NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. E.M.W.***, 2010 NSCA 73

Date: 20101008
Docket: CAC 321590
Registry: Halifax

Between:

E.M.W.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486.4 of the **Criminal Code**

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	June 14, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered per reasons for judgment of Farrar, J.A.; Beveridge, J.A. concurring; Fichaud, J.A. dissenting.
Counsel:	Donald C. Murray, Q.C., for the appellant Peter Rosinski, for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

I. BACKGROUND:

[1] The appellant, E.M.W., is the father of R.H. Mr. W. was charged that between October 1, 2006 and June 12, 2008 he sexually assaulted and, for a sexual purpose, touched his daughter R. Mr. W.'s trial took place over two days, June 11 and 12, 2009. By written decision of Judge Jamie Campbell, dated July 13, 2009 [2009 NSPC 33], Mr. W. was convicted of the offence under s. 271(1) of the **Criminal Code**. He was subsequently sentenced to a term of federal imprisonment of two years.

[2] The appellant appeals from conviction and sentence alleging that the learned trial judge erred in:

1. his evaluation of the credibility and/or reliability and/or sufficiency of the evidence of the appellant;

2. his application of the standard of the Crown's burden of proof, particularly in relation to the evaluation of the testimony of the appellant and other evidence;

3. sentencing the appellant to a federal term of incarceration of two years by inappropriately applying the sentencing principles for those found guilty of sexual offences. In particular, he overemphasized the use of incarceration as a means to achieve the statutory objectives for sentencing in this case.

[3] For the reasons that will be developed, the conduct of the trial and the manner in which the evidence was elicited was unfairly prejudicial to the accused. I would therefore quash the conviction and order a new trial.

II. ANALYSIS:

[4] Before addressing the issues on this appeal, it is necessary to set out in some detail the evidence at trial and the reasons of the trial judge.

[5] The presentation of the evidence at the trial was, to say the least, unusual. The transcript is littered with examples of careless presentation of evidence, as well as a presentation of inadmissible and quite irrelevant evidence. Further, much of the testimony of the Crown witnesses, and in particular the complainant, is adduced through leading questions by Crown counsel. With that backdrop I will now review the evidence.

[6] R. was born in 1997 to Mr. W. and T.L.H., who were in a common law relationship between 1996 and 2000.

[7] The offences which are the subject of this appeal are alleged to have occurred between October 1, 2006 and June 12, 2008 when R. was between 9 and 11 years of age. When she testified at Mr. W.'s trial, R. was 12 years of age.

[8] R. has always lived with her mother. Mr. W. has not lived with R. or her mother since 2000.

[9] Mr. W. only began exercising overnight access with his daughter in 2006, sometimes at his home and sometimes at his mother's home. During these access visits, R. would sometimes choose voluntarily to sleep in her father's bed because, she explained, she felt safer there.

[10] At the trial, R. was a reticent and unforthcoming witness. There were several questions during her direct and cross-examination that were met by her with total silence. In due course, however, Crown counsel led R. through a series of questions about how she had come to make a complaint about her father to the police.

[11] R. was interviewed on two occasions by the police. At the first interview R. refused to speak with police. It was at the second interview that the particulars of the allegations were developed. The allegations first came to light when R. told her friend L. about the alleged inappropriate conduct. L. in turn told her mother who reported the matter to the police.

[12] At trial the Crown established through R., inappropriately by leading questions, that when the police initially interviewed her they got it "pretty much right" when they <u>told her</u> what was supposed to have happened with her dad. This

is a particularly significant evidentiary interaction. As will be explained in more detail later, the trial judge identified the manner and context in which R. made her disclosure of the complaint, as a key factor in deciding her evidence excluded any possibility of a reasonable doubt about her allegation.

[13] The Crown, through leading questions, was attempting to establish R.'s credibility by suggesting to her that the information the police had at the initial interview was accurate, thereby suggesting her complaints were consistent throughout.

[14] The Crown then sought to establish what had occurred. In response to a question from Crown counsel about "what was happening?", R. replied:

> My dad was touching me inappropriately when I was sleeping in his room.

[15] R. testified that it had been going on for "a few months", and that it had commenced about a month after she started visiting her father at his home. Efforts by the Crown to acquire more detail about the "inappropriate" act or acts were met with significant silences.

[16] Met with R.'s reticence, the Crown prosecutor produced a drawing prepared by him of a stick figure. He then requested R. to identify "in the general vicinity of where he was touching you". R. then identified the area, circled and identified it as the vagina.

[17] After obtaining an affirmative response to the question of "And was your dad touching you on the vagina?", the Crown examined R. with a series of closed-end binary questions about how that touching occurred. As a result the evidence was presented more as the prosecutor's version of the event rather than that of the witness. Finally, based on a request from the Crown for a guess, R. developed an estimate that this kind of thing happened between five and ten times.

[18] The following exchange took place at trial:

> **Q.** No. If you had to guess for me, right, just an approximate number, but how many times would you say that happened? More than ten or less than ten?
>
> **A.** Less.

Q. Less than ten? More than five or less than five?

A. More.

Q. So somewhere between five and ten times?

A. Yeah.

[19] During the cross-examination of R., it was revealed that she had reported to the police that the touching had occurred on more than 20 occasions. As previously noted, R. was interviewed by the police on two occasions. On the first occasion, she was brought to the police station, by her mother and stepfather, without knowing the reason for being there. On that occasion, she refused to talk. She returned on the second occasion and it was at that time that the alleged details surrounding the assault were revealed.

[20] She had no explanation as to the discrepancies in her testimony other than that both of her responses to the questions were accurate. Other inconsistencies were pointed out between her statement to police and her evidence at trial, in particular:

> when she spoke to the police she did not know how long her father had been touching her inappropriately, (her evidence at trial was that it started approximately one month after the weekend visits started); and
>
> she had reported to the police that touching had occurred under her pyjama top as well, (she denied at trial that any such touching had occurred).

[21] I point out these inconsistencies not for the purposes of discrediting R.'s evidence but to illustrate there was a serious credibility issue at this trial and the appropriate presentation of the evidence was imperative to ensure a fair trial.

[22] The trial judge concludes his recitation of R.'s evidence as follows:

> 60) [R.]'s evidence was that while at her father's house she would sometimes sleep in his bed, because she felt safer. Sometimes she would wake up and find his fingers inside her vagina ...

[23] A review of the record reveals that this evidence is not found in R.'s words but only came through leading and close-ended questions from the Crown.

[24] In addition to R., the Crown called two other witnesses; the first was R.'s mother, T.L.H. Counsel for the Crown led evidence from T.L.H. about Mr. W.'s visiting habits with respect to R. between 2000 and 2006, as well as Mr. W.'s failure to adhere to his maintenance obligations. This evidence was completely irrelevant to the matters in issue in the proceeding. The trial judge picked up on this evidence when he commented on Mr. W.'s relationship with R. by concluding at para. 53:

> 53) ... There appears to have been no significant effort put into developing a relationship.

[25] T.L.H. also testified about her daughter's "big issue" about not wanting to visit with her father.

[26] She was asked a leading question by Crown counsel about "substantial problems with her [R.] lying or making up stories?" To this she answered "no" – a clear case of oath helping which should not have been admitted at the trial.

[27] Another example of inadmissible evidence being led through T.L.H. was when she told the Court that the reason for R. being reticent to give her version of events at the first police interview was because she told her she had been caught off guard, was scared and nervous. She also told her that she did not understand what was going on. None of this evidence should have been admitted. It is not part of the narrative regarding the way in which the statement was obtained but is hearsay evidence of R.'s view of her own state of mind, given through her mother.

[28] T.LH. continues her evidence by telling the court about her daughter coming to terms with the criminal justice system and telling her "I think I can talk to them now, I think I'd be okay." The extent that the trial judge referenced the manner and content of R. H.'s evidence is significant, this evidence suggests to the trier of fact that the reason why she was reluctant to tell her story at first was because she

was concerned, nervous, caught off-guard, which would provide an explanation for her failure to speak at the first interview.

[29] However, after talking about it with her mother and stepfather in the car, she became more comfortable with the process and decided she could tell her story.

[30] As previously noted, none of this evidence came through R. It is one thing to permit evidence of demeanor. This was not, but rather was her mother's version of what the complainant had told her and should never have been admitted at trial.

[31] The Crown also called Constable Mary Kathleen McQuaid. Constable McQuaid was at both interviews with R. At the first interview she said R. was in a state of "complete shock and disbelief".

[32] It is during the cross-examination of Constable McQuaid that we get a glimpse of the content of the complaint that was alleged to have been made to L. The following was told to Constable McQuaid by L. (according to Constable McQuaid):

> that only L. was present when R. made the complaint to her (R.'s trial evidence was that her friend C. was there as well);
>
> Mr. W. does not sleep with pants or underwear on (R. testified at trial that this was not the case);
>
> that she was told by the appellant to watch a video of a girl (R. denied at trial that this occurred);
>
> Mr. W. touched her above and below the pajamas and that Mr. W. would touch R. in the vaginal area.

[33] This line of questioning was eventually objected to by the Crown prosecutor and the defence quickly abandoned it. Even though it was led through the defence it was inadmissible hearsay. However, there was evidence before the trial judge of the "content" of the complaint made to L. Of the complaints alleged to have been made to L., the consistency is the assertion that her father touched her in the vaginal area.

[34] Once again, I have set out this evidence in some detail to illustrate the serious credibility issue in this trial.

[35] The defence called two witnesses. Mr. W.'s direct evidence is, as the trial judge states, a denial that the events ever occurred. Nothing more can really be said about it, it is difficult to elaborate on a denial (¶ 69).

[36] Obviously, the denial of the commission of the offence was a significant factor in Mr. W.'s evidence. But, also of significance was the unusual, if not somewhat bizarre, manner in which he was cross-examined by Crown counsel. Crown counsel was unrestrained by the trial judge, or indeed by defence counsel, in the manner in which he proceeded with the cross-examination. Some of it, at least, was eventually acknowledged in the trial judge's decision as having been inappropriate. For example, the polygraph exclusion and the Crown's opinion or "Mr. W.'s affect during the Crown interviews."

[37] However, Crown counsel went on to cross-examine the appellant by putting to him soliloquies (the term used by Mr. Murray in argument on behalf of the appellant to describe the questioning), suggesting how he, the Crown counsel, would have acted in similar circumstances. He also cross-examined about Mr. W.'s lack of contact with his daughter while he was working as a long haul trucker and allegations of his failure to honour his maintenance obligations, all of which was irrelevant and could only have been intended to cast the appellant in a bad light.

[38] An illustration of the bizarre nature of the cross-examination can be seen in the following question:

> **Q.** You've never woken up in the living room peeing into the afghan or anything like that?

[39] There was absolutely no evidence that anything like this had ever occurred.

[40] This type of questioning was addressed by Beveridge, J. (as he then was) in **R. v. Buckley**, 2009 NSSC 204. He held at para. 53:

> 53 The Supreme Court of Canada in **R. v. Lyttle**, [2004] 1 S.C.R. 193 clarified that defence counsel can cross-examine a Crown witness on matters that he or she may not be able to prove directly so long as counsel has a good faith basis for asking the question. This right is not unlimited. It does not extend to asking questions that are reckless, or false, or relate to, or rely on inadmissible evidence. The suggested procedure is that set out by Major and Fish, JJ.:
>
> > [51] A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that "counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box". See **Michelson v. United States**, 335 U.S. 469 (1948), at p. 481, per Jackson J.
> >
> > [52] Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may properly take appropriate steps, by conducting a voir dire or otherwise, to seek and obtain counsel's assurance that a good faith basis exists for putting the question. If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness.

[41] This is a perfect example of the Crown counsel taking a random shot at the accused's reputation by putting a groundless question to him. It could only have been intended to cast the accused in a bad light. The question did not have a "good faith basis".

[42] In addition to Mr. W., the defence called Mr. W.'s mother, N.L. N.L. testified about a school movie which was described to her by R. The movie titled "*Don't Touch Me There*" (or words to that effect) was described to N.L. by R. as a situation where someone wrongfully accused an individual of inappropriate sexual touching.

[43] There was also evidence led about the efforts to find that movie. This evidence was clearly hearsay and perhaps solicitor/client privileged as the efforts to find the movie were made by Mr. W.'s solicitor. For whatever reason, it found its way into the trial record.

[44] The cross-examination of N.L., like the cross-examination of Mr. W. was, again, more in the way of statements by Crown counsel about his own family situation, R.'s out-of-court interactions with the current and previously assigned Crown prosecutor, and Crown counsel's own statements about what the prosecutor would have done personally if his own daughter had done what R. is reported to have done.

[45] The following are examples of the nature of the cross-examination by the Crown of N.L.:

> **Q.** Who would? But coming back to my original question to you, ma'am, putting yourself in [R.]'s position that she had to go through . . . and can I tell you something? She met me for the first time two weeks ago, right.
>
> The person who was supposed to conduct this trial got in an accident. [R.] had come to know her and trust her, okay. And unfortunately because of that, she got stuck with me as the guy that was going to come in and try and walk through this process, okay.
>
> I can tell you . . . maybe you don't know about the totality of the circumstances, but she was interviewed by the police, and they interviewed her for an hour and a half the first time. And other than her nodding and shaking her head by times, she said very little, okay.
>
> All this stuff essentially had to be dragged out of her, for lack of a better term, other than when she disclosed or told a little friend of hers what my friend refers to as a little secret, okay. Up until that point, other than based on what [L.], her little friend, had told her, okay, [R.] hadn't been able to say things out loud, hadn't been able to talk about it, right.
>
> And in the face of meeting me for the first time a couple of weeks ago, in the face of having to come before a guy who she's never seen before, in the face of the fear of having to come and testify in a forum that you were going to be present . . . and I can tell you something, that kid loves you.
>
> She came and sat here for six hours yesterday. And had to talk about penises and vaginas, you know. And when I asked her about the term penis or the sexual parts of a girl, one time were here for 15 minutes before she could say a word, right. It was another 15 minutes before I . . . (inaudible) to draw this that she could even talk about what happened.

Does that to you, ma'am, sound like a 12-year-old girl who's seeking attention?

A. You have to know [R.].

. . .

Q. Can I just digress for a minute and tell you a story, okay? I hope my friend doesn't mind for just a minute.

I've got a step-daughter; she's eight, right. And when I got with her mom, her mom was really worried, right, that the divorce from her husband was going to ruin this kid's life, right. Kind of self-serving in a way, I said to her, 'I think she'll be better off.'

I personally don't believe kids should be in a situation where the parents hate each other, and she'll benefit from two houses that love her to death, right. Lo and behold, four years later, I think that kid is a million times happier than she ever would have been if my wife had stayed with her former husband and stayed in a house filled with acrimony, okay.

A. Uh-huh.

Q. That was just my personal belief. It might be self-serving, I might be able to concede, but I think I've done a lot for that child. And when Christmas time comes, she gets multiple presents. She now has my mother as her grandmother, you know. Dad's moved on, and he's got a new wife so there's, like, four times the families that are giving this kid presents and loving her and hugging her and telling her she's beautiful, right?

A. Uh-huh.

Q. She gets a boatload of attention, right. And I bet you when [R.] comes to your house, when she used to come to your house ... I can just tell from you. You know, you're sitting up there smiling. You seem like a really nice ... (inaudible). I get [sic] you she gets a boatload of attention from you when she comes to your house.

A. From me and Poppy, yes.

. . .

> **Q.** Okay. So my thing is you say there's two reasons why [R.] who you love . . . you know, and I haven't heard you say anything about [R.] making up wild stories before or anything of that nature.
>
> **A.** Oh. [R.] always makes up wild stories.

[46] These excerpts from the trial transcript are illustrative of the bizarre nature of the manner in which the cross-examination was conducted. The questions posed by the Crown prosecutor contained information about how the prosecutor came to conduct the case, how the Crown prosecutor interpreted the original interview and then the subsequent interview when "stuff essentially had to be dragged out of her", it contains the prosecutor's interpretation of how she was forthcoming to her friend, and finally, his own personal experiences with his stepdaughter.

[47] A criminal prosecution is to be performed efficiently with a sense of dignity having regard to the seriousness of judicial proceedings.

[48] At the conclusion of all of the evidence, the trial judge found that the evidence of R. was "the much more reliable of the two" [para. 108]. He also found that there was no reasonable doubt, looking at her evidence alone [para. 113]. The trial judge also found that the evidence of the appellant was a "clear and unequivocal denial", that he had not been "caught in contradictions or inconsistencies in cross-examination", and that his version of events "was plausible" [para. 114]. However, after making these findings, the trial judge goes on to say that he was given confidence in R.'s reliability specifically by the process of her disclosure of the allegation, both in terms of content and manner. It was the manner and content of her evidence which allowed him to conclude that it displaced any reasonable doubt [para. 115].

[49] After determining that Mr. W. was guilty of the offence, after consideration of a pre-sentence report and a sexual offender assessment, the trial judge sentenced Mr. W. to a term of imprisonment of two years in a federal penitentiary.

III. GROUNDS OF APPEAL:

> 1. The learned trial judge erred in evaluating the credibility and/or reliability and/or sufficiency of the evidence of the appellant;

> 2. The learned trial judge erred in his application of the standard of the Crown's burden of proof, particularly in relation to the evaluation of the testimony of the appellant and other evidence; and

(It is not necessary to address the third ground of appeal in light of the findings on the first two.)

[50] For the reasons that follow it is the sufficiency of the evidence at trial and the overall conduct of it which leads me to allow the appeal.

[51] Both the appellant and respondent agree that the appropriate standard of review for the conviction issues raised is correctness. The trial judge must have correctly cited, interpreted, and applied the relevant law.

[52] The appellant argued the learned trial judge erred in applying the direction of the Supreme Court of Canada in **R. v. W. (D.)**, [1991] 1 S.C.R. 742. The passage from **W. (D.)** at issue and cited in approximately 4,000 other cases, is found at pp. 757-758:

> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[53] More recently, the Supreme Court of Canada in **R. v. J.H.S.**, 2008 SCC 30, expanded on the **W. (D.)** analysis:

> [10] ...As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation. . . . The principle that a jury may believe some, none, or all of the testimony of any witness,

> including that of an accused, suggests to some critics that the first *W. (D.)* question is something of an oversimplification.
>
> [11] As to the second question, some jurors may wonder how, if they believe *none* of the evidence of the accused, such rejected evidence may nevertheless *of itself* raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.
>
> [12] The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in *H. (C.W.)* suggested an additional instruction:
>
> > I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit." [p. 155]
>
> [13] In short the *W. (D.)* questions should not have attributed to them a level of sanctity or immutable perfection that their author never claimed for them. *W. (D.)*'s message that it must be made crystal clear to the jury that the burden *never* shifts from the Crown to prove *every* element of the offence beyond a reasonable doubt is of fundamental importance but its application should not result in a triumph of form over substance. In *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, Cory J. reiterated that the *W. (D.)* instructions need not be given "word for word as some magic incantation" (p. 533). In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[54] I am mindful of the Supreme Court of Canada's direction not to treat the direction in **W. (D.)** as a "magical incantation" [**R. v. J.H.S., supra**, para. 14]. I will not do so. I can find no fault in the trial judge's analysis of the **W.(D.)** direction. In my view, he correctly stated the law. I reject the appellant's assertion that the trial judge misdirected himself when considering **W.(D.)**. However, that does not end the matter.

[55] The concern is not with the trial judge's analysis of the evidence or his application of the **W.(D.)** direction but rather with the evidence used by him to undertake the analysis.

[56] It is important to review the evidence the trial judge actually analyzed when considering the credibility of the appellant and the complainant. The trial judge reviewed the evidence of R. and determined that he could not find a reasonable doubt in R.'s evidence. As previously stated, R.'s evidence was almost entirely elicited by leading questions. He then reviewed the evidence of the accused and found it was a "clear and unequivocal denial" and that his version of events was "plausible". By using the word "plausible", I take the trial judge to mean a grammatical wording of the word, that is seemingly reasonable or probable.

[57] It is apparent from his reasoning that he found the accused's evidence, on its own, raised a reasonable doubt. This is clear from the next passage when he then compared the evidence of the complainant to the evidence of the appellant and concluded:

> [115] ...that even in light of her father's denial, her evidence displaces any reasonable doubt.

[58] The trial judge says he is comparing the accused's evidence to the evidence of R. "and all of the other evidence". (para. 115)

[59] Although the learned trial judge makes reference to all of the other evidence, that evidence is not detailed nor is any explanation given about why Mr. W.'s evidence compares unfavourably with the other evidence. The only witnesses to give evidence at this trial were R., her mother, the police officer, Mr. W. and N.L. No comment is made with respect to the credibility of N.L.'s evidence, and it certainly cannot be seen to be in any way inconsistent with the evidence of Mr. W. The mother's and police officer's evidence are not mentioned in the trial judge's conclusions. The decision makes it clear that the trial judge is comparing Mr. W.'s evidence to R.'s in order to determine that it "displaces" the reasonable doubt that arose from Mr. W.'s evidence. [para. 115]

[60] The trial judge's conclusions [para. 119] further emphasize the credibility issue which he had in front of him:

> 119. The level of confidence in the reliability of the complainant's testimony, though of course short of some theoretical standard of absolute certainty, is sufficiently great, that when his evidence contradicts hers, it cannot be accepted as raising a reasonable doubt. That level of confidence was not reached upon hearing her evidence but only after considering her evidence in light of all of the other evidence at the trial, including the evidence of the accused.

[61] Again, although the trial judge references other evidence at trial, there is no other evidence that he is comparing R.'s evidence to other than Mr. W.'s.

[62] The learned trial judge did not reject the evidence of the accused. Quite the contrary, he found it "plausible". What he found was that the evidence of the accused, when it contradicted the evidence of R., could not be accepted as raising a reasonable doubt. He preferred the evidence of the complainant when compared with the evidence of the accused.

[63] What is also troublesome is the basis upon which the trial judge prefers R.'s evidence.

[64] The trial judge specifically relied on the contents of R.'s disclosure as, essentially, "tipping the scales" in favouring the evidence of R. over her father. This appears in two places in the decision: when he rejects the theory of the defence that R. had a motive to lie where he held at para. 112:

> [112] ...On the contrary, the circumstances surrounding her disclosure <u>as well as its content</u>, weigh very heavily against such an inference. ...
>
> (My emphasis)

[65] Again, at para. 115, he uses virtually the same wording:

> [115] ...The circumstances surrounding her disclosure, <u>the contents of that disclosure</u> and manner in which she related the disclosure have given me such confidence in the reliability of her evidence that even in light of her father's denial, her evidence displaces any reasonable doubt.
>
> (My emphasis)

[66] Clearly, the learned trial judge is making reference to the content of her disclosure. However, his reasons are unclear as to what he is referring to in the contents.

[67] The Crown argues that there was no evidence as to what, precisely, R. told her friends. It argues that the judge, in that portion of his decision, is referring to the fact of the disclosure having been made and how the disclosure came to the attention of the police that was relevant. If that is what the learned trial judge meant, he did not say so. He gave three separate and distinct reasons as the basis for believing the complainant's evidence.

1. The circumstances surrounding her disclosure;

2. The contents of that disclosure; and

3. The manner in which she related the disclosure.

[68] I further disagree with the Crown that there was no evidence of what R. told to her friends. The evidence came through leading questions from Crown counsel regarding the police questions to her about what was going on with her father, at the first interview, and suggesting to R. that the questions were an accurate description of what was going on. The only way the police could have known that was from the information received from R.'s friends.

[69] Absent any elaboration from the trial judge on the issue, I must accept that he intended what he wrote.

[70] Obviously, if the trial judge relied in any way on the contents of the prior consistent statements to her friends, that is impermissible, particularly so when it is introduced by the Crown leading the witness.

[71] In **R. v. Ward**, 2008 NLCA 38, Rowe, J.A.:

> 16. The Supreme Court of Canada has recently rendered two decisions that deal with the use that can be made of prior consistent statements: **R. v. Stirling**, 2008 SCC 10 and **R. v. Dinardo**, 2008 SCC 24.
>
> ...

18. In **R. v. Dinardo**, Charron J. (for the Court) wrote at para.37;

> 'In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility"' ... ".

[72] The Crown has asked that we consider the trial judge's use of the words "contents" as part of the narrative and not as a basis for finding credibility. With respect, I cannot conclude that from the trial judge's reasoning.

[73] The judge went beyond simply using the prior content of the complainant's prior statements to the police and perhaps to her friend, L. as part of the narrative. He was using the consistency in the statements in assessing the credibility of R. and for the purpose of "displacing the reasonable doubt" that he had from her father's evidence.

[74] In **R. v. Dinardo**, [2008] 1 S.C.R. 788, a unanimous Court was dealing with an appeal from conviction. One of the grounds of appeal was that the trial judge had misdirected himself in assessing credibility. This ground of appeal was tied in with the failure to provide sufficient reasons as to how the credibility issues were resolved. Respecting those grounds of appeal, Charron, J. held:

> [2] I agree with Chamberland J.A. that the trial judge erred in law by failing to explain how he resolved the significant issues of credibility concerning the complainant's testimony, particularly in light of Mr. Dinardo's evidence at trial. While a trial judge is presumed to know the law, I conclude that in the context of the evidence and the issues in this case, the trial judge's reasons are insufficient to allow for meaningful appellate review on the question of credibility. Accordingly, I would allow the appeal and order a new trial.

[75] Although the trial judge, in this case, explained the reasons for preferring R.'s evidence over her father's, he did not elaborate on what he meant by the "contents" of her complaints.

[76] Reading the decision as a whole, I can only conclude that he is using prior consistent statements as buttressing her credibility. In doing so he erred.

[77] However, this is not the only concern I have with the evidence at trial. As set out in some detail earlier, a large part of the evidence of R., her mother, and the police officer was elicited through hearsay and was inadmissible. It is this evidence the trial judge relies upon for the purposes of assessing R.'s credibility. The concerns with the evidence include:

> leading questions by the Crown eliciting from R. the manner in which the sexual assault is alleged to have taken place;
>
> the Crown having R. guess at the number of times it occurred;
>
> the attempt by the Crown to bolster R.'s credibility by putting to her that the police got it "just about right";
>
> the hearsay evidence from R.'s mother relating to her state of mind regarding the complaint;
>
> the attack on Mr. W.'s character with respect to his maintenance obligations and his relationship with his daughter;
>
> the oath helping by R.'s mother through leading questions by the Crown;
>
> the inadmissible hearsay regarding the contents of the complaints made to L.;
>
> the inappropriate cross-examination of Mr. W. by the Crown relating to his character and by putting to him questions that were clearly improper; and

> the introduction of hearsay and probably solicitor/client privileged information relating to the alleged movie.

[78] This case is not unlike **R. v. Rose**, [2001] O.J. No. 1150 (Q.L.), a decision of the Ontario Court of Appeal. In **Rose, supra,** the conviction was quashed and a new trial ordered on the basis of the manner in which the evidence was admitted at trial. Particularly, Crown counsel elicited important information through leading questions. The court noted that the entire direct examination was more of a cross-examination. The court considered this was highly improper considering that the examination involved the Crown's primary witness.

[79] The court held:

> 9 A leading question is one that suggests the answer. It is trite law that the party who calls a witness is generally not permitted to ask the witness leading questions. The reason for the rule arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give his or her own answers to the questions. Of course, the degree of concern that may arise from the use of leading questions will depend on the particular circumstances, and the rule is applied with some flexibility. For example, leading questions are routinely asked to elicit a witness' evidence on preliminary and non-contentious matters. This practice is adopted for the sake of expediency and generally gives rise to no concern. Leading questions are also permitted to the extent that they are necessary to direct the witness to a particular matter or field of inquiry. Apart from these specific examples, the trial judge has a general discretion to allow leading questions whenever it is considered necessary in the interests of justice: Reference *Re R. v. Coffin* (1956), 114 C.C.C. 1 at 22 (S.C.C.).

[80] Similarly, in this case, the Crown's primary witness was R. The details with respect to the commission of the offence were elicited through leading questions. The questions were clearly suggestive of the answers. The following exchange took place between the Crown and R. H., after the Crown drew a stick figure for illustration purposes:

> Q. Yes. What's that part of the body on a female called?
>
> A. Vagina.
>
> Q. Vagina. And was your dad touching you on the vagina?

A. Yes.

Q. And when he touched you on the vagina, was it outside of your vagina or inside of your vagina?

A. Inside.

Q. What part of his body was he using to touch the inside of your vagina?

A. His fingers.

Q. Was he on the inside or the outside of your clothes when he was doing this?

A. Inside.

Q. So you would wake up and your dad's hand would be down your pants, and his fingers would be in your vagina?

A. Yes.

Q. What would you do when you woke up then and your dad's hands would be down your pants and in your vagina?

A. I'd move or go to the bathroom.

Q. When you say that you would move, what would you do to move?

A. I'd roll over or just shove over.

This exchange illustrates the manner in which the incriminating evidence was elicited from R. by leading and binary questions, not from her own words.

[81] The court in **Rose, supra**, was concerned with the manner in which the evidence was offered was not for its truth, but rather, to meet the expectations of the Crown and the police. (**Rose**, **supra**, para. 15) I have similar concerns in this case. By putting to R. choices about how the assault occurred, there is a significant danger that she is responding to meet the expectations of the Crown or the police.

[82] There were also concerns in **Rose, supra** about the cross-examination of the accused by the Crown. That Court concluded that the cross-examination was improper. At para. 26 the Court concluded:

> 26. ... However, in this case, when the cross-examination is considered in the context of the issues in this case, it is my view that Crown counsel transgressed the limits of relevance in questioning the appellant generally on his lifestyle, from the manner of his dress to the fulfilment of his fiscal responsibilities. The appellant was not on trial for his general lifestyle and it was unfair to place him in a position where he had to defend against vague and irrelevant suggestions of improper conduct:

[83] With respect to Crown counsel's cross-examination of Mr. W., his commitment to his daughter was called into question, his failure to build a relationship with her, his responsibilities, whether he called his daughter when he was on the road and the highly improper assertion that he urinated on an afghan in the living room.

[84] I would conclude, like **Rose**, **supra**, that Crown counsel's cross-examination of Mr. W. transgressed the limits of relevance so as to undermine the fairness of this trial.

[85] Section 686(1) of the **Criminal Code** provides as follows:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> . . .
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

[86] In **R. v. Fanjoy**, [1985] 2 S.C.R. 233 the Supreme Court of Canada considered application of the provision (then s. 613(1)) when it related to an improper cross-examination of an accused. In discussing a trial judge's decision to exercise discretion to intervene, the Court held at p. 239:

> ... The decision to exercise the discretion to intervene in cross-examination, or to refrain from intervention, is one involving consideration of both law and fact and cannot be said to be a question of law alone. Each case will depend on its own circumstances, and no doubt there will frequently be difficulty in deciding from case to case whether the point has arrived in a cross-examination where the trial judge should intervene. It is in this case abundantly clear, however, that that point was reached and passed. ....

[87] The Ontario Court of Appeal in **Fanjoy, supra**, despite finding prejudice as a result of the cross-examination, applied the *proviso* in s. 613(1)(b)(iii). The Supreme Court of Canada overturned the Ontario Court of Appeal and held at p. 239:

> I find it impossible to conclude that no miscarriage of justice occurred as a result of the appellant's cross-examination. A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. ... It would be wholly inconsistent with a finding of unfair prejudice in a trial to find, nonetheless, that no miscarriage of justice occurred. ...

[88] I conclude that the conduct of this trial and the manner in which the evidence was elicited was unfairly prejudicial to the accused. The accused was deprived of a fair trial which amounted to a miscarriage of justice. For these reasons I would quash the conviction and order a new trial.

[89] As I have determined that I would allow the appeal, it is not necessary to address the appeal from sentence.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Dissenting Reasons for Judgment (Fichaud, J.A.):

[90] I respectfully dissent from the decision of my colleagues on the conviction appeal. I will refer to the complainant as "R." and her father, the appellant and accused at trial, as "Mr. W.". Mr. W. was convicted of sexually assaulting R. contrary to s. 271(1) of the *Criminal Code*.

Background

[91] The trial judge's decision (2009 NSPC 33) recites that R. was born in 1997, was three years old when her parents separated and generally would spend every second weekend with her father. I quote the trial judge's summary of events beginning in May 2008:

> 56) In May 2008 R told a friend that her father had been touching her inappropriately. She said that she knew that her friend would either keep the secret or would tell someone who would know what to do. The friend eventually told her mother. She immediately called R's mom.
>
> 57) The two mothers were not sure what to do in the face of this disclosure. They did not speak to R about it. They contacted the police and arrangements were made to bring her in for an interview. Her mother did not mention the matter to her. She simply drove her to the police station. R arrived at the station, not knowing that her mother knew what she had told her friend. She did not know that she was going to be questioned.
>
> 58) At that first interview she was in a state of "complete shock and disbelief" as described by RCMP Constable Kathleen McQuaid who participated in the interview. It was apparent to the constable that the child had no idea why she was there. The interview was challenging and difficult. All she would do was to nod or shake her head. She would not respond verbally at all.
>
> 59) She returned for a second interview. She told her mother that she now felt more comfortable in speaking with the constable and the social worker who had conducted the first interview. She was interviewed and although far from being enthusiastic was prepared to speak.
>
> 60) R's evidence was that while at her father's house she would sometimes sleep in his bed, because she felt safer. Sometimes she would wake up and find

> his fingers inside her vagina. She would either get up or move without saying anything. She wasn't sure whether he was awake or asleep.

[92] Central to the conviction is the judge's statement in ¶ 60:

> Sometimes she would wake up and find his fingers inside her vagina.

Later I will discuss the evidence for that finding.

[93] The trial judge discussed Mr. W.'s evidence. Mr. W. denied the allegation. The judge, redacting Mr. W.'s name to "E.M.W.", said:

> 69) E.M.W.'s evidence falls into two broad categories. The first is his denial of the allegation. It is difficult to elaborate on a denial. There are only so many ways to say it. It is difficult to assess it, on its own and in its own right. It is, in essence, a single sentence. There is nothing inherently untruthful or contradictory in that sentence itself. Nothing in his direct examination or cross examination diminished the credibility of it. Were his evidence to be considered standing on its own, there would be nothing about it that would be inherently believable or unbelievable.
>
> 70) It must be contrasted with the evidence of his daughter to be given its context. It is impossible to give full consideration to the denial without considering it, and testing it, in light of the details of the allegation.
>
> 71) The second category of evidence is the evidence intended to undermine the credibility of the allegations made by his daughter. Into this category fall two aspects of his evidence. The first is the evidence that the child did not want to spend time with him and therefore made up the story. The second aspect of the evidence is the statement made by his mother that R had spoken to her suggesting that making false allegations of inappropriate sexual touching might sometimes be the right thing to do.

The decision continued (¶ 72-79) to summarize in more detail what the judge described as the second category of Mr. W.'s evidence – aimed at undermining R.'s credibility.

[94] The judge then recited nine "Factors supporting the Complainant's version of events". I prefer to quote the judge in full, rather than paraphrase:

80) There are a number of factors that support the inference that the complainant's version of events is accurate.

(a) Lack of animosity

81) The situation is not one in which R would be likely to develop a story that she would well have known would greatly harm her father. If she were sufficiently sophisticated to create the story, disclose it to a friend, and carefully measure her responses to the police, she would be sophisticated enough to know the consequences of telling such a story.

82) R and her father did not have a tempestuous relationship. Despite all that has been said, she still loves her dad. She also loves her grandmother. There is no doubt whatsoever of that. She would know perfectly well that they were close. Making a false allegation against him would be likely to affect her relationship, not only with him, but with her grandmother.

83) E.M.W. noted in his evidence that R had expressed boredom to him but they had never had a fight about the visits. He said that R would not want to have "hurt anyone's feelings". Raising this allegation, as a way to avoid access visits would be something that even a child of R's age would understand would have serious repercussions, well beyond relieving the boredom of access visits.

(b) Details of the disclosure

84) General sexual behaviour is something a child of R's age might have been made aware of through a number of sources. What she described contained a level of detail that would support the inference that this was not something she had heard about, read about or seen demonstrated in a video. She explained that her father not only touched her vagina but put his fingers inside. First, that level of detail would not be necessary to achieve her purpose, if indeed she had concocted a story. Second, that level of detail is not consistent with a story created by a child who could bring herself to say the word "vagina" only with great difficulty.

(c) Disclosure to a friend

85) R told a friend what had happened while at the friends house. She said that she told the friend that she would eventually tell her mother but didn't know how to do it. She said that she was nervous, but was not sure why she would feel that way.

86) R's disclosure to a friend rather than to an authority figure supports the inference that she was not using the allegation to further a purpose. If she wanted to stay home from visits, she simply could have refused to go. If the matter went further and she was forced to go, she could have made the disclosure to her mother. She would have known that her mother would not be unreceptive, given that her parents were separated though not antagonistic toward each other. If R were concocting a story simply to avoid weekend access, telling a friend would seem to have been either a very roundabout way of doing it or in the alternative a very sophisticated ploy to divert suspicion.

(d) Lack of evidence of coaching

87) The friend told her mother who told R's mother. They immediately called the police and R was taken to the police station without being told why. This is not a situation where a parent who is eager to find evidence of wrongdoing on the part of the other attempted to "firm up" the story before visiting the police. There was minimal discussion at any point between R and her mother about what had taken place. That continued to be the case after the disclosure was made. R's description of her mother's reaction when they did discuss it was that she was crying. It is reasonable to infer that her mother was not involved in any form of coaching.

(e) Delay from disclosure to reporting

88) If the story were planted with the friend, it took some number of days for it to bear fruit. R told no one else in the meantime. That is consistent with her evidence that she wanted to tell her mother but could not bring herself to do it. If the story were given to the friend in the hope that it would make its way to the authorities, R was showing considerable patience in waiting for her plan to work.

(f) Refusal to speak to the police

89) When R came to the police station for the first time she was visibly shocked and surprised. E.M.W.'s counsel asserts that she feigned shock. She refused to speak. She nodded or shook her head in response to questions. That suggests that she was either shocked by what had taken place or she engaged in a remarkably clever and subtle deception by which she assumed that her credibility would be improved by refusing to speak. She would have to have understood that her failure to speak in the first instance would result in a further opportunity to tell the story and that it would not reduce the eventual credibility of that story. Feigned shock would be more consistent with the outward signs of shock and then followed by a full and detailed "disclosure" of the prepared story. In the first instance R refused to speak at all.

(g) Lack of eagerness to report

90) R did eventually come back to the police station, where she did tell her version of events. She was far from eager to do so even on the second attempt. With some prompting and the use of head shakes and nods she was able to articulate what she alleged took place. Her behavior was not that of a child eager to tell her story to effect her purpose.

(h) Silence

91) R did not want to come to court. This is stated as a conclusion but it is one that was reasonably apparent to anyone who saw her that day. She was able to answer questions about her life and her interests with an age appropriate level of articulation. When it came to talking about what had happened at her father's home she once again refused to speak. She could not bring herself to say the words required. She sat for minutes at a time in silence.

92) Mr. Hartlen, for the Crown, saw a way around that. He drew a rudimentary stick figure and asked R to point to where she said her father had touched her. She drew a circle between the stick figures leg's. She was able to identify the area as the vagina and later was able to explain that his fingers had been inside her vagina.

93) The demeanor of a witness is not without value but must be considered with a view to the vast scope of interpretation that can be put on it. The assessment of the child's evidence here is not based on gestures, or posture or movements of the eyes or hands. It is based here on an assessment of what she said and what she did not say.

94) The long periods of silence indicate that R was intensely uncomfortable, as she had been when speaking to the police. She could not bring herself to say the word "vagina". She was not comfortable saying what had happened. She is not a precocious child but a 12 year old who appeared to be reacting to the stress of speaking in a very strange environment saying things about her father, while he watched and listened. She was not eager to be there and not eager to speak at all.

95) If she were simply lying in her evidence, as part of her continuing effort to frame her father, she was able to play the silence with an astounding degree of subtly. When asked where she had been touched she went silent. She remained silent for uncomfortable minutes. At any point, Crown counsel could have simply given up. The clever actor would have to have an uncanny sense of when to end

the silence or have the whole drama come to an end. There were a number of points at which it appeared as though the trial might come to an end as a result of her refusal to speak.

(i) Chances to "pull the plug" on the process

96) It could be argued that her reticence could be a sign that she was concerned about continuing with her deceit and found herself in a situation where after having made the statement to her friend she was carried along by the momentum of the process itself. On that theory she was uncomfortable because she knew she was lying. She had started the process and did not know how to stop it.

97) Reasonable inferences are drawn based on common sense or the experience that certain probabilities follow from certain premises. Where a 12 year old girl is concerned her reactions and responses cannot be measured by adult views of common sense or by adult experience, yet no judge can presume to adequately understand a child's thought process. Having said that, it is abundantly clear that R would have had any number of chances to pull the plug on her story before it got to court. After the first discussion with the police, where essentially nothing was disclosed, the matter could have ended. At that point the matter had little or no momentum of its own. It could easily have ended there.

98) At any later point, R could have refused to speak. At that stage, any plan to thwart access had already been successful. The stress of the process would have been unnecessary. It would far outweigh any momentum that had been built up within the process itself.

99) In some situations a child may be forced into a position where recanting is not an option because of pressure from the other parent to maintain the story. Here, there has been almost no discussion between R and her mother about what had happened. There has been no firming up of the details.

[95] The judge then discussed the defence's "Challenges to the Complainant's Evidence". There were seven items. For each, the judge discussed that factor's impact on the judge's assessment of the facts and reasonable doubt:

100) R's evidence was challenged by Mr. Cragg.

He pointed to a number of issues.

(a) Her denial of the discussion with her grandmother in the Jeep about the movie she had seen at school:

101) E.M.W.'s mother recalled speaking with R about a movie that she had seen at school. In that movie, according to her grandmother's recollection, a girl had falsely accused a man of sexually touching her. Despite that, in the movie, things ended well. E.M.W.'s mother took this as R indicating that she believed that false allegations are somehow acceptable. R could not recall any such conversation. While efforts were made to track down the movie from the school there was no evidence that a movie resembling the one described was ever shown at the school the child attended. The fact that R's recollection differs from that of her grandmother with respect to this matter does not suggest that her recollection is necessarily wrong with regard to it, and certainly does not support the conclusion that she concocted a story.

(b) Her recollection that two friends had been present when she first disclosed, while originally she had identified one as the person she had told:

102) When R made her earlier statements she indicated that she had told a friend. At trial, for the first time, she said that a second friend had also been present. This was put forward as an inconsistency in her evidence. If it is indeed an inconsistency it is a minor one. R did not understand that she had ever been asked, before the trial, who had been physically present when she told the friend eventually reported the conversation. The evidence that she told the friend who subsequently reported what she had been told was not disputed. Whether another friend had also been present at the time may indeed be a relevant fact, but her failure to mention it does not diminish the reliability of her evidence that a discussion took place in which the disclosure had been made to a friend. Her failure to mention the second friend does not relate to the allegations themselves.

(c) Her "feigned" shock when brought to the police station two weeks after telling her friend:

103) The only evidence regarding R's state of mine upon her arrival at the police station was from Constable McQuaid. She observed that the child showed signs of being genuinely shocked by what was taking place. She was withdrawn and generally non responsive to questioning. The suggestion that R was feigning shock, or acting, can hardly be used to undermine the reliability of her testimony because there is no evidence to indicate that she was anything but genuine in her response at the police station to the situation.

(d) Her "very confusing" testimony about how she and her father slept back to back and how he would be capable to touching her:

104) Counsel argued that R's evidence was that she and her father slept back to back when in the same bed. He questioned how he could have touched in the manner alleged while he had his back turned to her. Had she been able to answer that question it might have called into question the reliability of her evidence. She said that she and her father slept back to back. Of course she could not say what he did, how he slept or where he was when she was sleeping. She was able to say that she would wake up with his fingers in her vagina. How they got there she could not be expected to say.

(e) Inconsistencies in her police statement about the "top" and "bottom" of her pajamas:

105) There was some confusion about the pajama top. The issue was whether, when questions were being asked, the reference was to the top part of the pajamas, as opposed to the bottom, or "on top" of the pajamas, as distinguished from underneath the pajamas, next to the skin. It would be more remarkable if she were not confused by the terminology.

(f) Her evidence at trial that this happened more than 5 times and less than 10 times and her statement to police where she said more than 10 times and maybe more than 20 times:

106) R gave different evidence in her statement and at trial about the number of times she had been touched. That is not at all surprising. She did not make a diary of the events. She was called upon later to recall events that had taken place over a period of 18 months. The discrepancy was not between "once" and "many times" but a difference in the estimate. What she described as having happened was the same each time. One incident melts into the other. The reliability of her testimony might have been more questionable had she given a precise and entirely consistent answer as to the number of times her father had touched her.

(g) Her uncertain responses, where she said "maybe" or "I think so" and at other times sat in silence:

107) R's uncertain responses give clues to how she viewed her evidence. The standard "no -win" question was asked of her, whether she was telling the truth in her statement or telling the truth at trial. She paused for a long time and seemed to refuse to answer. There seemed to be no answer. She finally said "both". That is not as decidedly unhelpful a response as it may appear. To R, she was telling the truth both times because on both occasions she said what she could remember. Both in her view were "true" because both were her best recollections at the time when she was asked to recall.

[96] The judge then moved to his “Conclusion”:

> 108) R’s evidence was heard first. It seems logical to address it first. No conclusions as to its credibility, reliability, believability or acceptance can be made until all of the evidence has been considered and it has been tested against that evidence. After doing that, I have found her evidence to be the much more reliable of the two.
>
> 109) That is neither the beginning nor the end of the issue. The matter is after all not a contest of credibility. Reasonable doubt may be found in his evidence, her evidence, or any other evidence. My belief in her evidence, of course, is short of absolute certainty. That however is not the test.
>
> 110) None of the suggested “inconsistencies”, to the extent that they were indeed “inconsistencies”, were sufficiently material to have an impact on my view of the reliability of her testimony.
>
> 111) There is no suggestion that she has unconsciously created a memory of an incident or incidents that never took place. It must be acknowledge [*sic*] that the possibility of that explanation remains, as that, a possibility. It was not raised or suggested that R may believe her story to be true even though it is false. That kind of possibility points to the distinction between doubt and reasonable doubt. There are no reasons founded in the evidence that are capable of being articulated to support that doubt. Possibility does not equate to reasonable doubt.
>
> 112) The issue of motive remains. There may have been a motive for her to lie. Despite the evidence that nothing had been done to address R’s desire not to visit her father, that desire could have been real. Nothing in the evidence however permits a reasonable inference to be made that she was acting on such a motive. On the contrary, the circumstances surrounding her disclosure as well as its content, weigh very heavily against such an inference. The nature of the relationship between the child and her father, the circumstances of the disclosure, the unusual lack of discussion between the custodial parent and the child complainant, the initial unwillingness to speak, the generally hesitant manner of disclosure both to the police and to the court and the clear lack of scripted responses greatly diminish the reasonableness of any inference that this child has lied to achieve a purpose.
>
> 113) I can find no reasonable doubt in R’s evidence.

114) The evidence of the accused was a clear and unequivocal denial that any inappropriate touching had taken place. It stands in stark contradiction to the evidence of his daughter. He was not caught in contradictions or inconsistencies in cross examination. The version of events that he related was plausible.

115) I have tested his evidence against that of R and all of the other evidence. When tested that way, it cannot be accepted as raising a reasonable doubt. It is not merely a matter of finding her version of events to be the more believable. Neither is it a matter of not accepting it, or just not believing his evidence when it contradicts R's. The circumstances surrounding her disclosure, the contents of that disclosure and manner in which she related the disclosure have given me such confidence in the reliability of her evidence that even in light of her father's denial, her evidence displaces any reasonable doubt.

116) In *R. v. Jaura*, [2006] O.J. No. 4157 (Ont. C.J.), Judge B.W. Duncan found the complainant to be entirely believable. The evidence of the accused however, could not be rejected as untrue without having regard to the evidence of the complainant. The judge could find no shortcoming or flaw in the defendant's evidence.

> In summary, it is my view that the case law establishes that, in a "she said/he said" case, the Rule is that a trial judge can reject the evidence of an accused and convict solely on the basis of the acceptance of the evidence of the complainant, provided that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his acceptance of the complainant's evidence.
>
> Quite apart from case authority, there is ample reason to conclude that this must be the Rule. If it were otherwise, there would effectively be a legal corroboration requirement in these cases and the undoing of years of reform in this area. Alternatively, the issue of guilt would turn on whether the trial judge could identify and articulate that little something extra over and above the complainant's evidence - that flaw in the accused's evidence or its presentation - that would be the crumb on which a conviction could be supported. Reasons for judgement would become an exercise in highly subjective nit picking of the accused's evidence, disingenuously disguising the real reason for its rejection. (para 20, 21)

117) It would be tempting to make use of what Judge Duncan referred to as "crumbs" on which to find that E.M.W.'s evidence lacked credibility. As Judge Duncan did, a judge should call it as he or she sees it. Judgements are not delivered by trial judges to "appeal proof" their decisions.

> 118) The failure of E.M.W.'s evidence to raise a reasonable doubt was not because he refused a polygraph or because he casually chatted with the police while awaiting his interview, or made a more animated response to a false statement in that police interview.
>
> 119) The level of confidence in the reliability of the complainant's testimony, though of course short of some theoretical standard of absolute certainty, is sufficiently great, that when his evidence contradicts hers, it cannot be accepted as raising a reasonable doubt. That level of confidence was not reached upon hearing her evidence but only after considering her evidence in light of all of the other evidence at the trial, including the evidence of the accused.
>
> 120) I am satisfied that all of the evidence in this case has been searched for reasonable doubt. I have found none.
>
> 121) Consequently I find E.M.W. guilty of the offence under section 271(1) of the *Criminal Code*.

[97] In a separate decision, the judge later sentenced Mr. W. to 2 years imprisonment.

[98] Mr. W. appeals his conviction and sentence.

Issues

[99] The Issues segment of a decision usually is uncontroversial. That is not so on this appeal.

[100] Mr. W.’s only grounds of appeal against conviction are:

> 1. The learned trial judge erred in evaluating the credibility and/or reliability and/or sufficiency of the evidence of the appellant;
>
> 2. The learned trial judge erred in his application of the standard of the Crown’s burden of proof, particularly in relation to the valuation of the testimony of the appellant and other evidence; ...

His remaining ground is against sentence.

[101] Mr. W.'s factum words the Statement of Points in Issue as in his Notice of Appeal.

[102] In short, the grounds of appeal to this court against conviction were that the judge erred "in evaluating the credibility and/or reliability and/or sufficiency" of Mr. W.'s evidence and in the judge's "application of the standard of the Crown's burden of proof".

[103] The Statement of Argument in Mr. W.'s factum, relating to the conviction appeal, was premised primarily on the judge's statement (quoted above ¶ 96):

> 114) The evidence of the accused was a clear and unequivocal denial that any inappropriate touching had taken place. It stands in stark contradiction to the evidence of his daughter. He was not caught in contradictions or inconsistencies in cross examination. The version of events that he related was plausible.

Mr. W. argued that, by convicting despite what the judge acknowledged to be Mr. W.'s "plausible" evidence, the judge contravened the principles of *R. v W.(D.)*, [1991] 1 S.C.R. 742, at pp. 757-58. Mr. W. says that "plausibility" equates to reasonable doubt. So the judge ignored reasonable doubt and treated the prosecution as a credibility contest between R. and Mr. W. Mr. W.'s factum elaborates:

> 23. . . . The trial judge specifically found that Mr. W.'s evidence was plausible and had not been shown by the Crown to be contradictory or inconsistent in its content (Appeal Book, I, p.42, at para. 99). In short, the trial judge found that Mr. W.'s evidence was credible in the sense that it was capable of belief. The trial judge articulated no reason to reject or disbelieve the evidence of Mr. W. other than his acceptance of the evidence of R. (Appeal Book, I, p.42, para.100).
>
> . . .
>
> 26. The particular burden of proof issue in this case relates to exculpatory evidence of an accused that is recognized by the trier of fact as being capable of belief, but ultimately is found not to create a reasonable doubt *because of a preference by the trier of fact for the evidence of the complainant. . . .* [emphasis in Mr. W.'s factum]
>
> 28. It is submitted that when a trier of fact has no reason to reject or disbelieve the evidence of an accused, and the content of that evidence is exculpatory, that

accused is entitled to an acquittal. In other words, if an accused has testified as to an exculpatory version of events that is capable of belief, and the trier of fact is not able to reject that evidence other than because of a preference for the evidence of the complainant, the accused has by definition raised a reasonable doubt. . . .

31. A proper application of the burden of proof did not happen here because the trial judge made two sequential errors. First he failed to conduct his reasoning in accordance with the thrust of the roadmap set out in *R. v. W.(D.), supra*, and *R. v. H.(J.S.), supra*. Second, he evaluated the evidence of Mr. W. against the Crown allegation, by comparing it to the Crown allegation *and apparently requiring it to compare favourably with the Crown allegation*. As a result, the trial judge appears to have required the evidence of Mr. W. to not only rise to the level of being capable of belief, but also to compare favourably with the complaint of R. [emphasis in Mr. W.'s factum]

. . .

33. It would seem to be self-evident that if a Court finds that it is unable to disbelieve an exculpatory version of events given by an accused, the accused is entitled to an acquittal. . . .

. . .

35. Whatever difficulties academic commentators and jurors may have with the concept of disbelieved evidence raising a reasonable doubt, there should be none with the concept of acquitting an accused because his exculpatory evidence is capable of belief, and cannot be disbelieved (except when compared negatively with the prosecution's allegation). It is the position of the Appellant that if a true deadlock occurs in the evidence evaluation process (as existed here), the only legitimate conclusion is that the Crown has failed to discharge its burden, and that the accused is entitled to an acquittal.

. . .

36. . . .The criminal trial process is not one where the objective is to decide whether the accused or the complainant is more credible. The trial process is one where the objective is to determine whether the Crown's case leaves room for reasonable doubt: . . .

38. To conclude then, the sequential errors of the trial judge here were that a) he failed to properly follow the thrust of the credibility assessment roadmap from *W.(D.), supra* or *H.(J.S.), supra*, either of which would have

> prevented him from falling into error, and b) decided to reject the credible evidence of Mr. W because it did not compare favourably with the credible evidence of R. The proper result of a finding that the accused's exculpatory testimony had not been disbelieved, should have been an acquittal.

[104] Those passages summarize Mr. W.'s submissions against conviction. Those grounds and submissions were framed by experienced counsel for Mr. W. There was no ground of appeal in Mr. W.'s Notice of Appeal or argument that: (1) the judge erred by admitting inadmissible evidence such as hearsay, irrelevant evidence, answers elicited by leading questions or prior consistent statements; or (2) the trial was a miscarriage of justice; or (3) defence counsel at trial (who was not Mr. W.'s appeal counsel) was incompetent, for instance because of careless presentation of evidence, misplaced trial strategy or failure to object. Mr. W. made no request to amend the notice of appeal to add grounds, and no amendment was granted. There was no pre-hearing notice from the court to counsel to suggest that issues other than those in the grounds of appeal would be pertinent.

[105] I disagree with my colleagues that inadmissibility of evidence, miscarriage of justice or defence counsel's performance is a basis to allow this appeal. Those issues are not before this court.

[106] I will discuss Mr. W.'s grounds of appeal in Mr. W.'s Notice of Appeal, listed above (¶ 100).

Analysis

[107] The judge convicted despite saying that Mr. W.'s evidence was "plausible". Mr. W. submits that "plausibility" establishes reasonable doubt. Therefore, Mr. W. contends, the judge failed to consider reasonable doubt and convicted just because he found R to be more credible than Mr. W., contrary to Justice Cory's well known principles from *W.(D.)*. This was the issue Mr. W. presented to the Court of Appeal on the conviction appeal.

[108] In my view, Mr. W.'s submission misinterprets the judge's reasons. The judge did not say that, after assessing *all the evidence together*, Mr. W.'s testimony was plausible. Had the judge said that, I would agree there was reasonable doubt and a conviction would violate *W.(D.)*.

[109] Rather, the judge said that Mr. W.'s testimony in *isolation* was plausible. Similarly, R.'s version in isolation was plausible. The judge then posed the question – In a "he said/she said" case, each version plausible in isolation, how does a trial judge proceed from there? The judge referred to the case law and concluded that the judge must proceed to assess the conflicting testimony, indeed all the evidence, together, before making any finding of who did what, and any conclusion whether there was a reasonable doubt.

[110] On that point, I refer to the following passages from the trial judge's decision:

> 3) The phrase "he said, she said" does convey this troubling situation in its most basic sense. The only evidence pertaining to the alleged offence is the conflicting evidence of the two principal witnesses. The connotation of the " he said, she said" characterization may go beyond privatizing or even trivializing the matter. It may shape the perception of what the case is actually about. It seems to imply that there is an either/or choice. There is not.
>
> The *R. v. W.(D.)* test
>
> 4) The criminal trial process is not about determining "what happened". When there are two diametrically opposed versions there is a natural inclination to resolve that issue by picking a side. Following that natural inclination deprives the accused person of the fundamental right to be presumed innocent unless his or her guilt has been proven beyond a reasonable doubt.
>
> 5) The Supreme Court of Canada in *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 provided guidance on how juries should be instructed to avoid doing just that.
>
> 6) The *W. (D.)* (*supra*) jury instruction provides that if the evidence of the accused person is believed he or she should be acquitted. If the evidence of the accused is not believed, but still raises a reasonable doubt, he or she should be acquitted. Even if the evidence of the accused does not raise such a reasonable doubt, the person must be acquitted if a reasonable doubt is raised by the other evidence.
>
> . . .
>
> 33) Judges don't assess evidence by weighing each piece then placing it in one box marked "believed" or in another marked "not believed". Judges generally

don't make a determinations of absolute credibility or lack of credibility. Judges don't decide on the credibility of a witness upon hearing the evidence of that witness alone. If that were indeed the approach, the interpretation of W.(D.) that would require a judge to consider the evidence of the accused, without reference to that of the complainant, would make sense.

. . .

36) First, a finding that a complainant is "credible" can't be made in any meaningful sense until all of the evidence has been heard. The time honoured phrase "weighing of the evidence" suggests a process by which each piece of evidence is discretely considered, determined to be reliable or not reliable or assigned a value. Professor Bennet's phrase that a judge is "to synthesize" the evidence is a more apt description of the mental process. All of the evidence must be considered in the context of, and be tested by, all of the other evidence.

37) Second, when a finding is made that the evidence of the complainant is reliable, credible or believable, it is not absolutely reliable, credible or believable. All doubt has not been displaced. There almost always remains some level of doubt. Judges are required to consider the quantity and quality of that doubt to determine whether or not it is reasonable doubt. A finding of credibility, because by definition it presumes some level of doubt, should not stop the search for reasonable doubt in its tracks.

38) If a judge does not make a premature finding of credibility and refrains from dealing in absolutes even after having heard all of the evidence, the simple contest of credibility can be avoided without resort to the artificial and entirely counterintuitive process of considering the evidence of the accused only with reference to itself.

39) An interpretation of **W.(D.)** that does not permit the evidence of the accused to be tested by the evidence of the complainant, does not avoid the contest of credibility so much as it avoids the proper testing of credibility.

. . .

51) Here the evidence of the complainant daughter contradicts that of the accused father.

a) He must be found not guilty if his evidence is "believed". His evidence can only be "believed" after considering it in light of all of the

> evidence. If he is "believed" it means that his evidence is, itself, enough to establish a reasonable doubt.
>
> b) He must be found not guilty if the evidence of the two witnesses is equally "believable". In that case, reasonable doubt may have been found in the extent to which a reasonable doubt remains as to the complainant's evidence, or in the extent to which the accused's evidence has raised a reasonable doubt.
>
> c) He cannot be convicted simply if her evidence is "believed", on its own, without being tested by his evidence. That fails to consider the extent to which believed evidence still leaves room for reasonable doubt. It also marginalizes the accused by failing to even consider his evidence.
>
> d) He cannot be convicted simply if, having tested the evidence of each by the evidence of the other, her evidence is preferred or found to be more believable or even much more believable than his. That is not consistent with the standard of proof beyond a reasonable doubt. It fails to consider the extent to which evidence that has been accepted as more reliable or credible may still contain an element of reasonable doubt. It also fails to consider the extent to which evidence that is found to be less credible or reliable is not absolutely disbelieved and may still support a reasonable doubt.
>
> e) He can be found guilty if, after testing the evidence of each against that of the other, the evidence of the complainant has been not only preferred, but has displaced any reasonable doubt that could be found in any of the evidence, as to any essential element of the offence.

[111] In applying these principles, the judge said (¶ 108) that "[n]o conclusions as to [R.'s] credibility, believability or acceptance can be made until all of the evidence has been considered and it has been tested against that evidence". He said (¶ 114), in the passage relied on by Mr. W's submission to this court, that Mr. W.'s "version of events that he related was plausible", but then continued immediately thereafter:

> 115) I have tested his evidence against that of [R.] and all of the other evidence. When tested that way, it cannot be accepted as raising a reasonable doubt.

The judge concluded:

> 120) I am satisfied that all of the evidence in this case has been searched for reasonable doubt. I have found none.

[112] The judge made no error in his articulation or application of the Crown's burden of proof, or the *W.(D.)* principles. In *R. v Morin*, [1988] 2 S.C.R. 345, pp. 354-55, 357-58, the leading case on this point, Justice Sopinka rejected the piecemeal analysis of individual items of evidence for reasonable doubt. Rather all the evidence is to be considered together in the assessment of credibility and the ultimate conclusion on reasonable doubt. This principle applies to "he said/she said" cases, such as alleged sexual assaults. In *W.(D.)*, at p. 757, Justice Cory cited *Morin*. To similar effect: *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, ¶ 8 and the decision of this court in *R. v Lake*, 2005 NSCA 162, ¶ 22. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, ¶ 66, the Chief Justice, for the Court, said:

> [66] 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 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" (para. 68). 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.

[113] *W.(D.)* dealt with a jury charge. A judge alone need not mechanically recite the *W.(D.)* principles. Rather, the question for the appeal court is whether, "at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction": *Lak*e, ¶ 15 and cases there cited. In *R. v. Dinardo*, [2008] 1 S.C.R. 788, ¶ 23 Justice Charron for the Court said:

> 23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction

> be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge's decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.

[114] This case is not like *Lake*, where the judge said she believed the complainant, then leapt to conclude that the accused "did assault her" without even assessing the accused's credibility. In *Lake*, ¶ 21, this court said:

> [21] Second is the concern which arises here. The trial judge may discount the accused's testimony just because she has believed the Crown witnesses. The defence is neutered in the starting gate regardless of how the accused presents or testifies. The accused has not really been disbelieved. He has been marginalized. So it is impermissible to reject the accused's testimony solely as a consequence of believing the Crown witnesses. The trier of fact should address both whether the Crown witnesses are believed and whether the accused is disbelieved. This is the rationale for *W.(D.)'s* first question.

Here the judge's reasons discuss in detail Mr. W.'s version but, after consideration, conclude that the evidence as a whole left no reasonable doubt that Mr. W. committed the acts. In my view, the judge's decision, as a whole, respected and applied the essential principles underlying *W.(D.)*.

[115] I would dismiss the ground of appeal that suggests the judge misapplied the Crown's burden of proof.

[116] Mr. W.'s other ground of appeal against conviction is that the judge erred in his evaluation of credibility, or the sufficiency and reliability of evidence. But Mr. W.'s factum says (¶ 39):

> The Appellant is not able to take a position that the verdict was unreasonable.

Mr. W's argument on the evaluation of evidence and credibility was a buttress to the *W.(D.)* argument and was addressed jointly with that submission, which I have already discussed. Mr. W.'s appeal did not challenge the reasonableness of the trial judge's verdict.

[117] Nonetheless, because the matter was cited as a ground of appeal, I will review the sufficiency and reliability of the evidence on the alleged sexual assault.

[118] The only witnesses with direct knowledge were Mr. W., who denied it, and R. The following are extracts from R.'s direct testimony, questioned by the Crown. I prefer to quote, rather than characterize this testimony. I have initialized the names that appear in the transcript.

> Q. What caused you to stop going to see your dad?
>
> A. He did something inappropriate.
>
> . . .
>
> Q. . . . Do you remember your mom bringing you to the police station about a year ago?
>
> A. Yeah.
>
> Q. Can you tell us about it?
>
> A. Well, my dad was doing something, I guess, inappropriate. And I didn't think I'd be able to tell my mom. But I had to tell somebody, so I told [L].
>
> MR. CRAGG: I'm sorry, I didn't hear that.
>
> MR. HARTLEN: She said that she had to tell someone. She didn't think she'd be able to tell her mom, and so she told [L].
>
> THE COURT: She told who?
>
> MR. HARTLEN: [L]. I got that right, right? [L]?
>
> A. Uh-huh.
>
> Q. Now who is [L]?
>
> A. She's my best friend.

. . .

Q. A few weeks, okay. Had you told anyone else other than [L] up until that point?

A. My friend [C].

Q. [C]?

A. Yeah.

Q. So you told [C] about it before you told [L]?

A. At the same time.

Q. Oh, so [C] was there when . . .

A. Yeah.

Q. . . . you talked to [L]? Okay. What's [C]'s last name?

A. [P].

Q. [P]. Where were you when you told [L] and [C]?

A. [L]'s house.

Q. Was it in the night time or the day time?

A. Day time.

Q. And what made you decide to tell them right then and there?

A. It kept getting worse inside, and I just didn't know what to do.

Q. Okay.

A. So I thought maybe if I told them, it'd make it better.

. . .

Q. Yeah? Did you know when you went to the police station that your mom knew about anything?

A. Not at first.

Q. Now they asked you a whole swack of questions about what was going on with your dad, right?

A. Uh-huh.

Q. In terms of the questions they were asking you, did they have it about right?

A. Yeah.

. . .

Q. Well, just tell us what was happening. Tell us what happened that caused you to go to talk to [L] in the first place.

A. My dad was touching me inappropriately when I was sleeping in his room.

Q. Now you've used that word "inappropriately"a couple of times now, all right?

A. Yeah.

Q. What does that word mean to you?

A. Doing something you're not supposed to be doing.

Q. And how did you come to know that word?

A. I learned it in school.

Q. You learned the word "inappropriate" in school?

A. Yeah.

Q. Okay. How did your dad go about touching you inappropriately?

A. (No audible response.)

. . .

Q. How long would you say that inappropriate stuff or you said your dad was touching you inappropriately, how long would you say that had been going on for?

A. Fairly long.

Q. Yeah? Now to my daughter, a long time is a week, right?

A. Uh-huh.

Q. How long is a long time to you?

A. A few months.

. . .

Q. What do you mean when you said he was touching you inappropriately? Where was he touching you?

A. (No audible response.)

Q. I've got another idea. You're an artist. I'm not an artist, okay? That to me is a person, okay? It's the best I can do. Can you draw a circle in the general vicinity of where he was touching you? Do that for me. Okay.

So if I've got it right, and so my friend can see us, I've drawn a stick figure, okay, that has two arms here, see, in the center of the page. And this is the stick figure's head, okay. This is the stick figure's legs, these two things at the bottom here. And you've drawn a circle where the legs meet the torso or the body, right?

A. . . . (no audible response).

Q. Is that a yes?

A. Yeah.

Q. Can you speak up for me again?

A. Yes.

Q. Yes. What's that part of the body on a female called?

A. Vagina.

Q. Vagina. And was your dad touching you on the vagina?

A. Yes.

Q. And when he touched you on the vagina, was it outside of your vagina or inside of your vagina?

A. Inside.

Q. What part of his body was he using to touch the inside of your vagina?

A. His fingers.

Q. Was he on the inside or the outside of your clothes when he was doing this?

A. Inside.

Q. So you would wake up and your dad's hand would be down your pants, and his fingers would be in your vagina?

A. Yes.

[119] There was no objection by the defence to any of this evidence.

[120] R.'s cross examination by Mr. W.'s counsel included the following:

Q. No? You say your dad had been inappropriately touching you. And he did so . . . I believe later on in your evidence . . . less than ten times - you

said less - but more than five times. So do I take it you think your dad may have touched you between five and ten times?

A. Yes

Q. All right. You're certain of that.

A. Yes.

. . .

Q. And you recall just before we took a break I reminded you that earlier today you had said your dad had inappropriately touched you less than ten times but more than five times. Correct?

A. Yes

Q. Yes. Is that yes?

A. Yes.

. . .

Q. Yes. So [R], back to my very original question. Today you've told us that it was less than ten times your dad inappropriately touched you but more than five. You clearly see from that video that you told Constable McQuaid and Ms. Lumsden that you thought it was more than ten times, but didn't know if it was more than 20 times.

Now were you telling them the truth then, or are you telling us the truth today?

A. I told you the truth both days.

Q. So both days.

A. Yes.

Q. So he did it less than ten and more than five, and he also did it more than ten and you don't know if it was more than 20. So you're saying you told the truth both days?

A. Yes. I didn't properly understand your question today. Rick and I have discussed it in a different way, and that is the way I thought you meant.

. . .

Q. No. Well, can you tell me when your dad first started inappropriately touching you?

A. Maybe a month after I started going there.

Q. A month after you started going there.

A. Yes.

. . .

Q. Yes. And come the end of May 2008, you told us today you had to tell someone about it, but you couldn't tell your mom, is that right?

A. Yes.

Q. So you told [L], your best friend, is that correct?

A. Yes.

Q. [LH]?

A. Yes.

Q. And I gathered you told her on the evening of May the 31st, is that correct?

A. I don't know.

Q. Could you tell me when you think you told her, then?

A. I'm not sure.

Q. Was it before you met with Constable McQuaid and Ms. Lumsden on June the 16th, '08?

A. Yes.

Q. Yeah. Was it a day, a week, two weeks?

A. Umm . . .

Q. Could I suggest to you, [R], Constable McQuaid was told that it was on the evening of May the 31st, 2008 while you were in [L]'s basement? Does that help you?

A. Yes.

. . .

Q. Okay. Why did you tell [L] and [C]? Earlier you said, "Because I knew she . . ." - you referred to she, not they, just she, [L] - ". . . could keep a secret, or if she told someone, it would be someone who'd know what to do." So it wasn't really meant to be a secret at all, was it?

A. Yes, it was.

Q. Then why did you tell us this morning that if she told someone, it would be someone who'd know what to do? To do about what?

A. What I told her.

Q. About your dad inappropriately touching you?

A. Yes.

. . .

Q. All right. So you're telling us today you told [L] - and if [C] was there, her as well - the secret hoping they would not tell anybody, it would stay a secret?

A. Yes.

Q. So you didn't want anybody to know about it or someone who'd know what to do.

A. No.

Q. In fact, you told her to keep it a secret.

A. Yes.

Q. But she didn't, did she?

A. No.

Q. No. So you secret was out.

A. Yes.

Q. The secret you didn't want to come out.

A. Yes.

. . .

Q. On or about May the 31st in the basement, you tell your best friend [L] and [C] that your dad had been inappropriately touching you, but it was a secret. You didn't want them to tell anybody, correct?

A. Yes.

Q. And approximately two weeks later, you are taken to the RCMP station, and Constable McQuaid and Ms. Lumsden question you about your dad's inappropriate touching, is that correct?

A. Yes.

. . .

Q. You don't know why? You say that your dad would touch you in the vagina area. Is that correct?

A. Yes.

Q. Did he ever touch you anywhere else?

A. No.

. . .

Q. Did your dad . . . you've already told us that your dad didn't touch you anywhere else except in the vagina area.

A. Yes.

. . .

(LINING UP VIDEOTAPE - A COUPLE OF FALSE STARTS)

Q. It's about three or four pages after that.

VIDEOTAPE VIEWING COMMENCED: (TIME: 13:57 hrs.)

VIDEOTAPE VIEWING PAUSED: (TIME: 13:58 hrs.)

Q. Could we just stop that? Would you agree that after Ms. Lumsden said, "Has he ever touched you underneath your pyjama top?" you nodded your head affirmatively, yes?

A. Yes.

Q. So you told Ms. Lumsden and Constable McQuaid that he has touched you underneath your pyjama top.

A. Yes.

[121] In R.'s direct examination, R. replied to the Crown's expository questions by saying her father had touched her "inappropriately", but she was silent when asked what that meant. The Crown asked her to draw a circle on a figure indicating where Mr. W. touched her. R. drew a circle where the legs met the torso. The Crown did not suggest to R. where she should draw the circle. The Crown asked R. "What's that part of the body of a female called?", to which R. replied "vagina". The defence counsel did not object.

[122] In R.'s cross- examination, Mr. W.'s counsel elicited clear testimony from R. that Mr. W. had touched her vaginally. The defence strategy was to obtain explicit evidence from R., then impeach R.'s credibility by suggesting inconsistency between R.'s clear statements at trial and her earlier statements to the police or to her friends. That strategy failed, as it turned out. But the strategy's by-product was explicit testimony from R., admissible under the rules of evidence, that Mr. W. touched her vaginally:

(a) Q. . . . You say that your dad would touch you in the vagina area. Is that correct?

A. Yes.

(b) Q. . . . So do I take it you think your dad may have touched you between five and ten times?

A. Yes

Q. All right. You're certain of that.

A. Yes.

(c) Q. . . . You say that your dad would touch you in the vagina area. Is that correct?

A. Yes.

Q. Did he ever touch you anywhere else?

A. No.

I disagree with my colleague's suggestion that R.'s evidence on this point derives only from the Crown's leading questions.

[123] I see no appealable error in R.'s circle on the drawing, or her answer that the circled body part was a "vagina". But, even if we leave that aside, the trial judge was entitled to rely on R.'s unequivocal testimony in cross-examination for his key finding:

> Sometimes she would wake up and find his finger inside her vagina.

[124] There is no appealable error in the judge's assessment of the evidence, its reliability or the witnesses' credibility.

[125] My colleague refers to the trial judge's statement (decision ¶ 115) that "the contents of [R.'s] disclosure" assisted the judge to accept R.'s reliability, and says this was impermissible use of a prior consistent statement. My colleague says that, "absent any elaboration from the trial judge on the issue", the judge must be taken as using the prior statement impermissibly, and cites Justice Charron in *Dinardo*.

[126] Again, I respectfully disagree. Three paragraphs earlier, the judge explained what he meant by his use of R.'s prior statements:

> 112) The issue of motive remains. There may have been a motive for her to lie. Despite the evidence that nothing had been done to address R's desire not to visit her father, that desire could have been real. Nothing in the evidence however permits a reasonable inference to be made that she was acting on such a motive. On the contrary, the circumstances surrounding her disclosure as well as its content, weigh very heavily against such an inference. The nature of the relationship between the child and her father, the circumstances of the disclosure, the unusual lack of discussion between the custodial parent and the child complainant, the initial unwillingness to speak, the generally hesitant manner of disclosure both to the police and to the court and the clear lack of scripted responses greatly diminish the reasonableness of any inference that this child has lied to achieve a purpose.

[127] The judge did not use R.'s prior statement as corroboration, oath helping or proof of content. Rather, he cited R.'s initial silence, hesitancy and unscripted response (the "content") to refute the defence's suggestion that R. had an agenda to terminate visits to her father. If R. had such an agenda then, in the judge's view, her statements would have been more forthcoming and fulsome in content.

[128] The judge's approach is consistent with the limited usage of prior statements in sexual assault cases permitted by the Ontario Court of Appeal in *R. v. G.C.*, [2006] O.J. No. 2245 (Q.C.), that Justice Charron for the Court adopted in *Dinardo*, ¶ 38-39:

> 38 In *R. v. G.C.*, [2006] O.J. No. 2245 (QL), the Ontario Court of Appeal noted that the prior consistent statements of a complainant may assist the court in

assessing the complainant's likely truthfulness, particularly in cases involving allegations of sexual assault against children. As Rouleau J.A. explained, for a unanimous court:

> Although properly admitted at trial, the evidence of prior complaint cannot be used as a form of self-corroboration to prove that the incident in fact occurred. It cannot be used as evidence of the truth of its contents. However, the evidence can "be supportive of the central allegation in the sense of creating a logical framework for its presentation", as set out above, and can be used in assessing the truthfulness of the complainant. As set out in *R. v. F. (J.E.)* at p. 476:
>
> > The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.
>
> The trial judge understood the limited use that could be made of this evidence as appears from his reasons:
>
> > [I]t certainly struck me while the fact that you go and tell somebody that you were molested doesn't confirm the fact that you were molested. I'm struck by the manner or the way it came out, tends to confirm [the complainant's] story -- how they were reading this book, and how the thing came up about child sexual abuse.
>
> In cases involving sexual assault on young children, the courts recognize the difficulty in the victim providing a full account of events. In appropriate cases, the way the complaint comes forth can, by adding or detracting from the logical cogency of the child's evidence, be a useful tool in assisting the trial judge in the assessment of the child's truthfulness. This was such a case. [Emphasis added; paras. 20-22.]

39 The Ontario Court of Appeal's reasoning in G.C. applies equally to the facts of this case. The complainant's prior consistent statements were not admissible under any of the traditional hearsay exceptions. Thus, the statements could not be used to confirm her in-court testimony. However, in light of the evidence that the complainant had difficulty situating events in time, was easily confused, and lied on occasion, the spontaneous nature of the initial complaint and the complainant's

> repetition of the essential elements of the allegations provide important context for assessing her credibility. [Justice Charron's underlining]

[129] This trial displays a fizzled defence theory, not a miscarriage of justice.

Conclusion

[130] I would dismiss the appeal against the conviction. As the result of my colleagues' decision will be a new trial, I prefer not to comment on the sentence appeal.

Fichaud, J.A.