File No. 40147

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and –

S.S.

Respondent
(Appellant)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

[1] The Respondent was convicted of sexually abusing his seven-year-old niece, EB. The conviction depended on a videotaped statement that EB gave to police. Gray J, sitting without a jury, admitted this evidence under the principled exception to hearsay and entered a conviction. A majority of the Court of Appeal held that the trial judge was wrong to find that the statement passed the bar of threshold reliability. The majority went further and concluded that the trial judge could not have properly admitted the statement and entered an acquittal. The dissenting judge in the Court of Appeal would have upheld the convictions.

[2] The Crown appeals. This Court has had frequent cause to remind provincial appellate courts that it is for trial judges to decide whether to accept the evidence of a complainant in a sexual assault case. Appellate courts should not "finely parse the trial judge's reasons in search for error".[1] The same is true here: There is no question that the trial judge understood the proper test. And he considered the appropriate factors under the principled approach.

[3] The majority's threshold reliability analysis rests on its disagreement with the trial judge's reasonable factual findings. Because the trial judge was sitting alone, he acted as both gatekeeper and ultimate trier of fact. But he recognized the distinction between these two roles. The majority strayed beyond the scope of legitimate appellate review by substituting its view of the evidence for that of the trial judge.

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[1] *R v GF*, 2021 SCC 20 at ¶ 69-82

[4] The dissenting judge in the Court of Appeal was correct. He was appropriately deferential to the trial judge's conclusion that EB's statement met the requirement of threshold reliability. The trial judge, and the dissenting judge, looked at the statement's reliability in the full context of the case and drew permissible inferences from the evidence.

[5] That context included how the statement emerged in the first place. As explained in more detail below, a CAS worker attended at EB's school on March 31, 2015, because of concerns about EB. EB told the CAS worker that the Respondent was sexually abusing her. The CAS worker took EB directly to the police station, where she gave her statement.

[6] The statement was videotaped in its entirety. It lasted fifty minutes. The questions were open-ended, and the atmosphere was relaxed. Expert evidence at trial confirmed that the statement was taken in accordance with a widely-recognized protocol for interviewing children. The purpose of that protocol is to ensure that children are not influenced by the questions put to them. EB was able to provide explicit details, well beyond her years. There was, contrary to the majority's conclusion, no alternative explanation for how she could have acquired this detailed level of sexual knowledge at the age of seven.

[7] EB was apprehended by the CAS that same day. She went directly from school to the police station, and then into a foster home. She did not return to her mother's care for seventeen months. The evidence at trial was that, unsurprisingly, she associated the traumatic experience of being taken from her mother with talking about the abuse. She was afraid that, if she told the story again, she would again be taken from her mother.

[8] When she testified at the preliminary inquiry, EB said that she did not remember giving the statement; did not remember meeting the detective who took the statement; and did not remember any of the assaults. The majority of the Court of Appeal treated this as something akin to a recantation, or an example of EB lying after promising to tell the truth. But her evidence at the preliminary inquiry was readily explained by what happened to her after the first time she gave her statement. This was the conclusion reached by the dissenting judge.

[9] The Crown asks that this Court allow the appeal. The trial judge properly admitted the evidence. There was no other error in his reasoning. The appropriate remedy would be to restore the convictions.

B. The evidence at the *voir dire* and trial

(i) The disclosure to CAS

[10] EB was seven years old in March 2015. She is the Respondent's niece. At the time, she was living with the Respondent and her mother, LS. LS is the Respondent's sister.[2]

[11] On March 31, 2015, CAS worker TS went to EB's school. She planned to first meet with EB and then interview LS and the Respondent. TS asked EB open-ended questions. TS confirmed that EB could tell the difference between the truth and a lie and emphasized the importance of telling the truth. EB told TS that her uncle had touched her sexually. TS took EB to the police station.[3]

[12] The interview was conducted by Officer Cunnington. Prior to the interview, TS told Officer

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[2] *LS*, Appellant's Record ("AR") Part V, p 457

[3] *TS*, AR Part V, p 304-309

Cunnington that EB had reported that she did not want to live with her uncle. She had touched the Respondent's penis and observed him undo his zipper. EB made the hand gesture for masturbation. She said that she had seen "white stuff" and that "it happened on a pull-out couch". She also said that she watched movies with her uncle when her mother was not there.[4]

[13] TS testified that EB told her that she watched a pornographic movie where a woman was taking off her clothes, a man was undoing his pants, taking his penis in his hand and masturbating. TS believed that she told Officer Cunnington that EB had told her that EB had viewed a pornographic movie.[5] Officer Cunnington did not recall TS telling him that EB had reported watching pornography. He recalled TS telling him that EB said that she watched movies with her uncle when her mother was not there.[6]

(ii) The evidence regarding the interview

[14] Dr. Louise Sas gave expert evidence at trial. She was qualified to give opinion evidence regarding child behavioural and clinical psychology; child memory; behaviours of victims of child sexual abuse and child witnesses, in order to give evidence on the competency or capacity to testify; and interviewing children and communication of evidence by children.[7]

[15] Dr. Sas assessed the police interview using the National Institute of Child Health and Human Development ("NICHD") Protocol interview guide. The interview guide seeks to provide a

[4] *M. Cunnington*, AR Part V, p 79-80

[5] *TS*, AR Part V, p 339-340

[6] *M. Cunnington*, AR Part V, p 95-96

[7] Reasons for Judgment ("Reasons") ¶ 45, AR Part I, p 12

best practice to individuals interviewing a child to reduce the suggestibility of the child's evidence. Dr. Sas described the interview guide as the "gold standard" which is used in most police departments when interviewing children about reports of sexual assault.[8]

[16] Dr. Sas' opinion was that the interview with EB complied with this "gold standard". In particular, she pointed out that:

a. Officer Cunnington explained his role to EB and told her that the interview would be recorded on video.[9]

b. Officer Cunnington explored EB's knowledge of the difference between a truth and a lie in terms that EB would understand. He used a concrete example. He asked her to promise to tell the truth and told her to correct him if he made a mistake about what she told him. EB seemed to understand, as she corrected him when he incorrectly reflected back to her details of the abuse. Dr. Sas' view was that it would be unhelpful to repeatedly ask EB whether she was telling the truth about her story.[10]

c. Officer Cunnington asked EB whether she knew why she was there. He also appropriately assessed her ability to communicate with him by asking her questions

[8] Exhibit 4, Report of Dr. Louise Sas, dated May 15, 2017 ("Sas Report"), AR Part IV, p 201; *L. Sas*, AR Part V, p 195-197, p 226-228

[9] Sas Report, AR Part IV, p 202; *L. Sas*, AR Part V, p 197; Exhibit 2, Police Statement of EB , March 31, 2015 (Transcript) ("EB Statement"), AR Part IV, p 110-111; Exhibit 1, Police Statement of EB (Video) ("EB Video Statement"), AR Part IV, p 107, 0:03:36-0:03:50

[10] Sas Report, AR Part IV, p 202; *L. Sas*, AR Part V, p 197-199, p 221-222, p 225-226; EB Statement, AR Part IV, p 111-112; EB Video Statement, AR Part IV, p 107, 0:04:07 – 0:05:31

about her school and home.[11]

d. Officer Cunnington used open-ended questions and followed up with more direct questions where he already had some information about the allegations. These open-ended prompts produced "a great deal" of information from EB. He appropriately asked about the frequency of the abuse. The fact that she had difficulty with the number of times she was abused or when the events occurred was not unusual for a seven-year-old child. Officer Cunnington did not react to the information disclosed. EB was not "reinforced for specific responses nor deterred from talking".[12]

[17] The interview lasted about fifty minutes. EB said that her mother and the Respondent argued. This made her feel sad. She described the sleeping arrangements in the apartment. She and her mother slept together in the living room and her uncle slept in the bedroom. The Respondent took care of her while her mother worked. When asked to explain what she and the Respondent did when her mother was not home, she agreed that she was afraid of him.[13]

[18] After she was assured that Officer Cunnington was there to help her, she described the Respondent unzipping his pants and touching her. She gave a detailed description of the Respondent masturbating. She told Officer Cunnington that "he's showed me a lot of times and I don't like it". She also described him touching her vagina and demonstrated with her hands. The

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[11] Sas Report, AR Part IV, p 202; *L. Sas*, AR Part V, p 200-201; EB Statement, AR Part IV, p 112-115; EB Video Statement, AR Part IV, p 107, 0:05:44 – 0:06:55

[12] Sas Report, AR Part IV, p 202-204; *L. Sas*, AR Part V, p 201-204, p 208-209, p 218; *M. Cunnington*, AR Part IV, p 97-99, p 107-108, p 111-113, p 121-123

[13] EB Statement, AR Part IV, p 115-125; EB Video Statement, AR Part IV, p 107, 0:07:06 – 0:12:12

Respondent would ask her whether she liked it. She would say yes even though she did not. She was able to describe where the Respondent was standing while she was lying on the pull-out couch. She also described the Respondent putting his penis in her vagina. It did not hurt but felt "nasty". It stopped when her mother came home. However, the door was locked. Her mother did not have a key to the lock. She and the Respondent put their clothes on. The Respondent told her not to tell her mother. However, she said she had told her mother. It happened four or five times. She felt "not even good" about living with the Respondent.[14]

[19] Officer Cunnington told EB that the CAS worker had mentioned something about "white stuff". EB said she did not know what he was referring to. Later in the interview, she described the Respondent's penis. She gave an estimate of its length using her hands. She also said that it had a hole in the middle and that "plain, gross milk" came out of the hole. The "milk" went onto her stomach when it came out.[15]

[20] After the interview, EB was taken into the care of the CAS.[16] A medical examination was conducted. The report concluded that "[EB's] normal physical examination is entirely compatible with the statements that she has made regarding having been sexually abused".[17] EB was returned

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[14] EB Statement, AR Part IV, p 125-132, p 138-145, p 151-152, p 159, p 162; EB Video Statement, AR Part IV, p 107, 0:13:04 – 0:18:29 (demonstration); 0:18:29 – 0:19:20 (correcting the officer as to where the Respondent was standing); 0:29:00 – 0:30:49 (Respondent put his penis inside her vagina); 0:31:06 – 0:32:02 (told mother); 0:48:42 – 0:49:05 (feels "not even good" about living with Respondent)

[15] EB Statement, AR Part IV, p 138, p 155-157; EB Video Statement, AR Part IV, p 107, 0:25:25 – 0:26:46 ("white stuff"); 0:43:44 – 0:44:10 (demonstration of how Respondent touched her vagina); 0:44:20 – 0:45:35 (description of the Respondent's penis and "plain gross milk")

[16] *TS*, AR Part V, p 312-316

[17] Exhibit 6, Report of Child Advocacy and Assessment Program (CAAP), McMaster Children's Hospital, AR Part IV, p 224

to her mother's care about seventeen months after being apprehended at the police station.[18]

> Exhibit 6, Report of Child Advocacy and Assessment Program (CAAP), McMaster Children's Hospital, Appeal Book ("AB") Tab 11, p 180 (PDF p 183)

(iii) EB's evidence at the preliminary inquiry and the evidence of Dr. Sas

[21] At the Respondent's preliminary inquiry, EB testified that she did not remember Officer Cunnington, did not remember being interviewed and did not remember what she disclosed. After the preliminary inquiry, Dr. Sas interviewed EB twice. During the first interview, EB told Dr. Sas that when she testified at the preliminary inquiry, she told everyone that she did not remember what happened with her uncle. She told Dr. Sas that she did remember what happened with her uncle but was afraid to tell because she believed that she would again be taken away from her mother. EB believed that her mother did not want her to give evidence. Dr. Sas noted that EB was able to remember other aspects of the day that she was apprehended, including what was happening at school and what she was wearing that day. She told Dr. Sas that she had "good thoughts" and "bad thoughts"; when the bad thoughts intruded, she would sing to herself.[19] During the second interview, EB was less forthcoming. She noticed a camera in the room and kept asking whether the interview was being recorded.[20]

[22] Dr. Sas opined that that EB had very significant fears of coming to court to testify and would not give any evidence about what happened to her, even if compelled to attend. EB connected the disclosure of the abuse to being apprehended. If EB came to court, she would "shut

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[18] *TS*, AR Part V, p 316

[19] Sas Report, AR Part IV, p 197, p 199-200; *L. Sas*, AR Part V, p 174-177, p 180-186, p 194, p 218-219

[20] *L. Sas*, AR Part V, p 186-190

down again and would not be telling the Court anything, she cannot give a full and candid account… she'll give you nothing" because she was terrified of being removed from her mother. She would be traumatized by the experience.[21]

[23] Dr. Sas agreed in cross-examination that "a child could be anxious if they lied about something and then are being asked to talk about it again". In response to a question from the trial judge, she testified that it was possible that, if EB had lied about the assault, she could be traumatized because she was afraid about lying about it again. In re-examination, Dr. Sas was asked her opinion of the likelihood that that was the source of her anxiety and testified that it was "not a high probability".[22]

(iv) The defence evidence: EB's mother, LS

[24] LS was the only defence witness. LS's testimony consisted in large part of hearsay statements that LS said that EB told her. These statements were not introduced for the truth of their contents. Defence counsel sought to rely on them for the non-hearsay purpose of arguing that EB had given a different account to LS than she gave to Officer Cunnington.[23]

[25] LS testified that EB came home from school one day and reported that one of her friends told her what a penis and a vagina was. LS testified that EB provided a description of a man and a woman having sex. LS reported that EB said that her friend told her "that's how you make

[21] *L. Sas*, AR Part V, p 192-193, p 216-219, p 223-224, p 229-230, p 232-233, p 239-245, p 260, p 265-266, p 270-273, p 276; Sas Report, AR Part IV, p 200-201

[22] *L. Sas*, AR Part V, p 251-256, p 286-287

[23] Proceedings at trial, AR Part V, p 298-301, p 397-398, p 408-409, p 470-474

babies" and that her friend "explained to her what comes out of a male penis". She also testified that EB never reported to her that the Respondent assaulted her. In cross-examination she clarified that it was EB's friend "E" who told EB about seeing two adults having sex on TV. As far as LS was aware, EB had never seen adults having sex on TV. LS did not know whether the film that "E" may have seen was a pornographic film.[24]

[26] LS gave a statement to police on the date that EB disclosed the assaults. In that statement, she was asked whether there was any reason why EB would be able to describe semen coming out of a penis. Her answer was "no. but, now that's concerning, so no". She acknowledged in her police statement that EB may have said something to her about the abuse, but she may have misunderstood.[25] Her explanation for the discrepancy between her trial evidence and her statement to police was that she was upset when she spoke to police because she did not know what was happening at the station. LS refused to answer questions about an agreed statement of facts that she entered into with the CAS, in which she acknowledged that the Respondent abused EB. LS confirmed EB's evidence about the location of the locks on the doors in their apartment. She further confirmed that she did not have a key to those locks and agreed with EB's description of the sleeping arrangements.[26]

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[24] *LS*, AR Part V, p 409-412, p 426-427, p 443-445, p 476

[25] Exhibit 7, Police Statement of LS, AR Part IV, p 251

[26] *LS*, AR Part V, p 445-451, p 455, p 462-469, p 475-482, p 493-495; Exhibit 5, Agreed Statement of Facts from Child Protection Proceedings, AR Part IV, p 214

C. The decisions of below

(i) The trial judge's decision

[27] At the request of defence counsel, the trial judge issued a "bottom line" ruling on the *voir dire*. The trial judge provided written reasons on the *voir dire* when rendering judgment.[27]

[28] The trial judge concluded that the Crown had established necessity. EB's evidence at the preliminary inquiry, along with Dr. Sas' opinion, showed that EB would be unable to testify. The trial judge accepted Dr. Sas' opinion that requiring EB to testify would traumatize her.[28]

[29] The trial judge also concluded that the Crown had shown that EB's statement met the threshold reliability standard. He noted the general importance of cross-examination in testing the evidence of a witness: "for centuries, the right to cross-examine has been considered to be essential"[29]. However, he noted that "if the lack of a right to cross-examine were an overriding disqualifying feature, it is apparent that most *Khan* applications would fail".[30]

[30] He referred to the indicia of reliability present in this case, including that the interview was conducted in accordance with a well-recognized protocol, which was discussed "in some detail" by Dr. Sas.[31] The trial judge noted discrepancies in EB's account, but held that they were

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[27] Proceedings at trial, AR Part V, p 521, p 524-527

[28] Oral Reasons for Judgment on Hearsay *Voir Dire* ("Oral Reasons"), AR Part I, p 2-3; Reasons ¶ 106-108, AR Part I, p 22

[29] Reasons ¶ 104, AR Part I, p 21

[30] Oral Reasons, AR Part I, p 4; Reasons ¶ 105, AR Part I, p 22

[31] Oral Reasons, AR Part I, p 3; Reasons ¶ 22, AR Part I, p 9, ¶ 110-111, AR Part I, p 23; Sas Report, AR Part IV, p 201

not sufficiently significant to undermine the statement's reliability at the threshold stage.[32] Nor was there anything in LS' evidence that would undermine the reliability of EB's statement.[33]

[31] Having admitted EB's statement, the trial judge concluded that the Crown had established the Respondent's guilt. The trial judge reviewed the positions of the parties.[34] He considered LS' evidence and held that it did not add a great deal. Although LS denied that EB told her about the abuse, in her police statement she acknowledged that EB may have made such a disclosure, without LS understanding what was being disclosed. The trial judge acknowledged that EB may have discovered information about sexual matters from her friends. However, this did not detract from the fact that EB was able to provide a detailed description of her uncle telling her to strip naked, fondle her genitals, masturbate in front of her and ejaculate his semen on to her stomach. The graphic nature of these descriptions was compelling. The trial judge correctly stated the principles for evaluating the evidence of child witnesses and accepted EB's version of events.[35]

[32] The trial judge also addressed whether EB had a motive to lie. Relying in the decision of the Court of Appeal for Ontario in *R v Batte*[36], he found that the absence of a motive to lie was "not determinative" and "but one factor in the equation"[37].

[33] The trial judge also returned to the importance of cross-examination. He repeated that

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[32] Oral Reasons, AR Part I, p 4-5

[33] Reasons ¶ 112, AR Part I, p 23

[34] Reasons ¶115-122 (Defence), ¶ 125-133 (Crown), AR Part I, p 23-26

[35] Reasons ¶ 134-145, AR Part I, p 26-29

[36] *R v Batte* (2000), 40 OR (3d) 321 at ¶ 120-121 (CA)

[37] Reasons ¶ 146-147, AR Part I, p 30

cross-examination is generally an "important, if not essential, feature of a criminal trial that ensures that an accused can make full answer and defence". However, the lack of an opportunity to cross-examine was not fatal. He reminded himself that, given the lack of cross-examination, he must be "particularly vigilant in assessing the credibility and reliability of the hearsay evidence, and in deciding whether the evidence is sufficient to result in a conclusion that there is proof of guilt beyond a reasonable doubt". He was satisfied that the evidence as a whole met the Crown's burden and entered convictions on the charges of sexual assault and sexual interference.[38]

(ii) The decision of the Court of Appeal

[34] The majority of the Court of Appeal allowed the appeal. The majority concluded that the trial judge made two errors in his analysis of threshold reliability. First, the trial judge "improperly downplayed the importance of cross-examination in the threshold reliability assessment process" and failed to appropriately consider EB's perception and sincerity.[39]

[35] The majority concluded that the trial judge discounted the risk that EB's perception was influenced by having allegedly seen a pornographic movie with her uncle or being told about sex by her classmates.[40] The majority also concluded that the trial judge did not properly assess the risk that EB may have been lying. The majority found that the trial judge should have considered the fact that EB told Dr. Sas that she lied at the preliminary inquiry, even though she promised to tell the truth. The trial judge also did not address Dr. Sas' evidence that if EB had lied in her police

[38] Reasons ¶ 148-152, AR Part I, p 148-152

[39] Reasons of the Court of Appeal, 2022 ONCA 305 ("CA Reasons") ¶ 50-53, AR Part I, p 53-54

[40] CA Reasons ¶ 56-59, AR Part I, p 56-57

statement, it could have further traumatized her to be called to testify.[41]

[36] Second, the majority held that the trial judge misapprehended the evidence about EB's motive to lie. The majority found that there was evidence that EB had a motive to fabricate the allegations, as she told several people that she did not want to live with her uncle.[42] In the result, the majority found that the trial judge erred in admitting the evidence. Since there was no other evidence that could support the conviction, the majority entered an acquittal.[43]

[37] MacPherson JA dissented. In his view, the trial judge properly conducted the threshold reliability analysis and did not err in concluding that EB had no motive to fabricate.

[38] On the threshold reliability issue, the dissenting judge held that the trial judge properly relied on the "very impressive" way in which the interview was conducted.[44] The trial judge also properly considered the way in which EB answered Officer Cunnington's questions.[45] The trial judge was alive to the importance of cross-examination and considered the correct factors when assessing threshold reliability.[46]

[39] The dissenting judge concluded that the trial judge appropriately assessed the hearsay risks related to EB's perception and sincerity. With respect to perception, he pointed out that even if there was evidence that EB saw a pornographic movie, this fact would not account for the

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[41] CA Reasons ¶ 62-64, AR Part I, p 58-59

[42] CA Reasons ¶ 67-69, AR Part I, p 60-61

[43] CA Reasons ¶ 71-78, AR Part I, p 61-65

[44] CA Reasons ¶ 86-89, AR Part I, p 67-68

[45] CA Reasons ¶ 90, AR Part I, p 68

[46] CA Reasons ¶ 92-99, AR Part I, p 69-71

level of detail in EB's allegations.[47] With respect to sincerity, the dissenting judge found that EB's sincerity should be assessed in the context of what occurred to her after she gave the police interview: she was apprehended by the CAS and not returned to her mother for seventeen months. Nor did the trial judge incorrectly assess EB's potential motive to fabricate the allegations.[48] He would have upheld the convictions.

PART II: QUESTIONS IN ISSUE

[40] The Appellant submits that this appeal raises the following issue:

a. Did the majority of the Court of Appeal err in law in finding that the trial judge erred in admitting the out-of-court statement of the complainant by (i) finding that the statement met the requirements of threshold reliability; and (ii) finding that the complainant had no motive to fabricate the allegations.

PART III: STATEMENT OF ARGUMENT

A. Introduction

[41] The majority of the Court of Appeal committed three errors. First, the majority incorrectly found that the trial judge "improperly downplayed"[49] the importance of cross-examination at the threshold reliability stage. The trial judge was alive to the importance of cross-examination. But he recognized that the principled exception permits the admission of out-of-court evidence in certain cases, even in the absence of cross-examination. The dissenting judge was right to

[47] CA Reasons ¶ 101-104, AR Part I, p 71-73

[48] CA Reasons ¶ 105-114, AR Part I, p 73-75

[49] CA Reasons ¶ 50, AR Part I, p 53

conclude that the trial judge properly accounted for the absence of cross-examination.

[42] The majority's second error is related to the first. The majority was wrong to reweigh the evidence related to EB's perception and sincerity. The majority misapprehended the evidence about the pornographic movie and the information that EB could have received from her class-mates. As the dissenting judge points out, even if true, this evidence does not account for the detailed account that EB provided.

[43] Similarly, the majority was wrong to re-weigh the evidence regarding EB's sincerity. As the dissent points out, the fact that EB did not want to live with the Respondent is readily explained if, as she alleged, he was abusing her. The trial judge appropriately addressed this factor, having regard to the arguments made at trial.

[44] Third, and related to the second error, the majority was wrong to interfere with the trial judge's assessment of EB's motive to fabricate. The trial judge considered this factor and held that it did not undermine the reliability of EB's statement.

[45] Running through all three errors is a common thread: the majority, contrary to this Court's repeated guidance, failed to approach the trial judge's findings from a posture of deference. The majority erroneously identified as legal error what was, in actuality, disagreement with the trial judge's reasonable view of the evidence.

B. The principled approach to hearsay

[46] The rules governing the admission of hearsay under the principled exception are well-known. Hearsay, an out-of-court statement adduced to prove the truth of its contents, is

presumptively inadmissible. The central reason is the inability to test its reliability. It may be impossible to inquire into the declarant's "perception, memory, narration or sincerity", given that the declarant does not give the statement in court, under oath, under the scrutiny of contemporaneous cross-examination.[50]

[47] However, hearsay may be admitted where the proponent of the evidence demonstrates necessity and threshold reliability.[51] The context giving rise to necessity "may well impact on the degree of reliability required to justify its admission".[52] These requirements are to be interpreted flexibly, in the circumstances of each case, to ensure that the principled approach "does not itself become a rigid pigeon-holing analysis".[53]

[48] Threshold reliability can be established by (1) the presence of adequate substitutes for testing the truth and accuracy of the hearsay statement (procedural reliability); (2) sufficient circumstantial guarantees of reliability or an inherent trustworthiness of the hearsay statement (substantive reliability); and (3) a combination of procedural and substantive reliability that work in tandem. Procedural reliability is concerned with whether there is a satisfactory basis to rationally evaluate the statement. Substantive reliability asks whether the circumstances, and any corroborative evidence, provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy. Although the standard for substantive

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[50] *R v Khelawon*, 2006 SCC 57 at ¶ 2, 35-36, 56-59; *R v Bradshaw*, 2017 SCC 35 at ¶ 20-21

[51] *R v Bradshaw* at ¶ 20-24

[52] *R v Khelawon* at ¶ 78

[53] *R v Khelawon* at ¶ 84, quoting *R v U(FJ),* [1995] 3 SCR 764 at ¶ 35

reliability is "high", it does not require that reliability be established with "absolute certainty".[54]

[49] The distinction between threshold and ultimate reliability is important. At the admissibility stage, the trial judge has a limited role in assessing the evidence's threshold reliability on a balance of probabilities. On the trial proper, the trier of fact determines the evidence's "ultimate reliability", in other words, "whether, and to what degree, the statement should be believed, and thus relied on to decide issues in the case". That determination is made "in the context of the entirety of the evidence". It is crucial to the integrity of the fact-finding process that the question of ultimate reliability "not be pre-determined on the admissibility *voir dire*".[55]

[50] The admissibility of hearsay evidence is a question of law, subject to a standard of correctness. However, the factual findings that underlie the trial judge's decision to admit the evidence are entitled to deference.[56] Trial judges are well-placed to assess the hearsay dangers in individual cases and the effectiveness of any safeguards to assist in overcoming those dangers. The decision whether to admit a hearsay statement requires the trial judge to weigh various factors, some of which may point towards admissibility and others which may point away from admissibility. As long as the trial judge addresses the relevant factors, does not fall into any material misapprehension of the evidence relevant to those factors, and makes a reasonable assessment of the weight to give the factors, an appellate court should defer to the trial judge's conclusion.[57]

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[54] *R v Bradshaw* at ¶ 27-32, 40; *R v Khelawon* at ¶ 61-63, 76

[55] *R v Bradshaw* at ¶ 39-42; *R v Khelawon* at ¶ 50-55

[56] *R v Youvarajah*, 2013 SCC 41 at ¶ 31

[57] *R v Couture*, 2007 SCC 28 at ¶ 77, 81; *R v Blackman*, 2008 SCC 37 at ¶ 36; *R v SS*, 2008 ONCA 140 at ¶ 28-30; see also *R v GF* at ¶ 77-82

C. Application: the majority erred in overturning the convictions

(i) The trial judge understood the importance of cross-examination

[51] The majority faults the trial judge for not following this Court's direction to specifically identify the hearsay dangers and how they could be assuaged in the absence of cross-examination. It should be noted that the argument on the *voir dire* occurred on June 26, 2017. *Bradshaw* was released by this Court on June 29, 2017. The trial judge therefore did not have the benefit of this Court's most recent pronouncement on the principled exception. However, he cited the relevant caselaw[58] and the Reasons are faithful to the principles articulated in *Bradshaw*.

[52] There is no question that the trial judge properly described the principled approach to hearsay, or that he understood the "crucial" difference between threshold and ultimate reliability.[59] For example, the trial judge noted that at the admissibility stage he was "simply determining admissibility based on the criteria of necessity and threshold reliability."[60]

[53] Nor did the trial judge underplay the importance of cross-examination. As the dissenting judge noted:

> While the trial judge considered cross-examination to be more important to ultimate reliability, he was alive to its role in the threshold reliability analysis. In his written reasons, he said that hearsay "remains presumptively inadmissible, for valid policy reasons. Foremost of these is the lack of ability to cross-examine." He went on to remark that hearsay can be admitted "only where there

[58] Reasons ¶ 101, AR Part I, p 21

[59] *R v Khelawon* at ¶ 50

[60] Reasons ¶ 105, AR Part I, p 22; see also ¶ 96, AR Part I, p 19; Oral Reasons, AR Part I, p 1; Proceedings at trial, AR Part V, p 524-525, p 553, p 555

> are sufficient indicia of reliability to persuade the judge that the lack of right to cross-examine can be overcome."[61]

[54] This conclusion was amply supported by the trial judge's reasons, particularly read in the context of the submissions at trial.

[55] First, the trial judge's written reasons cite a number of cases regarding the importance of cross-examination.[62] He was not required to further elaborate on the importance of cross-examination in his reasons.

[56] Second, the trial judge put a number of questions to defence counsel during submissions that sought to focus the issue. As the trial judge pointed out, assuming that necessity was established here, it was obvious that EB could not be cross-examined.[63] This was supported by the evidence of Dr. Sas, who testified that EB would be traumatized if required to testify and would not be able to answer any questions.

[57] Thus, the trial judge was asking whether there were adequate substitutes for cross-examination in this case, such that the statement could meet the standard for threshold reliability.[64] This is precisely the question that the principled approach seeks to answer. As the Court of Appeal for Ontario has put it:

> Although it has been said that some form of cross-examination of the hearsay declarant is usually required, such as preliminary inquiry testimony or cross-examination of a recanting witness at trial, the whole point of the principled

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[61] CA Reasons ¶ 92, AR Part I, p 69

[62] Reasons ¶ 103-105, AR Part I, p 21-22

[63] Defence submissions on *voir dire*, AR Part V, p 554-555

[64] Defence submissions on *voir dire*, AR Part V, p 560-561, p 564, p 568-569; Crown reply submissions on *voir dire*, AR Part V, p 571

> exception to the hearsay rule is that exceptions are acceptable in certain circumstances.[65]

[58] Third, the trial judge returned to the importance of cross-examination when considering ultimate reliability. He reminded himself that he must be "particularly vigilant in assessing the credibility and reliability of the hearsay evidence, and in deciding whether the evidence is sufficient to result in a conclusion that there is proof of guilt beyond a reasonable doubt", given the lack of cross-examination.[66]

[59] Put differently, the trial judge was asking the right question: if there was to be no cross-examination in this case, were there adequate substitutes that could satisfy the requirement of threshold reliability? As the dissenting judge concluded, the trial judge looked to all the circumstances to answer that question.

[60] The trial judge therefore considered factors relevant to both procedural and substantive reliability. For example, the trial judge looked to the circumstances in which the interview was taken. The questions put to EB were open-ended. Officer Cunnington confirmed that EB understood the difference between a truth and a lie. EB corrected Officer Cunnington when he made a mistake. Dr. Sas' evidence that the interview was conducted in accordance with a "gold standard" protocol was thus highly relevant.[67] As the dissenting judge noted, the trier of fact was in a position to rationally evaluate the evidence.[68]

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[65] *R v McMorris*, 2020 ONCA 844 at ¶ 24

[66] Reasons ¶ 149, AR Part I, p 30

[67] Oral Reasons, AR Part I, p 3-4; Reasons ¶ 97, AR Part I, p 19-20, ¶ 110, AR Part I, p 23

[68] CA Reasons ¶ 93-96, AR Part I, p 69-70, citing *R v Khelawon* at ¶ 76

[61] In contrast to the approach taken by the trial judge, and approved by the dissenting judge, the majority in the Court of Appeal focussed on three circumstances in isolation: (i) the evidence that EB could have acquired age-inappropriate sexual information from another source (either by watching a pornographic movie or from her friends); (ii) the evidence that could have undermined the conclusion that she was telling the truth; and (iii) the evidence that she did not want to live with the Respondent, which the majority found could have given her a motive to lie.

[62] Asking these questions in isolation ignores this Court's direction that the reasons of a trial judge should not be scrutinized in a search for error, and that credibility findings should be read with the presumption of the correct application of the law.[69] The majority re-weighed the factors considered by the trial judge, an approach this Court has consistently rejected.

(ii) The trial judge appropriately considered any risks related to EB's perception

[63] It should first be noted that this was not a case about perception. As this Court explained in *R v Baldree*, the danger is that a declarant may have "misperceived the facts to which the hearsay statement relates".[70] This concern relates to the accuracy of the declarant's recollection.[71] There was no real suggestion here that EB mistakenly believed that she had been repeatedly sexually assaulted by her uncle, including with graphic details such as him ejaculating on her stomach. This case was about EB's sincerity, that is whether she was telling the truth.

[64] Even if there was a real danger of misperception in this case, the majority incorrectly re-

[69] *R v GF* at ¶ 77-82; *R v Gerrard*, 2022 SCC 13 at ¶ 2-3

[70] *R v Baldree*, 2013 SCC 35 at ¶ 32, quoted in *R v Bradshaw* at ¶ 20

[71] *R v Bradshaw* at ¶ 44, 64

weighed the evidence related to how EB might have acquired sexual information that was so obviously beyond what was appropriate to her age.

(1) The evidence that EB may have seen a pornographic movie with the Respondent

[65] The first point that the majority cites is the suggestion that EB may have watched a pornographic movie with the Respondent. There are three problems with the majority's treatment of this evidence.

[66] First, there was no evidence that EB actually watched a pornographic movie with the Respondent. As explained above, TS (the CAS worker) testified that EB told TS that she had seen a pornographic movie with the Respondent. But EB never said that she had seen a pornographic movie with the Respondent during her interview with Officer Cunnington. Indeed, defence counsel spent a significant amount of time questioning Officer Cunnington about the absence of any evidence from EB that the Respondent showed her a pornographic movie.[72] Further, the Crown did not seek to have the statement from EB to TS introduced for the truth of its contents.[73]

[67] The parties treated this evidence for what it was: a prior statement that was potentially inconsistent with the statement that EB gave to Officer Cunnington.[74] This was how the trial judge approached this evidence, as a potential discrepancy between two statements made by EB.[75] The majority of the Court of Appeal was therefore incorrect to fault the trial judge for failing to

[72] *M. Cunnington*, AR Part V, p 93-95, p 98-99

[73] Proceedings at trial, AR Part V, p 298-299

[74] Defence submissions on *voir dire*, AR Part V, p 563, p 580; Crown submissions on *voir dire*, AR Part V, p 604-605

[75] Oral Reasons, AR Part I, p 4-5; Reasons ¶ 144, AR Part I, p 29

address whether EB learned some of the age-inappropriate sexual information from a pornographic movie, since there was no evidence that she had actually seen one.

[68] Second, as the dissenting judge points out, even if there was evidence that EB had seen a pornographic movie with the Respondent, there was no evidence that it would have explained the detailed account of the assaults that she provided.

[69] TS' evidence was that EB said that, in this movie, there was a woman taking off her clothes and a man undoing his pants, taking his penis in his hand and masturbating.[76] There was no suggestion that the movie involved a child. There was no suggestion that EB would have seen "a little whole [*sic*] right there in the middle" of her uncle's penis. There was no evidence that the movie involved ejaculation. EB said that "it comes out milk" when describing what came out of her uncle's penis. She elaborated that it was "plain, gross milk". Her nose told her that it was "gross". She described the "plain, gross milk" going onto her stomach. There was no indication that the pornographic movie involved a man ejaculating on someone's stomach. Nor was there any reason to think that a movie could have explained to EB how ejaculate might smell.[77]

[70] It is speculative to suggest that EB acquired her detailed knowledge of age-inappropriate sexual matters from a movie that there was not any evidence that she actually saw, where the only evidence about the movie was significantly less detailed.

[71] Third, if there was evidence that EB saw a pornographic movie with the Respondent, that

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[76] *TS*, AR Part V, p 339-340

[77] EB Statement, AR Part IV, p 156-158

would be supportive of the allegations. Particularly given the fact that the evidence of the pornography was not particularly similar to the allegations that EB made against the Respondent, if he was showing her pornography that would support the view that he may also have been sexually abusing her.

(2) The evidence that EB may have learned about sexual matters from her classmates

[72] Again, the majority seems to have misapprehended this evidence. The evidence that EB may have acquired some sexual knowledge from her friend"E" came exclusively from LS. LS' evidence on this point was inconsistent. In her statement to police, when asked directly how EB may have acquired knowledge of what semen looks like and where it comes from, she purported to have no idea. In her evidence in-chief, LS said that EB told her that her friend "E" told EB that "E" had seen a man and woman having sex on TV. She also alleged that EB told LS that her friend "E" had told EB what comes out of a penis. In cross-examination, she described a trip to an IKEA where "E" was talking about having seen a movie with two adults having sex. This trip occurred about a year and a half prior to the interview with Officer Cunnington, and LS did not recall EB talking about sexual matters in the intervening time.[78]

[73] Like the evidence of the pornographic movie, this evidence was adduced to show that EB may have said something different to LS than to Officer Cunnington. It was not adduced to prove that "E" said these things to EB. It was not adduced to prove that "E" had seen a movie in which two adults were having sex.[79]

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[78] *LS*, AR Part V, p 409-411, p 426-427, p 443-450, p 455, p 476-484

[79] See ¶ 24, above.

[74] The trial judge therefore appropriately addressed this evidence when he treated it as a potentially inconsistent statement that was relevant to EB's credibility.[80] Indeed, the trial judge directly addressed the possibility that EB may have acquired some information regarding sexual matters from her classmates:

> I do not think the fact that E.B. may have discovered things about sexual matters from her classmates (which is likely not unusual), detracts from the fact that E.B. was able to describe in some detail the way in which her uncle got her to strip naked, fondle her genitals, masturbate in front of her, and ejaculate with his semen ending up on her stomach. The graphic way in which these incidents were described was compelling, and I am not convinced that they were the product of some generic description that may have been conveyed by a classmate.[81]

[75] The dissenting judge took the correct approach to both these pieces of evidence. He concluded that EB was able to give "detailed description of sexual acts well beyond her development stage". While some of the details in her allegations could have been acquired through watching a pornographic movie, there was no explanation for her being able to approximate the length of the Respondent's penis, describe that the ejaculate "smelled gross" or recount being unable to say no when her uncle asked whether she enjoyed the assault.[82]

(iii) <u>The trial judge properly addressed any issues related to EB's sincerity.</u>

[76] The majority of the Court of Appeal incorrectly found that the trial judge did not address the hearsay danger of whether EB was being honest. In the view of the majority, the trial judge erred in failing to consider the fact that, although she promised to tell the truth at the preliminary

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[80] Reasons ¶ 77, AR Part I, p 16, ¶ 82 and 87, AR Part I, p 17-18, ¶ 112, AR Part I, p 23

[81] Reasons ¶ 140, AR Part I, p 27-28

[82] CA Reasons ¶ 99, AR Part I, p 71, ¶ 102-104, AR Part I, p 72-73

inquiry, EB later told Dr. Sas that she had not done so. The majority also found that the trial judge should have referred to Dr. Sas' acknowledgement that, if EB lied in her police interview, being called back to court to testify could re-traumatize her. Finally, the Court viewed EB's preliminary inquiry testimony as akin to a recantation.[83]

[77] The majority reasons amount to a re-weighing of EB's evidence. First, it was clear that the main hearsay danger was that EB's sincerity could not be tested through cross-examination. This was a main focus of defence counsel's submissions on the *voir dire*, when he argued that EB "walked into court and decided to lie".[84]

[78] In this context, the trial judge was not required to specifically refer to the risk that EB was being dishonest. After extensively summarizing the submissions of the parties on threshold reliability[85], the trial judge referred back to the way that the interview was conducted, including the fact that EB could tell the difference between a truth and a lie and the fact that her information was very detailed.[86] The trial judge also specifically rejected the argument that EB had a motive to fabricate her allegations against her uncle.[87]

[79] Second, and as the dissenting judge points out,[88] the majority's approach ignores the context of EB's police statement and what occurred afterwards. She was immediately apprehended

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[83] CA Reasons ¶ 61-65, AR Part I, p 57-59

[84] Defence submissions on *voir dire*, AR Part V, p 560

[85] Reasons ¶ 97, AR Part I, p 19-20

[86] Reasons ¶ 110, AR Part I, p 23

[87] Reasons ¶ 111, AR Part I, p 23

[88] CA Reasons ¶ 108-109, AR Part I, p 22-23

by the CAS and was not returned to her mother for seventeen months. It would have been open to the trial judge to draw the common-sense inference that EB associated recounting the assaults with the traumatic experience of being taken from her mother. This inference was only strengthened by Dr. Sas' evidence.

[80] Dr. Sas' opinion was that EB did not want to return to court. EB believed that her mother also did not want her to testify. EB was afraid that she would again be apprehended by the CAS every time a social worker visited her at school. She confirmed to Dr. Sas that she was worried that if she talked about her uncle in court, she might be taken away again.[89]

[81] Third, the trial judge was plainly aware of EB's evidence at the preliminary inquiry. He reproduced her evidence in-chief in its entirety in the reasons.[90] The trial judge did not then have to specifically explain why he did not view EB's preliminary inquiry testimony as damaging to her credibility.

[82] There was nothing improper about the trial judge relying on the fact that EB promised to tell the truth to Officer Cunnington and demonstrated her ability to differentiate between a truth and a lie, while at the same time finding that her statements at the preliminary inquiry did not amount to a recantation of her evidence.

(iv) <u>The trial judge appropriately addressed the potential motive to fabricate</u>

[83] The final reason that the majority gave for overturning the trial judge's decision relates

[89] Sas Report, AR Part IV, p 198-200

[90] Reasons ¶ 6, AR Part I, p 7

to EB's sincerity. In the majority's view, the trial judge could not reasonably conclude that EB had no motive to lie.[91] In doing so, the majority again re-weighed the evidence.

[84] This argument must also be placed in the context of the trial. This issue was first raised by defence counsel in his cross-examination of TS, the CAS worker. She was asked whether she believed that EB was "intelligent enough to know that if she describes bad conduct of [the Respondent] that she'll finally get to live without him". Her answer was that, in her experience interviewing children, she had "never heard a child disclose sexual abuse to get out of a home".[92]

[85] In this context, the Crown anticipated the argument that might come from defence counsel about whether there was a motive to fabricate. The Crown submissions on motive were in the context of a discussion of the nine best practices identified by Dr. Sas as to how to interview a child witness. The fifth of these practices indicates that the officer should ask the child if they know why they are speaking to police that day.[93]

[86] Defence counsel argued in his closing submissions at trial that "in this case there is a motive to lie" and proposed two: either that EB simply wanted to live with her mother for some reason unrelated to any alleged abuse, or that EB did not want to be taken away by CAS.[94]

[87] During this exchange, the trial judge indicated that he understood the "standard proposition" that the lack of apparent motive to lie did not mean that EB was telling the truth. Absence

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[91] CA Reasons ¶ 66-70, AR Part I, p 59-61

[92] *TS*, AR Part V, p 354-355

[93] Crown submissions on *voir dire*, AR Part V, p 546-547

[94] Defence submissions at trial, AR Part V, p 582-583, p 588-591

or presence of a motive to lie is relevant, but it was "just a factor".[95]

[88] The trial judge returned to this point in both his oral and written reasons. In the oral reasons, he stated that "that there is no apparent motive, and I stress the word apparent. There is no apparent motive on her part to fabricate the allegations" [emphasis added].[96] In his written reasons, he referred to the motive to lie twice: first, when finding that threshold reliability had been established[97] and again when considering whether the Crown had met its burden. In this second portion of the reasons, he noted that "the absence of a motive to lie on the part of E.B., while it has some significance, is not determinative" and that "the absence of a motive to fabricate is but one factor in the equation. When placed alongside all of the other indicia of reliability that I have reviewed, it is a factor that supports a conclusion that the Crown has proven the case beyond a reasonable doubt".[98]

[89] Yet the majority found that the trial judge "misapprehended or ignored" the evidence that could have supported the view that EB did not like her uncle, and therefore could have had a motive to lie. With respect, this oversteps the proper role of an appellate court. The trial judge referred to evidence that could support the view that EB did not like her uncle, such as the fact that EB sang to herself during a break in the police interview that she did not want to live with

[95] Defence submissions at trial, AR Part V, p 589-591

[96] Oral Reasons, AR Part I, p 4

[97] Reasons ¶ 111, AR Part I, p 23

[98] Reasons ¶ 146-147, AR Part I, p 30

her uncle[99] and that she felt "not even good" about living with him.[100] He heard the submissions of counsel, arguing that she was lying in order to get her uncle out of the house.[101] And, the trial judge found that there was no motive to lie. This was not a misapprehension of the evidence, but rather a rejection of a position put forward by the defence.

[90] The trial judge could not simply ignore the defence argument that EB had a motive to lie. The trial judge was entitled to reject this argument and consider the absence of any evidence of a motive to fabricate as a relevant factor in assessing EB's credibility.[102]

[91] As the dissenting judge noted, this finding was open to the trial judge. Even if the evidence could have shown that EB did not like her uncle, it was entirely plausible that EB "could have disliked the [Respondent] ***because*** of the assaults" [emphasis in original].[103]

PART IV: COSTS

[92] The Appellant makes no submissions regarding costs.

PART V: ORDER REQUESTED

[93] The Appellant requests that the appeal be allowed, and the convictions restored.

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[99] Reasons ¶ 36, AR Part I, p 11

[100] Reasons ¶ 44, AR Part I, p 12

[101] Defence submissions at trial, AR Part V, p 582-583, p 588-591

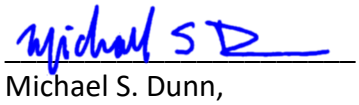
[102] See e.g., *R v Gerrard* at ¶ 3-4, adopting *R v Ignacio*, 2021 ONCA 69 at ¶ 38 and *R v Swain*, 2021 BCCA 207 at ¶ 31-33

[103] CA Reasons ¶ 113, AR Part I, p 75

PART VI: SEALING ORDERS, PUBLICATION BANS OR OTHER RESTRICTION ON PUBLIC ACCESS

[94] The s. 486.4(1) publication ban currently in place in this matter restricts the publication of any information that could identify the complainant. Assuming the Court's reasons do not refer to the complainant, her mother or the Respondent by their full names, the publication ban would have no impact on the release of the Court's reasons.

All of which is respectfully submitted this 18th day of July 2022 by



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PART VII
AUTHORITIES TO BE CITED

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SCC File No. 40147

SUPREME COURT OF CANADA

BETWEEN:

HER MAJESTY THE QUEEN

– and –

S.S.

RESPONDENT'S FACTUM

PUBLICATION BAN
Section 486.4 of the *Criminal Code*
Respecting the identity of the victim

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