NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. J.A.H.***, 2012 NSCA 121

Date: 20121207
Docket: CAC 365899
Registry: Halifax

Between:

J.A.H.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486 of the *Criminal Code*

Judges: Oland, Fichaud and Bryson, JJ.A.

Appeal Heard: September 24, 2012, in Halifax, Nova Scotia

Held: Appeal is dismissed per reasons for judgment of Bryson, J.A.; Oland and Fichaud, JJ.A. concurring.

Counsel: Luke A. Craggs, 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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] J.A.H. appeals his conviction for sexual interference, (s. 151(a) of the *Criminal Code*) arising out of an incident of sexual touching of his nine-year-old daughter (M.H.) on December 27, 2009 (2011 NSSC 433).

[2] J.A.H. and his daughter were visiting friends in a neighbouring apartment. He told his daughter to go home. J.A.H. was drinking and became involved in an argument with the neighbour's son. The trial judge found that when J.A.H. returned to his apartment, he summoned his daughter from her bedroom and ordered her to stand in front of him. He then put his hands inside the front of her pyjamas, touching her stomach, the upper part of her thighs and her vagina. M.H. told her father to stop, grabbed his hands and removed them. She returned to her bedroom. Approximately two weeks later, M.H. recounted the incident to her aunt, B.N. B.N. then reported it to Children's Aid, eventually resulting in criminal charges.

[3] J.A.H. testified in his own defence. He acknowledged drinking. He said that he came home to discover his nine-year-old daughter putting her hands down the front of her pyjamas. He challenged her about what she was doing and she replied "nothing". J.A.H. says that he thought his daughter was lying and became angry. He decided to discipline her by spanking her for lying. He ordered her to come to him while he sat in a kitchen chair. He was going to pull down her pants and spank her. Instead, he says that M.H. ran to her room. In anger he threw a wooden chair across the kitchen, breaking it.

[4] The trial judge did not find J.A.H. credible and rejected his evidence, where it differed from that of his daughter. He was satisfied that the Crown had proven its case beyond a reasonable doubt and convicted J.A.H. A charge of sexual assault based on the same facts was stayed by the trial judge.

[5] J.A.H. was sentenced to six months incarceration followed by 18 months probation with ancillary orders. He now appeals, arguing that the trial judge:

1. erred in his application of the burden of proof;

2. misapprehended the evidence of the Appellant;

3. misapprehended the evidence of the Crown by finding witnesses who gave conflicting testimony on material points to both be credible;

4. erred in his assessment of the complainant's testimony by failing to consider contradictory evidence;

5. failed to consider the included offences to the ones charged;

[6] In his factum, J.A.H. argues issues 3 and 4 together.

ISSUE 1 – Burden of Proof:

[7] Whether the trial judge reversed the burden of proof is a question of law, reviewed on a correctness standard.

[8] J.A.H. opens his argument on this ground of appeal by quoting from the trial judge's decision:

> [63] J.A.H.'s failure to offer an explanation of what he meant when he said "I educated her"; his criminal record; his suggestion that his superiors in the Canadian Military were prepared to promote him in the face of his criminal convictions in order to persuade him to stay; the fact that he said he did not really understand the nature of the allegations made against him until he heard his daughter testify on the first day of trial which I find to be absolutely incredible; and his motivation to deny the very serious allegations of sexual assault and sexual interference of his daughter convince me that where his testimony differs from that of the complainant it is her testimony that should be believed. [Appellant's emphasis]

[9] The foregoing prompted this exchange between the trial judge and counsel:

> **MR. CRAGGS:** Actually, My Lord, I do have one question about your decision.
>
> **THE COURT:** Um-hmm.

> **MR. CRAGGS:** Toward the end of it, you referenced [J.A.H.] had a motivation to deny. I just wanted – hope the Court would clear the motive – what the motivation to deny was.
>
> **THE COURT:** I think, given the nature of the charges, I guess a general motivation to deny because of the serious nature of them. That's what I was saying. I didn't find a specific motivation. I found that there would be a general motivation to deny, given the serious and the very – I would think very delicate nature of the offences for which he was charged.

[10] J.A.H. critically characterises the trial judge's comment about motivation:

> Logic of this nature in a criminal trial is a magnet for appellate intervention. In *R.* v. *J.W.* [2007] B.C.J. No. 1510 para 37, Tweedale Prov. Ct. J. characterized this type of reasoning as "a boot straps argument if there ever was one." [Appellant's Factum, para. 28]

Citing a number of cases, J.A.H. urges that the trial judge's comment reversed the burden of proof and effectively ignored the presumption of innocence (*R. v. J.W.*, [2007] B.C.J. No. 1510 (Prov. Ct.); *R. v. B.(L.)* (1993), 64 O.A.C. 15 (C.A.); *R. v. Murray*, (1997), 99 O.A.C. 103 (C.A.); *R. v. L.J.D.* (1997), 148 Nfld. & P.E.I.R, 72 (P.E.I.S.C. (A.D.)); *R. v. Laboucan*, 2010 SCC 12).

[11] A trial judge's consideration of motivation to fabricate is permissible when considering the credibility of any witness. However, in the case of an accused, exclusive or undue reliance on motivation may amount to an error of law that impairs the presumption of innocence and shifts the burden of proof. The Supreme Court of Canada has put it this way in *Laboucan*:

> [11] The fact that a witness has an interest in the outcome of the proceedings is, as a matter of common sense, a relevant factor, among others, to take into account when assessing the credibility of the witness's testimony. ...
>
> [12] The common sense proposition that a witness's interest in the proceedings may have an impact on credibility also applies to an accused person who testifies in his or her defence. The fact that the witness is the accused, however, raises a specific concern. The concern arises from the fact that both innocent and guilty accused have an interest in not being convicted. Indeed, the innocent accused has a greater interest in securing an acquittal. Therefore, any assumption that an accused will *lie* to secure his or her acquittal flies in the face of the presumption of

> innocence, as an innocent person, presumably, need only tell the truth to achieve this outcome. In *R. v. B. (L.)* (1993), 13 O.R. (3d) 796 (C.A.), Arbour J.A. (as she then was) succinctly described the inherent danger in considering the accused's motive arising from his or her interest in the outcome of the trial. In an often-quoted passage, she stated as follows (at pp. 798-99):
>
> > It falls into the impermissible assumption that the accused will lie to secure his acquittal, simply because, as an accused, his interest in the outcome dictates that course of action. This flies in the face of the presumption of innocence and creates an almost insurmountable disadvantage for the accused. The accused is obviously interested in being acquitted. In order to achieve that result he may have to testify to answer the case put forward by the prosecution. However, it cannot be assumed that the accused must lie in order to be acquitted, unless his guilt is no longer an open question. If the trial judge comes to the conclusion that the accused did not tell the truth in his evidence, the accused's interest in securing his acquittal may be the most plausible explanation for the lie. The explanation for a lie, however, cannot be turned into an assumption that one will occur. [Emphasis added by SCC.]

[12] As *Laboucan* makes plain, there is no absolute rule that allows this court to conclude that a trial judge made an error of law because he refers to the accused's interest in a favourable outcome of his trial. The trial judge's reasons have to be read in the context of the evidence, the issues and arguments at trial. Context is crucial (*Laboucan*, para. 16; *R. v. R.E.M.*, 2008 SCC 51 at 16). In this case, the trial judge's findings were preceded by a lengthy self instruction with respect to the burden of proof, the presumption of innocence and the principles of *R. v. W.(D.)* ([1991] 1 S.C.R. 742), steps cited with approval in *Laboucan* (paras. 18 and 19). If a trial judge places too much emphasis on motivation to fabricate by an accused person or otherwise assumes that an accused will lie to secure an acquittal, that is an error of law. But consideration of motivation to lie is not usually regarded as an error of law if it is only one of a number of factors cited in rejecting the evidence of an accused: *R. v. Parnell* (1995), 59 BCAC 291, at paras. 42-43; and *R. v. Edgar*, 2010 ONCA 529, paras. 96 and 97.

[13] Neither the passage impugned by J.A.H. (para. 8 above) nor the trial decision read as a whole discloses any shifting of the burden of proof or compromise of the principle of the presumption of innocence. The trial judge did not assume guilt in assessing credibility. His exchange with counsel (para. 9 above) shows that he did not assume that J.A.H. was lying to obtain an acquittal.

[14] J.A.H. also argues that the trial judge's treatment of the complainant's own testimony reveals that he misunderstood the burden of proof. J.A.H. attacks these comments:

> [64] The complainant was honest and forthright in presenting her evidence. She had no reason to lie. Indeed the testimony of her aunt, B. N., and her grandparents, M.N. and M. A. N., demonstrated a concern for her father's well-being and genuine love and affection for him. She has nothing to hide nor should she feel bad for the situation she was put in. She did the correct thing. She shared it with someone she trusted. That person also did the right thing by reporting it to the appropriate people at the Provincial Department of Community Services. Any allegation of this nature or any suspicion of child abuse has to be reported. [Appellant's emphasis.]

[15] J.A.H. says that the trial judge erred because he implied that the accused had to prove that the complainant had a motive to fabricate her story. This shifted the burden to the accused rather than asking whether the Crown had proven its case. J.A.H. cites the Ontario Court of Appeal in *R. v. L.L.*, 2009 ONCA 413, where the trial judge was faulted for failing to instruct a jury regarding the impropriety of Crown counsel's submissions and argument concerning the complainant's motive to fabricate.

[16] It is quite true that the absence of *evidence* of motive to fabricate on the part of a complainant is not the same as absence of a motive at all. However, it does not follow from this logical proposition that it is impermissible to consider factual evidence on this point when assessing credibility (*R. v. L.L.*, para. 53). This is precisely how the trial judge approached this evidence in this case.

[17] There was positive evidence that M.H. wished to minimize any ill effects on her father arising from her evidence. When she reported what happened, she asked that her aunt promise not to tell anyone. B.N. testified that M.H. was upset and did not want to get her father into trouble.

[18] Moreover, during his evidence, J.A.H. speculated about *why* M.H. had made her complaint. As well, during argument, counsel for J.A.H. commented on M.H.'s grandparents' family "looking down upon" J.A.H., given their different stations in life. Later, defence counsel conceded that M.H. had no apparent

motive to fabricate but that she had reason to be upset with her father because he was taking her for granted. Ultimately, this and the "family dynamics" caused her to "misstate" what happened to her aunt. M.H.'s testimony had to be viewed with the difference in households in mind. Counsel implied that this might have influenced M.H. – perhaps subconsciously – to say what she did. Why M.H. reported her father to her aunt was an active issue, commented upon in argument. In those circumstances, it was natural for the judge to mention it and he made no error of law in doing so.

[19] J.A.H. also faults the trial judge for the conclusory comments that M.H. was "honest and forthright" and that his reasons for accepting her testimony "are lacking". While acknowledging that the trial judge cited *W.(D.)*, J.A.H. says he misapplied *W.(D.)*.

[20] The trial judge heard and saw the witnesses. His "conclusory" comments capture the impression that M.H. gave the trial judge. To cite an oft-quoted passage:

> 20 Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that ***in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.***
>
> 21 This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and ***where***, as here, ***the evidence of a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt.*** [*R. v. Gagnon*, 2006 SCC 17] [Emphasis added]

The trial judge believed M.H. and did not believe J.A.H. He gave reasons for that preference but did not confine his decision to the "credibility contest".

[21] Courts of appeal defer to findings of credibility, (*R. v. W.(R.)*, [1992] 2 S.C.R. 122, at pp. 131-32; *F.H. v. McDougall*, 2008 SCC 53, at para. 73; *R. v. Gagnon*, 2006 SCC 17, at para. 20; *R.E.M.*, paras. 18-20). Credibility findings are questions of fact and cannot be reversed on appeal unless they "cannot be

supported on any reasonable view of the evidence" [*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 17; cited in *R. v. R.P.*, 2012 SCC 22, at para. 10].

[22] M.H. clearly made a favourable impression on the court. Defence counsel acknowledged as much during trial argument, describing M.H. as "a well spoken little girl, . . . in some respects, she brought a ray of sunshine to this courtroom..." He also acknowledged that M.H.'s evidence alone "could sound compelling". The record shows that she did not waiver in her description of the sexual assault or the immediately surrounding events. If she did not know something or was not sure, she readily conceded it. She admitted what she did not know and agreed with reasonable propositions put to her in cross-examination. She was asked about the impact of her police statement on her evidence at trial. She said that the statement had refreshed her recollection. She was not contradicted on anything she had previously said in court or to the police. Where her evidence differed from her aunt about their conversation, she answered clearly and directly. All this no doubt led to the favourable impression made on the judge and conceded by counsel – at least with respect to her demeanour and appearance of sincerity. It was her reliability that counsel attacked. That is addressed further under the other issues raised by the appellant.

[23] It is not an error of law to prefer the evidence of the complainant to that of the accused. Rather, the question is whether the trial judge limited his analysis to credibility (*R. v. Chittick*, 2004 NSCA 135, paras. 124-26). It is apparent from his self instruction on the law, his recitation of the evidence, his credibility findings and his conclusion that the Crown had proved its case "beyond a reasonable doubt" (Decision, para. 65), that the judge did not reverse the burden or misapply *W.(D.)*.

ISSUE 2 – Misapprehension of Appellant's Evidence

[24] A substantial and material misapprehension of evidence that is essential to a trial judge's reasoning constitutes a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code*.

[25] Here, J.A.H. alleges four areas of misapprehension of the evidence by the trial judge. He does not argue that they render the verdict unreasonable on the evidence within the meaning of s. 686(1)(a)(i) of the *Code* nor does he seek an

acquittal on that basis. But during oral submissions, J.A.H. did urge that the trial judge's alleged errors would justify an "unreasonableness" finding, relying on *R. v. J.M.M.*, 2012 NSCA 70.

[26] In very limited circumstances, a verdict may be unreasonable under s. 686(1)(a)(i) based on the trial judge's reasoning process (*R. v. Beaudry*, 2007 SCC 5; *R. v. Sinclair*, 2011 SCC 40). In these cases, a successful appeal results in a new trial because the verdict may have been otherwise sustained on the evidence (see discussion in *J.M.M.*, at paras. 35 to 37; *R. v. R.P.*, paras. 9 and 10; and *R. v. Morrissey,* [1995] 22 O.R. (3d) 514 (C.A.), at para. 88).

[27] Misapprehension of the evidence constituting a miscarriage of justice pursuant to s. 686(1)(a)(iii) of the *Code* has been described as:

- a failure to consider evidence relevant to a material issue
- a mistake regarding the substance of the evidence
- a failure to give proper effect to evidence

Examples include: drawing an unsupportable inference from the evidence or characterising a witness's evidence as internally inconsistent when the evidence does not reasonably support that conclusion (*Morrissey*, *supra*, *R. v. Deviller*, 2005 NSCA 71, at para. 10). The standard is stringent. For a misapprehension to result in a miscarriage of justice, the misapprehension must be substantial, material and essential to the decision to convict (*Deviller*, paras. 11 and 12; *R. v. Lohrer*, 2004 SCC 80, at paras. 1 and 2). An error in assessing the evidence will only constitute a miscarriage of justice if, "...striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground", (*Sinclair*, para. 56).

[28] For reasons that follow, the trial judge did not misapprehend the evidence so as to give rise to a miscarriage of justice.

Court Order

[29] The trial judge referred to a "court order":

> [52] In their testimony they [the complainant's grandparents] recalled the telephone call made to their residence by the accused late in the evening on January 25, 2010. The accused by then had been charged and was under a court order not to have contact with them or with his daughter. Despite this the accused telephoned their residence. Mrs. N. first answered the phone. She recognized the accused's voice. He asked to speak to Mr. N.

J.A.H. says that this is a misapprehension because there was no court order at all. He had only given an undertaking and it did not extend to the grandparents. The Crown argues that the judge is simply reiterating evidence. Whether this is simply a reiteration of the evidence of two witnesses or a misapprehension does not matter because the alleged error is not material and played no role in the judge's consideration of credibility or decision to convict (*Deviller*, para. 12).

Adverse Inference

[30] After he was charged, J.A.H. telephoned M.H.'s grandparents accusing them of trying to pit their family against his. The trial judge found that J.A.H. did not call out of concern for M.H., but to intimidate her grandparents. J.A.H. suggested that M.H. would be placed in foster care owing to the involvement of the Department of Community Services. During the course of the conversation, J.A.H. said that when he came home that night he found [M.H.] touching herself. He continued, "I wasn't going to let, or accept that grade four investigation of herself. I told her to turn around and I educated her."

[31] J.A.H. says that the trial judge drew an adverse inference about his credibility because he had failed "to offer an explanation" of what he meant when he told M.H.'s grandparents that "I educated her". J.A.H. claims that the trial judge inferred that he avoided answering questions about this turn of phrase but that a review of the evidence does not support such an inference.

[32] The trial judge did not draw an adverse inference against J.A.H. with respect to this evidence; rather it played a role in his assessment of J.A.H.'s credibility.

[33] One must begin with J.A.H.'s acknowledgement that he could not deny the evidence of M.H.'s grandparents that he had told them that he had come home to

find M.H. touching herself and that he was "not prepared to accept her grade four education of herself so I told her to turn around and I educated her". During cross-examination, J.A.H. conceded that this sounded as if he had decided to show her how to masturbate but "that's not what I meant". (Appeal Book – Volume 2, p. 591, line 8). After this denial, J.A.H. did not explain what "educating" his daughter meant.

[34] Again, acknowledging the Crown's suggestion of what he had told M.H.'s grandparents, J.A.H. testified:

> **Q.** All right. Well, I'm going to talk more about that, but let's move on to - - given everything that you've just said, it seems like - - -
>
> > "I came home and found [M.H.] touching herself, and I wasn't ready to accept her grade four investigation of herself, so I turned her around and I educated her."
>
> That sounds like to me - - and ask me if my interpretation is incorrect - - it sounds like you came home, you caught her masturbating, and you knew you did, or caught her investigating herself, her genital area, and you decided to turn her around and educate her. That sounds exactly what you just said. Isn't that right?
>
> **A.** Yes, that's what I said during the phone conversation, yeah.
>
> **Q.** So I don't see how that is consistent with the fact that some days after, you've made a decision that you really didn't know what you saw, you were just mad because you were lying. How is***[sic]*** that two things consistent?
>
> **MR. CRAGGS:** Mad because he was lying or mad because [M.H.] was lying?
>
> **MR. WOODBURN:** Mad because [M.H.] was lying.
>
> **MR. CRAGGS:** Thank you.
>
> **MR. WOODBURN:** He was mad because [M.H.] was lying.
>
> **BY THE WITNESS:**

> **A.** Okay. The event itself didn't really turn into anything sexual until after I got charged with something sexual. That's what put that in my mind. It was an event that occurred that [M.H.] had guilt. She looked like she was doing something, and I pieced that all together afterwards.
>
> [Appeal Book, pp. 683-684]

[35] Later J.A.H. testified he wanted M.H. to pull her pants down so that she could be spanked for lying to him when he found her in the kitchen with her hands down the front of her pyjamas, and she insisted she was doing "nothing":

> **Q.** Do you think that lying is a spanking offence?
>
> **A.** Continuous lying after what we had gone through with the school, and with a bunch of different issues that we had with lying, and the lectures, and the education, and the re-education, and - - yes, at that point.
>
> **Q.** "The education and re-education"?
>
> **A.** Yeah.
>
> **Q.** You were educating her?
>
> **A.** Well, through lectures and training, like you're supposed to do as a father and give them indications of right and wrong, and impose your will on your children. It's all an education. It's also an education for me.
>
> **Q.** You got her cornered, you want her to take her pants down so you can spank her, and where were you going to spank her?
>
> **A.** On her butt.
>
> [Appeal Book, Vol II, p. 626, lines 3-19]

At least some of J.A.H.'s explanation about "education" is broad and does not directly engage the conversation with M.H.'s grandparents.

[36] The exchange regarding J.A.H.'s "education" of his daughter caused the trial judge to question his credibility. It is a fair inference that J.A.H.'s testimony implied that he caught his daughter masturbating. Yet, he denies this. But in cross-examination he explained that when he came home and entered the kitchen,

M.H.'s back was to him, her pyjama pants were "stretched" across her bottom, and her hands were down the front of her pyjamas and she was doing something she was guilty about. J.A.H.'s testimony (para. 34 above) suggests that he only "pieced together" that she was "guilty" about "something sexual" after he was charged. So how did J.A.H. conclude that M.H. was lying at the time – what did she feel guilty and lie about that would justify spanking?

[37] In light of this evidence, the judge's conclusion is not a clear misapprehension of the evidence. Certainly, it is not substantial. J.A.H. never really explained what he meant by the phrase he "educated" his daughter in the context of her alleged "guilt". In fact, his expression "I educated her", suggests that he accomplished what he intended. In response to queries from the Court at trial, defence counsel conceded that J.A.H. didn't provide a positive explanation, but did not admit doing anything "criminal".

[38] The clear implication of J.A.H.'s evidence was that he had caught his daughter masturbating – whether she was or not – but then he did his best to distance himself from that suggestion. It is obvious that the trial judge did not find him credible on this point and the evidence certainly supports the judge's scepticism. The alleged misapprehension of J.A.H.'s evidence related to the judge's credibility finding against him. Even if one accepts J.A.H.'s submission that the judge misconstrued the evidence of whether he had explained what he meant by having "educated" his daughter – and it is not at all clear that the judge erred – his error was not material in the larger context of J.A.H.'s lack of credibility on the topic.

Judicial Notice

[39] J.A.H. next complains that the trial judge apparently took judicial notice that the Canadian Military does not promote members with criminal records. For this conclusion, J.A.H. again relies upon the trial judge's decision:

> [62] At one point in cross-examination the accused suggested that he left his former position in the Canadian Military voluntarily despite the fact that he had no job and no place for him and his daughter to live. He further suggested that his superiors, despite knowing of his criminal conviction, offered him a promotion to persuade him to stay.

J.A.H. says the trial judge was wrong to rely on this in finding him not credible.

[40] With respect, the trial judge did not take "judicial notice" of anything. He simply did not believe J.A.H. The inherent improbability of this evidence is ample foundation for that conclusion.

J.A.H.'s Understanding of the Allegations Against Him:

[41] The fourth alleged misapprehension arises from these comments by the trial judge which told against J.A.H.'s credibility:

> The fact that he [J.A.H.] did not really understand the nature of the allegations made against him until he heard his daughter testify on the first day of trial which I found to be absolutely incredible...

[42] Presumably the trial judge's observation was prompted by this evidence of J.A.H.:

> **A.** I was in between all kinds of theories at that point, and I didn't really realize what had happened until [M.H.] testified the other day. I don't think I really digested what had exactly happened until [M.H.] testified the other day. I think I was still up in the air with all kinds of theories of what had happened.
>
> [Appeal Book, Vol. II, p. 699]

The trial judge's incredulity would be well founded on this evidence. However, the appellant argues that he was really saying that he didn't understand his daughter's motivation for the complaint and believed that someone had influenced her to make it. He points to evidence such as this:

> **A.** ...At that point, I think I was under the impression that this was some - - I still didn't believe. I didn't believe until I saw [M.H.] testify that this was [M.H.], so I thought that they had more information about what was going on, and why it happened than I did. So the conversation was, you know, basically, "Why are you doing this to me?" You know, "How can you help me? I've got to go to this meeting which I could potentially make things worse."
>
> [Appeal Book, Vol. II, p. 529, lines 8-15]

[43] Again, at p. 642-643:

> **A.** Well, again, I was at that point in all of this where I didn't believe that [M.H.] had said anything on her own about anything, and I thought that they had done something. So, therefore, my family and their family were at odds with all this, because I had informed all of my family what was going on.
>
> **Q.** Okay. So, sorry, you didn't understand who was doing what?
>
> **A.** I didn't understand until [M.H.] testified that she actually was, without coercion, making statements.
>
> **Q.** So your thought, at that point, was that your daughter was being coerced by [M.N.] and [his wife] [M.N.], and [B.N.] in order to make up these lies against you?
>
> **A.** I didn't think all of them, but them as a family, I just - - them as a family, yeah.

And later at p. 643-644:

> **Q.** But listening to your daughter, that changed your mind, didn't it?
>
> **A.** Well, that's a crashing reality right there.
>
> **Q.** I said listening to your daughter changed your mind, didn't it?
>
> **A.** Yes.

[44] Even if the appellant's interpretation of the trial judge's comment is correct and he mistook "allegations" for "motive to make the allegations", J.A.H.'s explanation that he finally "understood" after his daughter testified, makes no sense. He does not explain how her testimony suddenly dispelled his alleged concerns about why she complained in the first place. M.H. had given a statement to police. She had testified at a preliminary inquiry. No questions were put to M.H. to explore whether or not anyone had influenced her to make a complaint against her father. In other words, there was nothing new at trial of which J.A.H. would have been previously unaware that could prompt him to "understand" for

the first time. J.A.H.'s sudden grasp at trial of "what happened" was not credible to the trial judge and the record supports him.

ISSUE 3 & 4 – Misapprehension of evidence of Crown witnesses

– Misapprehension of complainant's testimony

[45] J.A.H. argues these issues together because he says that they both relate to contradictions between the evidence of M.H. and her aunt, B.N., to whom M.H. made her initial disclosure.

[46] B.N. testified that when M.H. told her about J.A.H. touching her, she also said that it had happened before when she was four. M.H. denied saying this and denied that it had happened.

[47] A second discrepancy relates to whether B.N. told M.H. that her father would not "get into trouble" over M.H.'s disclosure. M.H. agreed with this suggestion put to her in cross-examination. B.N. says she does not believe she said this to M.H.

[48] The third discrepancy relates to whether M.H. told B.N. that her father asked her to change in front of him. M.H. denied changing in front of her father or telling B.N. that he requested her to do so.

[49] The fourth discrepancy relates to whether J.A.H. made M.H. wear a bra. B.N. testified that M.H. told her this. M.H. did not deny this as it was not put to her, but she did say that her grandmother bought her a bra and her father was annoyed about it.

[50] J.A.H. argues that these discrepancies were not resolved by the trial judge and represent contradictory evidence. He says that B.N. and M.H. cannot both be right on these points. His submission then evolves into a complaint that the trial judge's reasons are inadequate, citing *R. v. Sheppard*, 2002 SCC 26, at para. 55 and *R. v. D.D.S.*, 2006 NSCA 34 where Justice Saunders described a trial judge's obligation to explain credibility findings. During oral argument, J.A.H. augmented these submissions by reference to *J.M.M.*, suggesting that the verdict could also be unreasonable. But in the end, this argument depends on showing a

misapprehension of the evidence – which then might also be an "unreasonable verdict".

Alleged "contradictions"

[51] With respect, *J.M.M.* has no application to the facts of this case. *J.M.M.* involved the failure of the trial judge to reconcile the complainant's own testimony with her previous inconsistent statements, the statements of other witnesses and circumstantial evidence, all of which suggested that the sexual assaults could not have happened or happened in the ways alleged. Moreover, many of the serious allegations in *J.M.M.* occurred when the complainant was a teenager – not nine as here or eleven, when M.H. testified. The court's expectations of the complainant's reliability were correspondingly higher in *J.M.M.*, and the serious discrepancies in evidence material to the alleged offences, more problematic.

[52] In *J.M.M.*, Justice Saunders described the type of very serious evidentiary contradictions which can attract appellate intervention::

> [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:
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> > . . .
> >
> > 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.
>
> [Emphasis added]

[53] In this case, none of the alleged discrepancies touch the evidence of the offence itself. The trial judge was aware of them and mentions at least two of them in his decision (para. 50). None of the "discrepancies" renders M.H.'s evidence unreliable, internally inconsistent or contrary to other reliable circumstantial evidence, as in *J.M.M.*

[54] The alleged conflicts between M.H. and B.N. are not on "key issues" (*R.E.M.*, para. 29) nor do they relate to facts on which the charges were based or the conviction founded. The judge did not misapprehend this evidence.

Duty to give reasons

[55] The trial judge's duty to give reasons is assessed on a functional basis. The appellant must show that the right of appeal has been prejudiced. Does the decision fail to address difficult, unresolved questions of law or critical factual findings on unexplained and confused or contradictory evidence? (*Sheppard*, para. 46; *Chittick*, para. 34.)

[56] A trial judge's decision need not confront every inconsistency in the Crown's evidence (*R. v. D.W.S.*, 2007 NSCA 16, at para. 19, relying upon *R. v. Braich*, 2002 SCC 27). The question is whether the judge has "...seized the substance of the issue...". There is no requirement to provide a "detailed account of the conflicting evidence." (*R.E.M.*, para. 50, citing *R. v. Dinardo*, 2008 SCC 24.)

[57] The trial judge needed to make clear findings of what happened on December 27, 2009. He did that. It was unnecessary to resolve the small discrepancies in evidence between B.N. and M.H., unrelated to the events of that night. The trial judge's reasons are adequate to explain what he decided and why. He did not err by not resolving discrepancies in the recollection of a conversation between M.H. and her aunt several weeks after the sexual touching.

ISSUE 5 – Did the trial judge fail to consider "included offences"?

[58] J.A.H. says that both his evidence and his daughter's are consistent with a potential finding of common assault. He said he came home angry and under the influence of alcohol. His alleged intention to spank M.H. was consistent with her evidence that he put his hands down her pyjama pants "albeit for a non-sexual purpose".

[59] J.A.H. did not argue "included offence" at trial. In light of M.H.'s evidence and J.A.H.'s denial, it was unnecessary to consider common assault. It was not a live "issue" at trial. The judge did not err in failing to address something not argued and not supported by the evidence. In *R. v. Gillis* (1994), 134 N.S.R. (2d) 119 (C.A.), this Court observed:

> [14] The issue at this trial was clear. The Crown's evidence spelled out a case of attempted murder. The defence's position was that it was simply an accident brought on by illness without any intention on the appellant's part to cause harm. In our opinion, ***the issues thrown up by the evidence did not leave room for the need to direct on the included offence. But even if it did, this is a case for invocation of the curative provision*** of s. 686(1)(b)(iii) of the **Code**. The trial judge's failure to direct on the included offence did not result in any substantial wrong or miscarriage of justice. The jury's verdict in the face of the evidence makes it abundantly clear that there is no reasonable possibility that the verdict would have been different had direction on the included offence been given. See

> **R. v. Bevan and Griffith**, [1993] 2 S.C.R. 599; 154 N.R. 245; 64 O.A.C. 165; 82 C.C.C. (3d) 310, per Major, J. at pp. 328-9.
>
> [Emphasis added]

The emphasized words are apposite here.

[60] I would dismiss the appeal.

Bryson, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.