NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. J.M.M.***, 2012 NSCA 70

Date: 20120706
Docket: CAC 354084
Registry: Halifax

Between:

J. M. M.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Publication Ban: pursuant to s. 4886.4 of the Criminal Code of Canada

Judges: Saunders, Oland and Beveridge, JJ.A.

Appeal Heard: May 22, 2012, in Halifax, Nova Scotia

Held: Appeal allowed, convictions quashed and a new trial ordered per reasons for judgment of Saunders, J.A.; Oland and Beveridge, JJ.A. concurring.

Counsel: Tony W. Mozvik, for the appellant
Mark Scott, for the respondent

Order restricting publication – sexual offences

486.4 (1) 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 step-daughter), 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:

[1] The appellant faced trial in the Nova Scotia Supreme Court on several charges related to a series of sexual assaults said to have been committed on his niece, J.M., between April, 1989 and April, 1999; that is from the time she was six years of age until the day she turned 16.

[2] Following a preliminary inquiry the appellant re-elected to be tried by judge alone.

[3] At the time of trial J.M. was 27 years old. She described being repeatedly victimized by her uncle in ways ranging from the appellant forcing his penis down her throat, to groping her breasts and genitals, to rape.

[4] The appellant did not testify, but called other witnesses to challenge the reliability of the complainant's testimony.

[5] The case took a day to try. After hearing the evidence and counsels' submissions, Justice Frank Edwards reserved judgment for two days, and then returned to court to deliver an oral decision convicting the appellant as charged.

[6] On July 21, 2011, Mr. M. was sentenced to a term of imprisonment of four years. He was also ordered to provide a DNA sample and comply with the provisions of the **Sex Offender Information Registration Act**, S.C. 2004, c. 10. He was given a lifetime firearms prohibition pursuant to s. 109 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[7] Mr. M. appeals his conviction. He asks that the verdict be set aside and acquittals entered, or alternatively, that a new trial be ordered.

[8] For the reasons that follow I would allow the appeal and order a new trial on those counts for which convictions were entered.

[9] To provide context I will briefly describe the circumstances which prompted this prosecution. A more complete consideration of the evidence will be found in the analysis of the issues that ensues.

Background

[10] On August 31, 2009, the appellant was charged under the **Criminal Code** with:

1. Sexual Assault contrary to Section 271(1);

2. Uttering a Threat contrary to Section 264.1(1)(a);

3. Unlawful Confinement contrary to Section 279(2);

4. Assault contrary to Section 266; and

5. Touching somebody under the age of fourteen (14) for a Sexual Purpose contrary to Section 151.

[11] The appellant had originally elected to be tried by judge and jury. A preliminary inquiry was held on May 31, 2010. On April 5, 2011, the appellant re-elected to be tried by judge alone and pleaded not guilty to all counts. The trial, as well as counsels' submissions, wrapped up that same day. The Crown called the complainant and her father. The defence called the appellant's wife, his sister, and four friends or work associates. The appellant did not testify. The parties returned to court on April 7 when the trial judge rendered an oral decision convicting the appellant on all five counts as charged. The appellant was remanded into custody until his sentencing on July 21, 2011.

[12] The judge's oral decision was released in written form on April 19 and is now reported at 2011 NSSC 153.

[13] In his written reasons the judge explained that upon reflection, he had decided to acquit the appellant on count #3, that being a charge of unlawful confinement contrary to s. 279(2) of the **Criminal Code**. He explained it this way:

> [39] When I gave my oral decision, I found the Accused guilty on all five counts in the Indictment. The only evidence supporting Count #3 (unlawful confinement) is J.M.'s statement that the Accused held her down while he committed, what she called the second rape (paragraph 12 above). Holding her down is part of the sexual assault; it does not constitute a separate offence when

> there is no temporal separation between the confinement and the sexual act. I am therefore entering a finding of not guilty on Count #3.
>
> [40] Count #5 alleges touching for a sexual purpose with his "hands and penis". The evidence supporting this charge is outlined above in paragraph 8, 9 and 13. In each instance, the touching is with the hands only. I am therefore amending Count #5 to conform with the evidence; I am deleting the words "and penis" from Count #5. The incidents of forced oral sex described in paragraphs 6 and 7 are sexual assaults and are therefore covered in Count #1.
>
> [41] Finally, Counsel asked for clarification of my findings regarding the "first rape" (paras. 12, 34, 35). As I said, I have a reasonable doubt whether that event occurred as J.M. described. For sentencing purposes, I will therefore ignore evidence of the alleged "first rape".

[14] Having provided this brief synopsis of the procedural background, I will now present the facts which led to the appellant's conviction. I will do that on a count by count basis, but leaving out the third count on which the appellant was acquitted.

Count #1 – Sexual Assault

[15] J.M. said the first incident of sexual assault occurred when she was in the appellant's apartment in D., Cape Breton, Nova Scotia. She was 6 years of age. The appellant used to pick her up from school and babysit her when her parents were working. She recalled the appellant's wife being in the apartment at the time. J.M. said he forced his penis down her throat. The incident happened in his bedroom. J.M. said she couldn't remember her reaction to that assault.

[16] J.M. told her parents. Her father confronted the appellant who denied having done anything. Regular contact between J.M. and the appellant resumed.

[17] After this initial assault, J.M. said she was subjected to six to ten similar incidents when she was between 8 and 10 years of age. The appellant would ejaculate, she would throw up, and he would make her clean up the mess.

[18] She described one such assault as having occurred in the baby barn next to the appellant's trailer after he and his wife had moved to the [...] in D.. She could not recall how old she was at the time but said her older brother was with her. She

said the appellant “made us suck on his penis” and that during this incident the appellant’s wife “came out on the step” and the appellant “told her to fly the fuck back into the house.”

[19] I note that J.M.’s older brother – who was also, according to her testimony, a victim of this same sexual assault – did not testify at trial.

[20] The complainant described how the appellant “raped me twice”. Both incidents she said took place in the bedroom of his trailer at the [...]t. On the first occasion she was 13 years old. J.M. said the appellant held her down and used a blue rope to tie her hands and her legs to the bed posts. J.M. remembered kicking and screaming and crying while all of this was happening. He penetrated her, ejaculated, and then let her go. J.M. said she got dressed and went to her grandmother’s nearby. She said she never told anyone because she was afraid the appellant would hurt her parents, as he had threatened to do.

[21] J.M. said the appellant raped her a second time when she was 15. On this occasion he removed her clothes and once again pinned her to the bed with her legs hanging off the edge. This time J.M. said the appellant held her hands by the wrist over her head and proceeded to rape her while she kicked and screamed. When he finished she put her clothes back on and walked to her grandmother’s home. She said she never told anyone because she didn’t want to break up the family by telling people what was going on.

Count #2 – Uttering Threats

[22] The day following the first incident of sexual assault (which J.M. had disclosed to her parents, saying her uncle had “stuck a pink thing down my throat”), J.M. testified that the appellant picked her up at school, took her back to his apartment and beat her. She said he pulled her hair, kicked her underneath the bed and threatened to kill her father, J.V.M., if she ever told again.

Count #4 – Assault on J.M.

[23] While making the threats constituting Count #2, the appellant was said to have struck J.M. across the face, pulled her hair and kicked at her underneath his bed.

Count #5 – Touching J.M., a person under the age of 14 years, with a part of his body for a sexual purpose

[24] The complainant described numerous occasions between the ages of 6 and 16 when the appellant groped her breasts and/or vagina. When she was asked to quantify these incidents J.M. said:

> ... it happened so frequently .... I don't know.

[25] From her testimony, the following instances stood out:

(i) J.M. was approximately twelve years old. The family budgie bird was dying. Her parents were home but not in the kitchen. J.M. was seated at the kitchen table along with her brother and the appellant. The appellant touched her breasts and vagina. When her mother walked into the kitchen, J.M. ran outside.

(ii) Not long after the budgie bird incident, J.M. was home sick. She was lying on the couch under a blanket. Her parents were in the house but not in the same room. The appellant came in, sat on the couch, and put his hand under the blanket. J.M. went to say something and the appellant squeezed her breast "really hard" outside her clothing.

(iii) J.M. was at her grandmother's home on her sixteenth birthday. The appellant met her in the porch and grabbed her breasts really hard. After that, J.M. avoided being alone with the appellant. There were no further incidents. The complainant said the encounters ended because she stopped going to her grandmother's or running errands which had often caused her to be in the appellant's presence when she was younger. She also said it was because "I wasn't letting him do it any more."

[26] J.M. testified that, following her initial disclosure to her parents, (which she said occurred when she was six and which precipitated the confrontation by her father, the appellant's denial, then his threats and physically assaulting her), she did not report the incidents to any other adult until she was 25 or 26 years of age when she said she told the appellant's sister, M.A.D. what he had done to her. The matter later came to the attention of the authorities after J.M. told her father's girlfriend's daughter. J.M. said that when her father became aware of the allegations, he went to the police.

[27] J.M.'s father testified. His evidence contradicted the complainant's account. He said he did not report these revelations to the police.

Issues

[28] The appellant's Notice of Appeal lists the following grounds:

1) The Learned Trial Judge erred in finding, as a matter of law, the assaults in question had been committed.

2) The Learned Trial Judge erred in his assessment of the weight and reliability of the complainant's evidence having regard to the numerous inconsistencies and contradictions therein.

3) The Learned Trial Judge erred in law by misapprehending the evidence as presented at trial.

4) The Learned Trial Judge erred in accepting evidence of the complainant's prior consistent statements and using such evidence to bolster the credibility of the complainant contrary to the evidentiary rule against 'oath-helping' and the admissibility of prior consistent statements.

5) The Learned Trial Judge erred in law in rejecting or not giving appropriate weight to all portions of the relevant evidence tendered on behalf of the Appellant.

6) The Learned Trial Judge erred in law in convicting the appellant based on the evidence before him, such that the conviction was unreasonable and cannot be supported by the evidence.

> 7) The Learned Trial Judge erred in law by placing upon the accused some 'onus' to establish reasonable doubt.
>
> 8) The Learned Trial judge erred in failing to apply the principle of reasonable doubt in his consideration of the whole of the evidence before him.
>
> 9) The Learned trial Judge erred in such other grounds as may appear from the transcript of evidence and decision of the Learned Trial Judge.

[29] In his written and oral submissions, the appellant's counsel abandoned the fourth ground of appeal relating to the complainant's prior consistent statements.

[30] The remaining eight grounds of appeal reduce to three principal issues:

> (i) whether the trial judge misapprehended the evidence;
>
> (ii) whether the trial judge erred in his assessment of credibility and proof of guilt;
>
> (iii) whether the verdict is unreasonable.

[31] In my view, the merits of this appeal are best addressed by considering the reasonableness of the verdict as well as the judge's application of the law related to proof beyond a reasonable doubt.

Standard of Review

[32] An appeal lies to this Court where the verdict is said to be unreasonable or cannot be supported by the evidence; an erroneous decision was made on a question of law; or a miscarriage of justice occurred. The relevant provisions of s. 686 of the **Criminal Code** say:

> **686.** (1) **Powers** — On the hearing of an appeal against a conviction ... , the court of appeal
>
> (a) may allow the appeal where it is of the opinion that

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

[33] It is settled law that choosing the appropriate standard for appellate review will depend upon how one characterizes the question under scrutiny.

[34] An error in articulating or applying the standard of proof amounts to a legal error, reviewable on a standard of correctness.

[35] Whether a verdict is unreasonable is a question of law. Perhaps the most familiar test for deciding whether a verdict is unreasonable is to ask whether the verdict is one that a properly instructed jury or judge could reasonably have rendered. **R. v. Yebes**, [1987] 2 S.C.R. 168, and **R. v. Biniaris**, 2000 SCC 15. But that is not the only test. We may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that:

1. is plainly contradicted by the evidence relied upon by the trial judge in support of that inference or finding; or

2. is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge.

See for example: **R. v. R.P.**, 2012 SCC 22; **R. v. Sinclair**, 2011 SCC 40; **R. v. Beaudry**, 2007 SCC 5; and **R. v. Clark**, 2005 SCC 2.

[36] As directed by the majority decision in **Sinclair, supra**, and what amounts to binding instructions from a majority of the Court on this point in **Beaudry, supra**, I have applied the Supreme Court's expanded test for unreasonableness under s. 686(1)(a) to our review of the verdict in this case.

[37] Applying first the **Yebes/Biniaris** test I am unable to say that this verdict is <u>not</u> one that a properly instructed jury, acting judicially, could reasonably have rendered, which would then have necessitated an acquittal. Rather, this is one of

those rare cases where such a verdict might be available on the evidence and yet the conviction ought to be set aside and a new trial ordered because the trial judge's reasoning is flawed. In such cases we are expected to test the reasonableness of the verdict by scrutinizing the logic of the trial judge's findings of fact or inferences drawn from the evidence. This involves a critical examination of the judge's reasoning process in our overall assessment for reasonableness. It is incumbent upon me to thoroughly re-examine the evidence and be very explicit in my reasons for deciding that this case requires intervention.

[38] In my opinion and with great respect to the trial judge, the verdict in this case ought to be set aside because it is unreasonable in the sense that the judge's findings are plainly contradicted by the evidence relied upon for that purpose and are demonstrably incompatible with evidence not otherwise contradicted or rejected by the judge. I would also allow the appeal because the convictions resulted from a flawed assessment of the evidence, in particular, the evaluation of the complainant's testimony, and because the judge erred in his application of the law with respect to the standard of proof.

[39] Since these failings are intertwined, it would be impractical to address them as discrete faults. Rather, I propose to consider the flaws in the judge's approach and reasoning, and their impact, as one.

Analysis

[40] Mr. Mozvik mounted a very creditable defence on behalf of his client raising a number of issues which seriously undermined the reliability of the complainant's evidence.

[41] The trial judge addressed some, but not all, of the inconsistencies established by the defence. And the ones the judge did mention were not subjected to the kind of probing and careful examination this record demanded. In my respectful view, the judge's treatment of the evidence was problematic in several respects. I will mention those I found especially troubling.

[42] I will start by considering the approach taken by the trial judge in assessing credibility.

[43] The judge began his reasons by wisely highlighting the special challenges confronting decision-makers faced with determining guilt in cases where crimes are said to have taken place years before. The judge observed:

> [20] ***Analysis*** At the outset I want to emphasize an observation I made when we adjourned on Tuesday: allegations of so-called "historical" sexual assaults are among the most difficult cases a judge or a jury is called upon to decide. That does not mean that such cases are incapable of being proven beyond a reasonable doubt. It does mean that careful analysis is required.

[44] The judge averted to the fact that the complainant, then 27 years of age, was testifying to things she said happened to her between the ages of six and 16. The judge instructed himself as to the impact time will have on the process of recollection in general, and the accuracy of courtroom testimony in particular. He said:

> [21] In this case, a 27 year old is testifying about what she says occurred when she was between the ages of six and sixteen. The passage of time invariably has some impact upon the accuracy of one's memory. Peripheral details may become vague, or forgotten, or inaccurately recalled. But one can usually recall the extraordinary or the traumatic.
>
> [22] When an adult is testifying about what occurred when she was a child, there is an additional difficulty. The impression made on what is now an adult memory, was made initially upon the mind of a child - in this case, a child as young as six years old. That fact has to be kept in mind when assessing the evidence of such a witness.
>
> [23] An adult witness testifying about events that occurred while she was an adult can be expected to be able to recall a certain amount of peripheral detail. Such a witness could be expected to be able to recall, for example, whether certain events occurred in a new trailer or an old trailer. An adult witness will normally recall the color of the room, the floor covering, the number of windows, if any, or other detail relating to a room where certain events are alleged to have occurred. Even an adult, however, may often be unable to recall, or recall inaccurately, such detail when overwhelmed by the psychological or physical trauma of the situation. ...
>
> [25] These are some of the considerations I have to keep in mind when I assess the evidence of J.M. Her memory, though that of an adult, is recalling events she says occurred years ago when she was a child.

[45] Generally speaking, one cannot quarrel with the judge's statements. Where he erred, however, was in their wholesale application to all of the complainant's evidence, whatever her age, and wherever and whenever the particular assault was said to have occurred.

[46] The Indictment charging the appellant covered a period between April 1, 1989 and April 30, 1999; a ten year and one month interval from the time the complainant was six years of age until she turned 16 (that being April 25, 1999). While some of the offences alleged to have occurred would have happened when J.M. said she was six, and then eight to ten years of age; the two rapes occurred when J.M. was a teenager, and the last groping of her breasts was on her 16th birthday. Thus, different considerations would apply when gauging the reliability of the complainant's testimony, depending upon the age she said she was when these events occurred. Appearing as a complainant in a criminal case at age 27, and testifying to things alleged to have happened when she was a mature teenager, attracts an evaluation of reliability and credibility based on age appropriate criteria which are very different than those applied to testimony describing something said to have occurred when one was six years of age.

[47] The variety and significance of the conflicts in the evidence in this case obliged the judge to subject the complainant's testimony to a very critical eye, using criteria appropriate to her circumstances. In my respectful view, that was not done. **R. v. D.D.S.**, 2006 NSCA 34.

[48] In a case like this one, the strong warning expressed by McLachlin, J. (as she then was) in **R. v. W.(R.)**, [1992] 2 S.C.R. 122, at p. 134 is especially apt. The Chief Justice observed:

> As Wilson J. emphasized in *B.(G.)*, [1990] 2 S.C.R. 30, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

> It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[49] In this case, the trial judge misapplied the law with respect to “child” witnesses. He brought an uncritical and superficial eye to the complainant’s evidence by forgiving her inconsistencies and ignoring her inability to recall events, dates, and places on the basis that she was “a child”. That failing, in this case, amounts to reversible error. I will offer some examples.

[50] The most serious allegations against the appellant were the two “rapes” J.M. described at the [...] when she said she was 13 and 15 years of age. By all accounts, this trailer was an old decrepit structure parked in D., next to the complainant’s grandmother’s home. She said the first “rape” happened the year she repeated Grade 7 and was 13 years old. As such, she ought to have been in Grade 8 at the time. The second rape occurred when she was 15 years of age, in other words, eligible to be in Grade 10. However, the appellant produced documentation at his trial, which was uncontradicted, and which clearly established that he and his wife and children moved out of that trailer and into their new residence on [...] in December, 1994, that is, when J.M. was 11 years old.

[51] The trial judge excused this gaping inconsistency in the evidence by saying the complainant was only a “child” or that the crimes could well have taken place elsewhere. He uses the phrase “a child” throughout his reasons. The judge said:

> [26] I therefore attach little significance to J.M.'s evidence that some events occurred in the [...] trailer <u>when clearly, if they did occur, they occurred in the [...] trailer. Indeed, some of the events she places in the [...] trailer could have</u>

> occurred in her own home if only she and the Accused were present. The passage of time and the impressions of a child may have clouded the exact location of the events while the events themselves may have made an indelible impression. That probably explains why she placed the first incident in the Accused's apartment while, at the Preliminary Inquiry, she testified that it occurred in her home. (Prelim. p.4/17).
> (Underlining mine)

[52] The trial judge's finding is flawed in at least two respects. First, J.M. was not a "child" when she said these incidents occurred. She was a teenager, 13 and 15 by her own account, and testifying to those "rapes" as an adult. Second, J.M. was insistent throughout her testimony that the "rapes" occurred in the trailer at the [...], and that nothing of a sexual nature ever occurred at the (brand new) trailer on [...]. Thus, the judge's reasoning is both plainly contradicted by the complainant's own testimony which the judge relied upon to support his finding, and is incompatible with the appellant's evidence as to ownership of the trailers, which evidence was not otherwise rejected by the judge.

[53] The next troubling aspect of this case is the very serious inconsistency between J.M.'s description of the bed where she says she was raped, and the evidence offered by the defence which completely undermined the reliability of the complainant's account.

[54] J.M. never resiled from her description that the bed had a wooden, half-moon headboard with spindles, as well as a wooden footboard and that the appellant used a blue rope to tie her hands and her feet to the four bed posts. The evidence led by the appellant was that no such bed was ever in any of their residences and did not in any way compare to the homemade bed he built for he and his wife, which was the mate of a similar bed he had made for his sister M.A.D. When shown pictures of the homemade bed the appellant had constructed for he and his wife and the mate he had built for his sister, J.M. admitted that the bed shown in the photographs was not the one she had described in her evidence. Again, the judge was unimpressed by this serious contradiction. He said:

> [34] Defence Counsel insisted that J.M.'s description of the bed is crucial to her version of events, that is the bed with the headboard and footboard. That overstates the evidence. Arguably, the exact bed or the bed with the headboard and the footboard is crucial to J.M.'s account of having her hands and feet tied to the headboard and footboard during what she described as the first rape. The

> possibility exists that she was describing an incident that occurred in a different bedroom or at a different location.
>
> [35] If that were the only incident, I would have a reasonable doubt. I am mindful also that she did not mention her legs being tied either in her police statement or at the Preliminary Inquiry. She said so for the first time during her direct testimony in this trial. If he had been charged with that one incident, (not that I disbelieve her on it, but that's not the test), I would have a reasonable doubt and the Accused would get the benefit. But that is not the only incident. Just because I may have a reasonable doubt about one aspect of the Complainant's evidence, it does not follow that her evidence falls like a house of cards. Whether the bed had a headboard or footboard is irrelevant to all the other incidents she described.

[55] In my respectful view, the judge's reasoning is belied by the complainant's own testimony as well as the appellant's evidence on this point which was clearly incompatible with the complainant's version of events, and yet not rejected by the judge.

[56] The last serious inconsistency I wish to mention is the absolute contradiction between J.M.'s evidence concerning her disclosure to her aunt, M.A.D., and M.A.D.'s testimony denying any such thing.

[57] It will be recalled that J.M. was unequivocal in her evidence. She said she had reported being sexually assaulted by her uncle to M.A.D. (the appellant's sister). We see this exchange during her direct testimony when questioned by the Crown attorney:

> **Q.** Okay. How old were you when you first told an adult?
>
> **A.** Twenty-s ..., 25 or 26.
>
> **Q.** Okay. Who was the first adult you told?
>
> **A.** [M.A.D.].
>
> **Q.** Okay. And who is she?
>
> **A.** My aunt.

[58] On cross-examination, when J.M. was questioned by the appellant's lawyer, the transcript records:

> **Q.** Now you mentioned you spoke with [M.A.D.].
>
> **A.** Uh-huh.
>
> **Q.** She was the first relative that you told about this incident.
>
> **A.** Yes.
>
> **Q.** Well, [M.A.D.]'s outside.
>
> **A.** Uh-huh.
>
> **Q.** She's going to say that you didn't tell her.
>
> **A.** That's, that's her lying under oath, not me.
>
> **Q.** Okay. Presumably you would have been close to her, though, I would think, if, if you went to her first.
>
> **A.** I was close to her, yes.
>
> **Q.** Are you still close with her?
>
> **A.** No.

[59] I acknowledge the considerable deference owed to a trial judge's assessment of credibility. I recognize that whether a witness is credible is a question of fact. Absent palpable and overriding error we have no cause to intervene. In my respectful view, the judge's rejection of M.A.D.'s evidence reveals just such an obvious and critical error. His rejection of M.A.D.'s evidence was blunt. It consists of four lines. The judge said:

> [36] Nor does the evidence of M.A.D. cause me any difficulty. I have no difficulty accepting the evidence of J.M. over that of M.A.D. M.A.D. was clearly doing what she could to protect her brother, the Accused. It is not plausible that J.M. would have said she disclosed to M.A.D. if she had not.

[60] Thus, the judge dismissed the testimony of M.A.D. out of hand on the basis that she was "clearly doing what she could to protect her brother" and that it was "not plausible that J.M. would have said she disclosed to M.A.D. if she had not."

[61] With respect, there is nothing in the transcript of M.A.D.'s testimony to suggest that she was vague, hostile, biassed, uncertain, exaggerating, evasive or otherwise prevaricating in her evidence. On the contrary, her clear, straightforward testimony on direct was unassailed on cross-examination.

[62] In her evidence, M.A.D. completely contradicted the complainant's account. We see this exchange during her direct examination:

> **Q.** Okay. Now you weren't in the courtroom earlier but [J.M.] testified that a couple of years ago she told you that she was sexually assaulted by [J.M.M.]. What, if anything, can you say about that?
>
> **A.** She's never told me that.
>
> **Q.** And if she did tell you that, what would you do?
>
> **A.** I would have told someone ...
>
> **Q.** Okay.
>
> **A.** ... because it was done to me when I was young.
>
> **Q.** Well, we don't, please don't ...
>
> **A.** Okay.
>
> **Q.** But what would you do if she told you that?
>
> **A.** I would have told her father.

[63] M.A.D.'s contradiction of J.M.'s description of the appellant's bed was similarly, completely incompatible with the complainant's account. M.A.D. said she had seen the appellant's bed many times, having babysat his children when they were young. She identified the five photographs in Exhibit No. 7 as being the appellant's bed. These pictures clearly depict a box frame on top of which the

mattress would sit, lying directly on the floor, with no space between the bottom of the frame and the surface of the floor. We see this exchange during M.A.D.'s direct examination:

Q. I'll show you exhibit seven. I'm going to ask you to look through these photographs one through five. You'll see they're numbered up in the right-hand corner.

A. Uh-huh.

Q. Do you recognize that bed?

A. Yes.

Q. And whose bed is that?

A. That's [M.]'s bed.

Q. Okay. And do you know approximately how long [M.] had that bed?

A/ He, he built this bed when he lived at the [...] in D..

Q. Okay. And that would be [...]?

A. Yes, [...].

Q. And what can you say, was there ever a headboard on that bed?

A. Never.

Q. And what about on the bottom, was there ever a footboard on the bottom of that bed?

A. No.

Q. Do you have a similar bed to that?

A. I do.

Q. And who built that bed for you?

A. [M.] did.

Q. And when did he build it, do you recall?

A. He built it a few years ago.

[64] M.A.D. said the bed in their family that did have both a wooden headboard with a half-moon shape and vertical spindles, and a footboard, was the bed her parents had given to J.V.M., who was the father of the complainant. That bed wasn't anything like the bed she said the appellant and his wife always had in their homes.

[65] While recognizing the preferred seat occupied by trial judges when assessing credibility, I see absolutely nothing in this record to remotely suggest that M.A.D. would "say anything" to "protect her brother". Further, I think it untenable for the judge to have characterized as "not plausible" the idea that J.M. would reveal these alleged incidents to her aunt, if she had not (in other words, if it were not true). One can imagine any number of plausible scenarios, including the idea that the complainant might make up a story that she had disclosed to her aunt (or someone else) in the hope that she would never be gainsaid by others.

[66] In the result, I see this case as being one of those rare instances where the judge's assessment of credibility, "cannot be supported on any reasonable view of the evidence" and where his findings are both plainly contradicted by the evidence he relied upon, and are incompatible with evidence that was never rejected by the judge. As a consequence the verdict upon which it is based, is unreasonable and must be set aside. **R. v. Burke**, [1996] 1 S.C.R. 474; and **R. v. R.P.**, **supra**.

[67] The examples I have included are intended to illustrate the most significant flaws in the judge's analysis. I need not go on to consider the other contradictions raised by appellant's counsel both at trial, and on appeal.

[68] Neither do I need to address what the appellant says was a misapprehension of important evidence by the judge.

[69] As indicated at the beginning of these reasons, I would also set aside the conviction on the basis of the judge's failure to correctly apply the law with respect

to the burden of proof. In this case, as we have seen, credibility was critical to a determination of the appellant's guilt, as charged. In trials where credibility is important, it is imperative that judges (or juries) be mindful of the fact that the rule with respect to proof beyond a reasonable doubt, applies to that issue. **R. v. W.(D.)**, [1991] 1 S.C.R. 742.

[70] I will refer to two cases to illustrate my point. Each appeal followed conviction at trial on charges of a sexual nature. In both, the appeals were allowed, the convictions set aside, and a new trial ordered because of errors made by the judge in assessing credibility and addressing the burden of proof. The first case is **R. v. R.W.B.**, [1993] B.C.J. No. 758 (C.A.)(Q.L.) where Rowles, J.A. found that the trial judge failed to properly address the issue of credibility or apply the rule of reasonable doubt to that issue. She observed:

> 28 It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether a witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered. Where, as here, the case for the Crown is wholly dependant upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
>
> 29 In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.
>
> 30 The trial judge characterized the evidence called on behalf of the accused as a "flat denial" and said "the rest of it is directed to the proposition that all of the time had been accounted for" and "that there would have been no opportunity for the accused to have done the things this young woman said he did." The trial judge went on to say that he was "really not that concerned about certain discrepancies, if they were discrepancies, in S.'s testimony" and that he was "not concerned because in my view such inconsistencies as were pointed out were upon the trivial side."

> 31 With deference to the learned trial judge, his characterization of the purpose of the defence evidence is inaccurate. The evidence as to timing was not, as the trial judge stated, directed simply to the matter of there not being any opportunity for the incident to have occurred, although that was part of it. The question of timing was important in this case, not only because of the limited opportunity in which the events the complainant described could have taken place, but also because of the lack of consistency between the complainant's evidence and the evidence of other witnesses.

[71] Similarly, in **R. v. Gostick**, [1999] O.J. No. 2357 (C.A.)(Q.L.), Finlayson, J.A. criticized the trial judge's approach to deciding credibility and in doing so, endorsed the comments of Rowles, J.A. in **R.W.B.**, **supra**. Justice Finlayson said:

> [13] This case is one of those unfortunate examples of a trial judge applying one standard of scrutiny to the evidence led by the Crown in a sexual assault case involving youthful complainants and another to the evidence of the adult accused person and those who testified in his defence. The complainants were not children; they were teen-age students attending the school in which the appellant was a teacher. ... While some allowance must be made for minor discrepancies in their testimony, in my opinion the testimony of all three complainants must be judged in the overall context of the plausibility of the conduct they allege. ...
>
> [14] The trial judge was entirely uncritical of the complainants. ...There is no analysis of internal contradictions in their testimony or discussion about matters raised in cross-examination. ... In so doing, he failed to judge the appellant on the totality of the evidence.
>
> [15] The proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation: see *R. v. Morin* [1988] S.C.J. No. 80; (1988), 44 C.C.C. (3d) 193 (S.C.C.). This is particularly true where the Crown's case depends solely on the unsupported evidence of the complainants and where the principal issue is those witnesses' credibility and reliability. As Rowles J.A. emphasized in *R. v. R.W.B.*, [1993] B.C.J. No. 758, 40 W.A.C. 1 (B.C.C.A), these issues are not to be determined in isolation. She said at p. 9:
>
> > Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested *in the light of all of the other evidence presented*. [Italicized for emphasis by Finlayson, J.A., in his reasons]

...

> [43] I am not satisfied that the trial judge subjected the case for the Crown to the scrutiny required to justify a criminal conviction. ... I have no sense that this is a safe conviction.
> (Underlining mine)

[72] I recognize that the **W.(D.)** "formula" need not be followed slavishly and that in this, a judge alone trial, a recitation of the three steps suggested by Justice Cory is not required at all. What is critical, however, is that the record demonstrate an appreciation for and a proper application of the criminal standard of proof to the whole of the evidence. As Cromwell, J.A. (as he then was) observed in **R. v. Mah**, 2002 NSCA 99:

> [42] The **W.D.** principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, **W.D.** describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. ... The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.
>
> ...
>
> [44] In my respectful view, the judge's reasons, read as a whole, make it clear that he did not apply this approach to the evidence. His reasons as a whole are concerned with comparing the Crown and defence positions with a view to ascertaining which was the more probable. Nowhere is the additional required step taken of assessing the whole of the evidence by the reasonable doubt standard. ...
>
> [45] ... The issue at the end of the day is whether guilt has been proved beyond reasonable doubt; the ultimate question is whether the evidence as a whole satisfies that standard. The judge's reasons show that this ultimate question was neither asked nor answered.
>
> ...
>
> [47] The **W.D.** analysis requires consideration of whether all the evidence leaves the judge with a reasonable doubt. Looking at all of these passages in the context of the reasons as a whole, I am persuaded that the judge did not approach

> the evidence in this way. The decision read as a whole reflects a chain of reasoning from credibility to guilt without recognition that the ultimate issue is not credibility but reasonable doubt.

[73] While declaring his satisfaction in this case:

> [38] ... that J.M. is a truthful witness. On the whole of the evidence, I am satisfied that the Crown has proven its case beyond a reasonable doubt. ...

I find that in the circumstances the judge failed to subject the whole of the evidence to the level of scrutiny this record demanded. In the face of so many crucial inconsistencies a great deal more was required than to simply say the complainant was "a truthful witness". The judge ought to have exposed the evidence to the kind of cautious and probing analysis such serious conflicts required so that he could then articulate why he was not left in any reasonable doubt on the whole of the evidence. One is forced to conclude that the judge did not apply the same critical eye to the complainant's account, as he did to the evidence called by the defence.

[74] The question arises whether the approach urged in **W.(D.)** applies to cases where the accused does not take the stand in his own defence. In the present case the appellant did not testify. However, he did call evidence which was in direct opposition to the complainant's account. The Ontario Court of Appeal recently dealt with this issue directly. In **R. v .B.D.**, 2011 ONCA 51, Blair, J.A., writing for the Court, observed:

> [114] What I take from a review of all of these authorities is that the principles underlying *W.(D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: *Challice*. In that event, they must acquit.

[75] I would, respectfully, adopt Justice Blair's analysis as a proper statement of the law on this point.

[76] In this case the judge did not apply the principles underlining **W.(D.)** either explicitly or implicitly in his reasons for conviction. It appears to me that the judge missed the third step in the approach suggested in **W.(D.)**. He did not take that long, last, careful look to see if, on the whole of the evidence, he could properly satisfy himself that the Crown had proved the guilt of the accused beyond a reasonable doubt. This final step is especially important in cases of historical sexual assault where there may be a heightened risk for wrongful conviction.

[77] This Court dealt with a similarly flawed analysis in **R. v. Saulnier**, 2005 NSCA 54. There, Chipman, J.A. remarked:

> [34] The respondent emphasizes that the trial judge is very experienced, that he is presumed to know the law and, although he did not articulate precisely the *D.(W.)* three-step analysis, it should be presumed not only that he knew the law, but applied it correctly. The respondent submits that the trial judge's expression of acceptance of the complainant's story "on the whole of the evidence" makes clear that he disbelieved the evidence of the accused beyond a reasonable doubt and that he believed the evidence of the complainant beyond a reasonable doubt. The respondent points out that the trial judge did not merely identify "the more probable version of events" but rather, having reviewed all of the evidence, of necessity found proof beyond a reasonable doubt that the offences were committed. He had considered, in particular, "the inherent logic or plausibility" of the evidence of the appellant and the complainant.
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> ...
>
> [36] When the decision of the trial judge here is read as a whole, it is apparent that from the very beginning he stated the issue in terms of a credibility contest. He embarked upon a careful inquiry into the conflicting stories and the credibility issues. He concluded with a simple finding "I accept on the whole evidence ... (that the appellant was guilty)". No reference, whatever was made to the principle of reasonable doubt. No reference was made at all to the three step test enunciated in *R. v. D.(W.), supra*. No reference was made to the presumption of innocence. No reference was made to whether or not doubt arose in the trial judge's mind, either from the evidence of the appellant alone or from the evidence as a whole.
>
> [37] ... While it is true that it was not necessary for the trial judge to give a mere recitation of the so-called *D.(W.)* formula, it had to appear that its basic

> requirements were followed. Specifically, the trial judge took the first step. As a result of the credibility exercise he was unable to believe the accused and acquit him. He, therefore, had to go on and seek out whether from the appellant's testimony or that of the evidence as a whole a reasonable doubt existed. But he did not, as did the trial judge in *R. v. J.K.*, *supra*, "move on" to address the question of reasonable doubt.

[78] Accordingly, I would set aside the verdict as being both unreasonable for the reasons stated, and flawed by the errors of law I have described.

[79] I would allow the appeal, quash the convictions, and direct that a new trial be ordered on those counts for which convictions were entered if the Crown in its exercise of prosecutorial discretion were so inclined.

Saunders, J.A.

Concurred in:

Oland, J.A.

Beveridge, J.A.