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File Number: 35143

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

FABIAN VURADIN

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

RESPONDENT'S FACTUM

PURSUANT TO RULE 36 OF *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. The appellant was convicted of sexually abusing an eleven year old girl while she was in his care. He was convicted primarily on the basis of the child's evidence, his evidence having been rejected and not raising a reasonable doubt.

2. The case was essentially one, like many others, that was decided on the basis of the trial judge's assessment of the credibility of the witnesses. The appellant would have this court upset the trial judge's credibility finding, and rule on this case contrary to this Court's decision in *R v M(RE)*.[1]

Statement of Facts

Background and the allegations of sexual abuse

3. The complainant was born June 28, 1995. She was eleven years old in March 2007, when she made her complaint to police about Fabian Vuradin's sexual assault of her. Although she was not clear on dates, she said she had only known the appellant since the summer of 2006, during the time of Capital Ex (Edmonton's summer exhibition) – establishing the relevant period for the allegations.

4. The trial took place more than two years later, in June 2009, just before the complainant's 14th birthday. Her evidence at trial consisted of her March 2007 videotaped statement, admitted pursuant to s. 715.1 of the *Criminal Code*, in addition to her testimony in court. Other witnesses provided background evidence regarding the appellant's association to the complainant's family, and providing corroboration as to opportunity. There was also evidence led of a medical

[1] *R v M (RE)*, 2008 SCC 51

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examination of the complainant; however the trial judge found that evidence to be of little value. As such, the primary evidence of the sexual abuse came from the evidence of the complainant, and the only contrary evidence was the testimony of the appellant. The case was one determined entirely on the assessment of credibility of these two witnesses.

5. The appellant, Fabian Vuradin, was a friend of the complainant's family. As the complainant's family did not have a car, the complainant's father would pay Mr. Vuradin to drive members of the family on occasion. Mr. Vuradin drove the family members for a variety of reasons, including shopping, to visit friends, or to go to a particular location.

6. According to the complainant's evidence, the first incident of inappropriate touching occurred on an occasion in the summer of 2006 when the appellant drove the complainant to her cousin's home for a sleep over. On the way there, the appellant touched the complainant's butt, under her clothing. This occurred when she stood and reached for a juice box. She described him rubbing her butt cheeks while he was driving. She was wearing sweat pants at the time. The complainant used physical demonstrations in her statement as she tried to explain in actions what the appellant had done to her.[2]

7. The complainant described a second specific incident in which the appellant drove her and a friend home from the YMCA, not long before her complaint to police. The appellant first dropped off the complainant's friend. As he was then driving the complainant home, he made comments to the complainant about the friend's breasts, and began to touch the complainant's breasts under her clothing. She told him to stop and he put his hand in her pants, touched her vagina under her underwear and inserted his fingers. The complainant also used physical demonstrations during her video statement while explaining what had happened on this occasion.[3]

8. In addition to the two specific incidents, the complainant said the appellant touched her breasts approximately nine times, and touched her approximately 20 times on her butt and

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[2] Exhibit 2, Complainant's videotaped statement, Respondent's Record, pages 41-45, 47, 53-54 and 73 (indications of physical demonstrations appear at pages 42, 47, 53-54, 73)

[3] Exhibit 2, Complainant's videotaped statement, Respondent's Record, pages 26, 34-39, 55 and 71-72 (indications of physical demonstrations appear at pages 27, 37, 39, 55, 71)

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vagina. Sometimes she didn't mind it, and let him. On some occasions he put his fingers inside her.[4]

9. The appellant testified and denied ever touching the complainant. He went on to present a number of stories about the complainant's family, presumably as an explanation of motive for their allegations, but none of those scenarios had been put by the defence to the complainant or any of the other family members who had testified as Crown witnesses.[5]

The defence theory at trial

10. The defence submissions, as they related to the allegations made by this complainant, were brief. Defence counsel acknowledged that the case was one of credibility and reliability. He challenged the complainant's evidence on the following bases:

- He referred to alleged contradictions in the complainant's video statement;
- He suggested there was a rehearsed quality to the complainant's statement; and
- He argued the improbability of the events having occurred as the complainant had described them.[6]

[4] Exhibit 2, Complainant's videotaped statement, Respondent's Record, pages 57, 68-69 and 72
[5] Evidence of Fabian Vuradin, Respondent's Record, pages 13-17.
[6] Defence Submissions, Respondent's Record, pages 18-24

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PART II – ISSUES

11. The appellant's factum, dated December 11, 2012, contained three issues. However, an amended notice of appeal was filed subsequently, abandoning the first ground of appeal. As the original first ground was not a ground on which there was a dissent, as leave was not sought on that ground, and as that ground has now apparently been abandoned through the amended notice of appeal, the respondent intends to respond only to the two remaining grounds.

12. On the issue of the adequacy of the reasons for judgment, the respondent submits that this case is not dissimilar to *R v REM*, or many other cases where the key issue is the credibility of witnesses. To criticize a trial judge's reasons on the basis of what was not said, in these circumstances amounts to abandoning the well established standard of review for determinations of credibility.

13. On the issue of whether or not the trial judge properly considered the doctrine of reasonable doubt, the respondent submits that the clear and correct articulation of the law by the trial judge at the outset of his reasons for judgment demonstrates there was no error.

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PART III – STATEMENT OF ARGUMENT

1) The adequacy of the reasons for judgment

14. Reasons for judgment in a criminal case will be adequate if they explain why the accused was convicted, provide public accountability, and permit effective appellate review.[7]

15. From a position of retrospect, it is possible to look at nearly any judgment and criticize it for what it doesn't say, as opposed to what it does say. From a position of retrospect, it is possible to craft an argument that gives newly inflated importance to the unspoken. It is not from that position of retrospect that reasons for judgment ought to be evaluated.

16. As this Court stated in *R v REM*, "The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law."[8] Yet that is exactly what the appellant seeks to argue on this appeal. That is also the basis for the dissent of Côté J, who critiqued the trial judge's reasons through a four-columned chart.

17. Many criminal cases, and particularly child sexual abuse cases, come down to one simple issue: Are the allegations of the complainant credible such that, despite the denial by the accused, the Crown has proven the guilt of the accused beyond a reasonable doubt? If a trial judge's reasons answer that question, and do so in an articulated reasoned manner, then deference is owed to the decision of the trial judge, and appellate intervention is unwarranted.

18. As this Court noted in *REM*, it is "the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at trial" that are to be considered.[9] The adequacy of reasons cannot be assessed by reference only to the judgment viewed in isolation. Yet that is how the appellant proposes this Court assess the reasons in this case. The Appellant's record

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[7] *R v REM*, 2008 SCC 51 at para 14 (Appellant's Authorities, Tab 6)
[8] *R v REM, supra* note 7 at para 56
[9] *R v REM, supra* note 7 at para 55

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contains no evidence or the submissions of counsel, both of which would provide context for the assessment of the reasons.

19. As in *REM*, the appellant here complains that the trial judge failed to explain why he rejected the accused's plausible denial of the charges. This Court expressly rejected this argument in *REM:*

> Finally, 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 make 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 the 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.[10]

20. The trial judge in this case provided reasons for accepting the complainant's evidence. He pointed to particular aspects of the child's evidence that led him to conclude that she was truthful. He recognized the inconsistencies in her evidence and considered the nature of the inconsistencies and her explanation. He was attentive to the defence argument of implausibility. In the end, he found the evidence of the complainant to be compelling, and despite the accused's denial, found he had no reasonable doubt about the appellant's guilt.[11]

21. As the majority of the Court of Appeal found, "The reasons given by the trial judge meet the *Sheppard* requirements and made it clear to the appellant why he had been convicted at trial. The reasons also permit meaningful appellate review."[12] A review of the reasons in this case demonstrate clearly the "why" requirement on conviction. The criticisms raised by the appellant

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[10] *R v REM*, *supra* note 7 at para 66
[11] Reasons for Judgment, page 1, line 21 to page 2, line 32 (Appellant's Record, Tab 2, pages 5-6)
[12] Memorandum of Judgment of The Honourable Mr. Justice McDonald, para 66 (Appellant's Record, Tab 3, page 31)

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relate to the question of "how" he came to his conclusions, something the law does not require of reasons.[13]

22. In his dissent, Côté J fell into the trap identified by the majority in *R v Gagnon* (and affirmed in *REM*) of ignoring the trial judge's unique position to see and hear witnesses, and instead criticized the reasons for judgment for not explaining why a reasonable doubt was not raised.[14] That is the effect of Côté J's four-column appendix, and it is that approach that the appellant promotes in his appeal to this Court.

23. In this case, as in many cases dependent on child witnesses, the evidence was as much visual and audial as it was verbal. The trial judge was able to see and hear the complainant, both on video as she gave her original police statement, and in the courtroom as she gave her in-court testimony and was cross-examined. The trial judge was able to observe the physical demonstrations of the complainant that accompanied or exemplified her words. The trial judge commented during the trial on the importance of the visual reception of this evidence, as well as the importance of hearing "the inflection of their voices."[15]

24. As noted in *Gagnon*: "Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."[16] As stated in *REM*, "the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize."[17] It is for precisely that reason that the decisions of trial judges on matters of credibility are entitled to deference. The respondent submits that this is particularly so when dealing with assessments of credibility in cases involving child witnesses.

25. Cases involving child witnesses and s.715.1 video evidence do not lend themselves well to traditional evaluations of credibility based on articulated inconsistencies. Many of the "live topics" outlined in Côté J's four-column chart may be significant in cases involving adult

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[13] *R v REM, supra* note 7 at para 17
[14] *R v Gagnon*, 2006 SCC 17 at para 11 (Appellant's Authorities, Tab 3); *R v REM, supra* note 7 at para 68
[15] Trial transcript, page 21, lines 31-34 (Respondent's Record page 3)
[16] *R v Gagnon, supra* note 14 at para 20
[17] *R v REM, supra* note 7 at para 49

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witnesses, but the law recognizes that assessing the credibility of a child witness requires an understanding of the child's special situation:

> The law, through the efforts of Parliament and the courts, now recognizes that children may encounter greater problems in giving their evidence than adults. […] The entire court process may be alien and frightening to children, no matter how well briefed. The child finds him- or herself in a strange world, surrounded by stern and imposing adult strangers, demanding on pain of perhaps incompletely understood consequences that the child reveal what he or she knows. Sexual assault cases bring yet another anxiety. The child is asked to reveal to these imposing and intimidating strangers the most private details of what was done to him or her. From infancy, the child may have been trained not to discuss such things with strangers. He or she has acquired a sense of privacy, and perhaps a sense of shame and guilt about such matters. The child finds him- or herself conflicted, being asked to tell strangers that which he or she has been trained not to tell strangers. Many children, despite these problems, prove equal to the task. But it is not surprising that a few find themselves unable to respond in any meaningful way. […] The policy of the law in recent decades points to seeking to understand and recognize these difficulties. When we do, it becomes apparent that a child's inability to answer questions about upsetting and highly personal events some time in the past may well establish reasonable necessity in Wigmore's sense of unavailability. Instead of treating the child witness more harshly than the adult, as those who insist on special evidence of necessity suggest, we should be seeking to understand the child's special situation.[18]

26. A trial judge is presumed to know the law. The trial judge in this case, in his reasons, articulated an understanding of the special circumstances of child witnesses as was proper in the context of this case.

27. The trial judge in this case simply made a finding that the complainant was credible, notwithstanding the denials of the appellant. It was a credibility finding, something judges are required to do everyday, based on the evidence that the trial judge heard and saw – one which the appellant would like redetermined by someone else who did not have the same benefit of hearing and seeing the witness.

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[18] *R v F(WJ)*, [1999] 3 SCR 569 at para 43 (Respondent's Authorities, Tab 3)

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2) Reasonable doubt and *W(D)*

28. The appellant's argument that the trial judge failed to follow the test outlined in *R v W(D)* ignores the clear and correct articulation of the legal framework articulated at the outset of the reasons for judgment. The trial judge stated:

> *W.(D.)* requires me to attend to the evidence of the accused in a particular way. That does not mean, however, that the accused's evidence is considered in a vacuum. The dangers that *W.(D.)* addresses are the potential for simply comparing stories and for shifting the onus to the accused. However, the accused's evidence is part of a body of evidence, all of which bears upon the credit that may be given to any portion of that evidence.
>
> One cannot determine whether the accused's evidence is true or at least raises a reasonable doubt by simply considering his evidence and the way he gave it. Doing so ignores one of the fundamental tenants of fact-finding. It is not just internal consistency which lends credence to testimony. External consistency is also part of the analysis. Evidence inconsistent with found or admitted fact, may be discounted, no matter what its source.[19]

29. It is presumed that a trial judge understands the basic principles of criminal law at issue in a trial.[20] In this case, the Trial Judge clearly and correctly laid out the principles that were relevant to the trial. He properly referenced the test from *W(D).* There is nothing in the reasons for judgment that indicate he failed to consider whether the accused's evidence was believable, or if not believable at least capable of raising a reasonable doubt. To the contrary, with specific reference to the accused's denial of the allegation, the trial judge concluded that the allegations had been proven beyond a reasonable doubt.[21]

30. The appellant's argument incorrectly suggests that whenever the evidence of the accused is considered within the context of all of the evidence, a "classic *W(D)* error" occurs. Indeed this would be *in*consistent with *R v W(D),* inconsistent with subsequent appellate authority, and would undermine the very valuable purpose the *R v W(D)* decision serves in criminal law. The

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[19] Reasons for Judgment, page 1, lines 21-33 (Appellant's Record, Tab 2, page 5)
[20] *R v M (RE), supra* note 7, at para 45
[21] Reasons for Judgment, page 2, lines 31-32 (Appellant's Record, Tab 2, page 6)

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purpose served by the *W(D)* approach to assessing credibility is to ensure that the presumption of innocence and standard of proof is protected in cases of uncertainty. *W(D)* provides a suggested structural format, but it is not a case about structure.[22] It is a case that draws attention to the differing burdens on the Crown and defence in criminal cases, and how that difference in burden must be recognized in the assessment of credibility. As Alan D. Gold stated in his response to Jack Gibson's terming *R v W(D)* "The Liars' Defence", the *W(D)* analysis is not about an artificial finding of reasonable doubt in evidence that has been rejected:

> The following is the situation: the accused has testified; the trier must consider "what effect has his evidence had on my mind with regard to the Crown's burden of persuasion beyond a reasonable doubt." The trier may feel the evidence was worthless, without effect, and so "not believe" or "not accept" or "reject" or "refuse to accept" or "disbelieve" it. It is hard to imagine such evidence raising a reasonable doubt, and it is probably true that in such a case the accused may well be a liar. Mr. Gibson need not worry: in such a case the accused will probably get his just deserts.
>
> But there is another category of cases where the burden of proof is crucial because matters are not black and white, but rather a troubling shade of gray. Here the accused's evidence is equally with the first category *not* so strong as to be "accepted" or "believed" (and in that sense it is equally "not accepted" and "not believed") but it is troubling, and it leaves the trier in a state of reasonable doubt. It has some evidentiary value in the sense that it has some effect on the mind of the trier of fact. In short, "disbelieve" is *not* the same as "not believe". "Not believe" covers two separate and distinct possibilities: not believe in the sense of "disbelieve", that is, an affirmative negative belief; and also "not believe" in the sense of "do not believe but also do *not disbelieve*", i.e. the middle-ground, the state of uncertainty, of not knowing one way or the other, of not believing nor not not-believing, in short, of being left in a reasonable doubt.[23]

31. Arguments that attempt to turn *R v W(D)* into a rule of prohibited wording or into an artificial exercise in the isolation of evidence, are arguments of form and not substance. These arguments fail to understand the underlying importance of the case, and its relationship to fundamental criminal law principles.

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[22] *R v CLY*, 2008 SCC 2 at paras 6-7 (Respondent's Authorities, Tab 2)

[23] Alan D Gold, "The 'Average, Nervous, Inadequate, Inarticulate, Inshort, Typical' Accused's Defence" (1993), 22 CR (4th) 253 (Respondent's Authorities, Tab 1)

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32. Far from condemning the practice of evaluating an accused's evidence in light of Crown evidence, this Court in *REM* found that a finding that a complainant was generally truthful and "a very credible witness", and that her testimony on specific events was "not seriously challenged" was a perfectly acceptable explanation for rejecting an accused's evidence.[24]

33. Similarly, the Ontario Court of Appeal in both *R v Morrissey*, and *R v JA* found nothing wrong with the notion that acceptance of Crown evidence beyond a reasonable doubt can be valid basis for rejection of an accused's evidence.[25]

34. It is not the law that if an accused takes the stand and testifies "I did not do it" he must be acquitted. His denial, of course, is significant evidence, but it is for the trial judge to determine whether or not that evidence is to be believed or, if not believed, whether it at least raises a doubt about the veracity of the allegations. Here the accused was not believed. The Crown's case was considered with the accused's denial in mind, and the trial judge concluded, as he was entitled to do, that his denial did not raise a reasonable doubt.

Conclusion

35. This was a case of credibility. As was found by the majority in the Court of Appeal below, the reasons of the trial judge met the *Sheppard* requirements and made it clear to the appellant why he had been convicted. The trial judge was mindful of all the evidence, and came to a reasoned conclusion based on his findings of credibility to which deference is owed.

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[24] *R v REM, supra* note 7 at para 66

[25] *R v Morrissey* (1995), 22 OR (3d) 514, 97 CCC (3d) 193 at 207 (Ont CA) (Respondent's Authorities, Tab 5); *R v JA*, 2010 ONCA 491 at paras 22-23, rev'd on other grounds 2011 SCC 17 (Respondent's Authorities, Tab 4)

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PART IV – COSTS

36. The Respondent makes no submissions regarding costs.

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PART V – ORDER SOUGHT

37. The Respondent asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 20th day of March, 2013.

MAUREEN J. McGUIRE
COUNSEL FOR THE RESPONDENT

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PART VI - TABLE OF AUTHORITIES

Found at App's Authorities Tab	Found at Resp's Authorities Tab	Authorities Cited	Cited at Paragraph No.
	1	Alan D Gold, "The 'Average, Nervous, Inadequate, Inarticulate, Inshort, Typical' Accused's Defence" (1993), 22 CR (4th) 253	30
	2	*R v CLY*, 2008 SCC 2	30
	3	*R v F(WJ)*, [1999] 3 SCR 569	25
3		*R v Gagnon*, 2006 SCC 17	22, 24
	4	*R v JA*, 2010 ONCA 491	33
	5	*R v Morrissey* (1995), 22 OR (3d) 514, 97 CCC (3d) 193 (Ont CA)	33
6		*R v REM*, 2008 SCC 51	14, 16, 18-19, 22, 24, 29, 32
10		*R v W(D)*, [1991] 1 SCR 742	28-31

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PART VII – STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW

Criminal Code, RSC 1985, c C-46, s 691(1)

Appeal from conviction

691. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Appel d'une déclaration de culpabilité

691. (1) La personne déclarée coupable d'un acte criminel et dont la condamnation est confirmée par la cour d'appel peut interjeter appel à la Cour suprême du Canada:

a) sur toute question de droit au sujet de laquelle un juge de la cour d'appel est dissident;

b) sur toute question de droit, si l'autorisation d'appel est accordée par la Cour suprême du Canada.