NLCA 8 | 77 |
| *R v Lohrer*, 2004 SCC 80 | 70 |
| *R v Menow*, 2013 MBCA 72 | 74 |
| *R v Morrissey*, [1995] 22 OR (3d) 514 (CA) | 76 |
| *R v Morrissey*, 2007 ONCA 770 | 36 |
| *R v N.S.*, 2012 SCC 72 | 32, 55 |
| *R v R.P.*, 2012 SCC 22 | 39 |
| *R v R.A.*, 2017 ONCA 714, aff'd 2018 SCC 13 | 4, 67 |
| *R v R.E.M.*, 2008 SCC 51 | 4, 33, 35, 36, 68 |
| *R v Roy*, 2017 ONCA 30 | 59 |
| *R v Sheppard*, 2002 SCC 26 | 34 |
| *R v Smith*, 2011 BCCA 362 | 68 |
| *R v Sinclair*, 2011 SCC 40 | 70 |
| *R v T.D.A.*, 2017 ONCA 910 | 55 |
| *R v Vuradin*, 2013 SCC 38 | 20, 43, 44, 68 |
| *R v W.(D.)*, [1991] 1 SCR 742 | 6, 20, 24, 77 |

**STATUTE/REGULATION/RULE**

| **Legislation** | **Cited at Paragraph/Page No.** |
|---|---|
| *Criminal Code*, RSC 1985, c. C-46, s. 715.1<br><br>*Code Criminel*, L.R.C. 1985, ch. C-46, s. 715.1 | Para. 15 |
| *Criminal Code*, RSC 1985, c. C-46, s. 691(1)(a)<br><br>*Code Criminel*, L.R.C. 1985, ch. C-46, s. 691(1)(a) | Page 9 |

**OTHER DOCUMENTS**

| **Other Documents** | **Cited at Paragraph No.** |
|---|---|
| David Paciocco, "Doubt about Doubt: Coping with *R. v. W. (D.)* and Credibility Assessment" (2017) 22:1 Can Crim L Rev 31 | 46, 47, 66<br><br>Tab 1 – Book of Authorities |