NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. J.C.*, 2018 NSCA 72

Date: 20180822
Docket: CAC 468716
Registry: Halifax

Between:

J.C.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: ss. 110(1) and 111(1) Youth Criminal Justice Act

Judges:	Beveridge, Farrar, Van den Eynden, JJ.A.
Appeal Heard:	June 5, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Timothy O'Leary, for the respondent

Identity of offender not to be published

110 (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Identity of victim or witness not to be published

111 (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Reasons for judgment:

INTRODUCTION

[1] The appellant, now an adult of twenty-eight years of age, was tried in Youth Court on allegations that when he was 12 or 13 years old he invited touching, and touched for a sexual purpose, a person under the age of 14 contrary to ss. 151 and 152 of the *Criminal Code*. There was a companion count of sexual assault (s. 271).

[2] For reasons I will detail later, the Honourable Judge Jean Whalen acquitted the appellant of the ss. 151 and 152 counts. She convicted him of sexual assault and imposed an 18-month period of probation.

[3] The appellant argues that the trial judge's reasons are insufficient and what reasons there are demonstrate she impermissibly shifted the burden of proof and misapprehended the evidence.

[4] The Crown concedes that the trial judge's reasons are less than ideal and she misapprehended the evidence. Nonetheless, the Crown seeks to uphold the conviction, arguing that the judge applied the correct burden of proof, the reasons are sufficient and the misapprehension did not play an essential role in the trial judge's reasons to convict.

[5] The trial judge's reasons are problematic. Most troubling is her misapprehension of evidence. It played an essential part in her reasoning process to convict. The conviction was therefore not based on the actual evidence and is unfair. The misapprehension equally amounts to an error in law, and the Crown has not satisfied me that we should apply the proviso to uphold the conviction.

[6] Since I would allow the appeal and order a new trial, I will only refer to as much of the evidence as necessary to demonstrate why a new trial must be ordered.

THE FACTUAL CONTEXT

[7] Like so many criminal trials, outcome depended on the trial judge's assessment of credibility and reliability. The complainant was K.R. At the trial, she was 23 years old.

[8] She testified that she was regularly in J.C.'s home from ages 5 until 9 because his mother, Mrs. P.C., provided day care services for K.R.'s family and others. The day care services stopped when K.R.'s family moved to British Columbia in the summer of 2002.

[9] Nothing untoward happened when K.R. was at the C. household for child care. However, K.R. said that she and her two siblings stayed overnight at J.C.'s home five or six times. On one of those occasions, sometime between June 27, 2000 and April 16, 2002, she claimed to have been the victim of sexual abuse at the hands of J.C. and his older brother, C.C.

[10] K.R. testified that she was put to bed in a top single bunk bed. She usually shared that top bunk with her siblings, but, on the night of the abuse, she had no recall of her siblings' presence. She woke when C.C. entered the room. No words were spoken, but she followed C.C. out of the room and down the hall to the dining room.

[11] In the dining room, she said J.C. was seated on the floor. She sat between J.C. and C.C., while she masturbated and fellated them. She had no recall of anything being said during or after the sexual acts. She had no recall of ejaculation or even reaction by the two boys. Afterward, she went back to bed.

[12] K.R. said the sexual conduct had become routine with C.C., but this was the first and only time with J.C.

[13] K.R. identified a sketch she had drawn of the layout of the C. home. It became Ex. # 1.

[14] K.R.'s mother, L.R., corroborated some of K.R.'s evidence. L.R. claimed that both J.C. and C.C. used to play with her children. J.C. was three years older than her eldest, T.R., and some four-and-a-half years older than K.R. C.C. was five years the elder of J.C.

[15] Importantly, she also claimed that her children spent the night at the C. home a couple of times a month "in later years". When they did so, all three stayed.

[16] She allowed that Mrs. P.C. only babysat at the R. home once. On other occasions, it was mostly C.C., and later J.C., that babysat.

[17] L.R., despite being of the belief that the family moved when K.R. was going to enter grade 4, which would make the move the summer of 2002, insisted they

stopped child care services with Mrs. P.C. in January 2003 and moved in the summer of that year.

[18] The defence called two witnesses, Mrs. P.C. and the appellant.

[19] Mrs. P.C. introduced business records that demonstrated the last day she provided day care services for the R. family was in January 2002. She testified that the R. family moved in the summer of 2002.

[20] Mrs. P.C. was emphatic that the R. children never stayed overnight at her home. She described how she would volunteer to babysit the R. children if their parents needed help. It would always involve her going to the R. home to babysit, but, even then, never overnight—even if it was 2:00 a.m., she would go home to her own house.

[21] Mrs. P.C. provided additional evidence that would make it less likely that J.C. would have been involved in the alleged conduct. She confirmed the five-year age gap between C.C. and J.C., and that they were not close. They did not play together, have mutual interests or friends. They did not see each other naked. They would not even undress in front of the other.

[22] J.C. testified. He denied any sexual abuse, and that neither K.R. nor her siblings had ever been babysat overnight at their home. If true, J.C. had no opportunity to have committed the sexual abuse alleged by K.R.

[23] The evidence was completed on April 13, 2017, followed by oral argument. The defence position was succinct—the allegation was labelled as bizarre. Not only did the details make no sense, the idea that two boys with a five-year age difference, too shy and private to change in each other's presence, would expose their genitals and engage in such sexual abuse did not add up.

[24] Counsel urged the trial judge to accept the evidence of Mrs. P.C. that K.R. did not stay overnight at their home, and the only babysitting was at the R. home, and that J.C.'s evidence should be accepted.

[25] The Crown conceded that the evidence supported that J.C. was only 12 or 13 years of age at the time the alleged incident occurred. This was significant because, at the relevant time, s. 150.1(3) provided that no person can be tried for offences contrary to ss. 151 or 152 when they are 12 or 13 unless they were in a

position of trust or authority or the complainant was in a relationship of dependency with the accused. It provided as follows:

> No person aged twelve or thirteen years shall be tried for an offence under section 151 or 152 or subsection 173(2) unless the person is in a position of trust or authority towards the complainant or is a person with whom the complainant is in a relationship of dependency.

[26] The Crown argued that K.R.'s evidence should be accepted. He emphasized the accuracy of the complainant's sketch of the C. home; and L.R.'s corroboration that Mrs. P.C. babysat K.R. and her siblings at the C. home overnight.

[27] The trial judge reserved her decision.

THE TRIAL JUDGE'S REASONS

[28] On June 5, 2017, the trial judge delivered oral reasons. A written version was later provided to counsel that contained headings, but is substantively identical. Appellant's counsel later added paragraph numbers for ease of reference. I will refer to the latter.

[29] The reasons are short, just 26 paragraphs over eleven double spaced pages organized into six parts as follows: INTRODUCTION; ISSUES; CREDIBILITY OF WITNESSES; ASSESSMENT AND CREDIBILITY; POSITION OF THE PARTIES; and, ANALYSIS.

[30] After a brief introduction, the trial judge said the issues she had to decide were:

> (1) Did J.C. sexually assault Ms. K.R pursuant to Section 271 of the *Criminal Code*;
>
> (2) Did the defendant commit the offences under Section 151 and 152 given the Complainant's testimony and his age as testified to.

[31] She next quoted an article that discussed credibility assessments, and Justice Cory's model jury instruction from *R. v. W.(D.)*, [1991] 1 S.C.R. 742. She then made a number of comments about the credibility of the four witnesses she had heard.

[32] The trial judge remarked favourably about all of the witnesses. She observed that: K.R. had testified in a straightforward manner and did not embellish

her evidence; L.R. had testified in a straightforward manner and did not embellish her evidence; Mrs. P.C. also testified in a straightforward manner without embellishment; and, there was nothing inherently believable or unbelievable about J.C.'s denial.

[33] She said this:

> [9] Ms. K.R.'s narrative was not complicated. It was a straight forward telling of her evidence. I find she did not embellish her evidence, and if she could not remember or recall she said so. It must be noted that the complainant is testifying to events which are alleged to have occurred approximately 15 years ago when she was seven or eight years old.
>
> [10] Her mother, Mrs. R., testified in a straight forward manner and I find that there was no embellishment on her part. She denied discussing her evidence with her daughter. She was adamant that Mr. J.C. did babysit K.R. a few times and that the children did stay overnight at the C.'s maybe five or six times.
>
> [11] Mrs. P.C., mother of J.C., testified in a forth right manner. There is no embellishment on her part either. She was adamant that the R.'s did not stay overnight, nor did her son J.C. babysit at the R.'s home. She produced a ledger confirming child care services to January 2002 (which was separate from any babysitting she did for the R.'s in the evenings).
>
> [12] J.C. denied babysitting K.R. at any time and vehemently denied the allegations of sexual assault and sexual touching.
>
> [12] It is difficult to elaborate on a denial. There is nothing inherently untruthful or contradictory in Mr. J.C.'s denial. His evidence on its own suggests nothing inherently believable or unbelievable. The defendant's evidence has to be contrasted with the evidence of the complainant, Ms. K.R., her mother, Mrs. R., and his own mother, Mrs. P.C., to be given its context. It is impossible to give full consideration to this denial without considering it and testing it in the light of the details of the allegation.

[34] The trial judge briefly referred to the positions of the parties and then turned to her analysis. She found that the appellant was either 12 or 13 at the time of the alleged offence. Given the absence of evidence the appellant was in a position of trust or authority toward the complainant or in an exploitive or dependent relationship with the complainant, the trial judge acquitted the appellant of the ss. 151 and 152 counts.

[35] With respect to the charge of sexual assault, the trial judge said that it was up to her to analyze and weigh all of the evidence and determine the strength of the Crown's case.

[36] The trial judge commented that the complainant's recollection of the C. home was quite accurate. Any different details that Mrs. P.C. had pointed out did not "detract from the allegation".

[37] With respect to babysitting, the trial judge noted the disagreement about where it took place. She said that Mrs. P.C. testified that if any kids stayed, they were in her room, and, even then, if it was 2:00 a.m. K.R. would have gone home.

[38] The trial judge found that Mrs. P.C. did babysit K.R. and her brothers at the C. home; hence, it was still possible that this instance could have occurred.

[39] The trial judge referred to: the lack of any animus between the two families and the absence of evidence that the complainant had drug or alcohol issues that could have affected her ability to recall the allegation. She then concluded:

> [25] I have assessed all of the evidence of all of the witnesses, including Mr. J.C., and I am not left in doubt by his evidence.
>
> [26] Based on all that I have heard before me, I find that the crown has proven its case beyond a reasonable doubt and I find Mr. J.C. guilty of count one, section 271 of the *Criminal Code*.

ISSUES

[40] Initially, the appellant's Notice of Appeal framed the issues as:

> (i) The Trial Judge erred in law by failing to provide sufficient reasons for conviction; and
>
> (ii) The Trial Judge erred in law by shifting the burden of proof for conviction.

[41] However, the appellant's factum also asserted that the trial judge misapprehended the evidence as to the appellant having had the opportunity to commit the offence. The Crown's factum expressed agreement—the trial judge had misapprehended the evidence, but it was not material nor played an essential role in the trial judge's reasons.

[42] The Court sought clarification from the parties, in particular, if they intended to ask the Court to deal with the misapprehension of evidence as a freestanding ground of appeal. The answer was yes. Both filed further written submissions in advance of the appeal hearing.

[43] While I am concerned that some of the trial judge's comments could be viewed as an impermissible shift of the burden of proof, I need not deal with this issue. I am satisfied that the trial judge's reasons are insufficient, and she misapprehended the evidence. Either error is sufficient to require a new trial.

[44] Insufficiency of reasons and misapprehension of evidence are conceptually distinct. In the circumstances of this case, it is difficult to talk about one without discussing the other. I will address them both after setting out the principles that govern.

THE PRINCIPLES

[45] As is usually the case, there is little disagreement over the principles. It is the application of the principles that provoke debate.

[46] Judges have a positive duty to provide meaningful reasons. It is based on: the need of the losing party to know why there has been an acquittal or conviction; public accountability; the goal of ensuring fair and accurate decisions; and, to permit effective appellate review (*R. v. R.E.M.*, 2008 SCC 51 at paras. 11-12).

[47] However, even if a judge neglects to fulfill her duty, success on appeal is by no means automatic. The appellant must demonstrate that the trial judge's reasons are so deficient that they foreclose meaningful appellate review (*R. v. Sheppard*, 2002 SCC 26 at para. 46; *R. v. Dinardo*, 2008 SCC 24 at para. 25).

[48] Sufficiency of reasons assessment is driven by context. It requires an appellate court to take a functional approach to the reasons, in the context of the evidence, and the live issues to be resolved by the trial judge. The approach was summarized by McLachlin C.J. in *R. v. R.E.M.* as follows:

> [35] In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[49] This Court summarized the law with respect to misapprehension of evidence in *R. v. Izzard*, 2013 NSCA 88:

> [40] To obtain a remedy on appeal based on an allegation that a trial judge misapprehended the evidence, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence - that is, she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in the decision to convict (see *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34).

[50] Material errors made in the course of credibility determination on the path to conviction can be fatal (see *R. v. C.L.Y.*, 2008 SCC 2; *R. v. P.(J.)*, 2014 NSCA 29; leave to appeal denied, [2014] S.C.C.A. No. 255).

ANALYSIS

[51] The appellant notes that the trial judge never said she rejected his evidence. However, the appellant concedes that it is not a difficult inference for this Court to draw—the trial judge must have done so.

[52] The trial judge had earlier set out the correct principles with respect to proper application of the criminal burden of proof, highlighting the avoidance of a straight credibility contest. She concluded:

> [25] I have assessed all of the evidence of all of the witnesses, including Mr. J.C., and I am not left in doubt by his evidence.
>
> [26] Based on all that I have heard before me, I find that the crown has proven its case beyond a reasonable doubt and I find Mr. J.C. guilty of count one, section 271 of the *Criminal Code*.

[53] The appellant argues that there is nothing in the trial judge's reasons to explain why she rejected the evidence of the defence and found the allegation proven.

[54] This is not one of those cases where the Appeal Court found no error despite the lack of detailed reasons for rejection of defence evidence (*R. v. J.J.R.D.* (2006), 218 O.A.C. 37; *R. v. R.D.*, 2016 ONCA 574; *R. v. Vuradin*, 2013 SCC 38).

[55] In *R. v. J.J.R.D.* and *R. v. R.D.* the accuseds' evidence was rejected even in the absence of obvious flaws. In *R. v. J.J.R.D.*, Doherty J.A., for the Court, explained why the trial judge's reasons were sufficient:

> [53] The trial judge's analysis of the evidence demonstrates the route he took to his verdict and permits effective appellate review. The trial judge rejected totally the appellant's denial because stacked beside A.D.'s evidence and the evidence concerning the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.
>
> [54] On the trial judge's reasons, the appellant knew why he was convicted. His daughter's evidence, combined with the credibility enhancing effect of the diary, satisfied the trial judge of the appellant's guilt beyond a reasonable doubt despite the appellant's denial of the charges under oath.
>
> [55] The trial judge's reasons allowed for effective appellate review. His reasons permitted this court to assure itself that the trial judge had properly apprehended the relevant evidence, applied the proper legal principles to that evidence, particularly the burden of proof, made findings of credibility that were available to him on the evidence, and ultimately returned a verdict based on the evidence and the application of the relevant legal principles to that evidence.

[56] Laskin J.A., in *R. v. R.D.*, writing for the Court, upheld a conviction where the trial judge found the complainant's evidence to be credible and reliable, and flatly rejected the accused's testimony despite the lack of obvious flaws. He emphasized that the bare rejection of an accused's denial can meet the sufficiency of reasons provided it is based on a considered and reasoned acceptance of the complainant's evidence:

> [18] The sufficiency point: the bare rejection of an accused's evidence will meet the two important purposes for giving sufficient reasons – explaining why the

> accused was convicted, and permitting effective appellate review – provided that the bare rejection is based on a "considered and reasoned acceptance" of a complainant's evidence. Implicitly, the bare acceptance of a complainant's evidence and the bare denial of an accused's evidence ("I accept the complainant's evidence; therefore I reject the accused's evidence") are unlikely to amount to sufficient reasons. A trial judge who relies on the formulation in *J.J.R.D.* should at least give grounds for accepting a complainant's evidence.
>
> …
>
> [21] In the case before us, the trial judge's reasons were sufficient. He did summarily reject the appellant's evidence though it had no obvious flaw in it. But he did so based on a "considered and reasoned acceptance" of K.Y.'s evidence. He discussed her evidence at length, including the discrepancies in it, and gave several grounds for why he found her evidence to be both credible and reliable.

[57] Similarly, in *R. v. Vuradin*, the trial judge's reasons were found to be sufficient. He found the complainant's evidence to be compelling, having the "ring of truth". The complainant was unshaken on cross-examination, the inconsistencies in her evidence were minor, and the appellant's theories were speculative. Karakatsanis J., for the Court, explained:

> [15] The core question in determining whether the trial judge's reasons are sufficient is the following: Do the reasons, read in context, show why the judge decided as he did on the counts relating to the complainant? In this case, the trial judge's reasons satisfy this threshold.
>
> [16] First, the trial judge found the evidence of the complainant compelling – that is, credible and reliable. He explained why, noting an exchange between the complainant and the investigating police officer to whom she expressed worry about being considered a bad girl because she may have liked what the appellant had done to her. The trial judge stated that this "had the ring of truth".
>
> [17] Second, the trial judge recognized the live issues relating to the complainant's credibility. He was not obliged to discuss all of the evidence on any given point or answer each and every argument of counsel: *R.E.M.*, at paras. 32 and 64; and *Dinardo*, at para. 30. Here, he noted the problems in her evidence – the lack of a hymen, inconsistency as to the number of incidents, the physical impossibility of some allegations, and leading questions by the police officer who took her statement. He addressed each of them, albeit briefly, ultimately finding that they were inconsequential to his conclusion. He characterized the appellant's suggestion of concoction as speculative.
>
> [18] Third, the trial judge considered the appellant's denial of the allegations. He acknowledged that the appellant's evidence may have been more fulsome if his command of the English language were better. Read in context, the trial judge's reasons reveal that he rejected the appellant's denial. Later in his reasons, in

> relation to the other counts, the trial judge stated that the denial was not truthful and did not raise a doubt.
>
> [19] I conclude that the reasons were sufficient – they allow for meaningful appellate review because they tell the appellant why the trial judge decided as he did. The trial judge found the complainant's evidence compelling, the problems in her evidence inconsequential, and the appellant's concoction theories speculative. The reasons reveal that the trial judge accepted the complainant's evidence where it conflicted with the appellant's evidence. No further explanation for rejecting the appellant's evidence was required.

[58] Here, the trial judge made no adverse findings of credibility against the appellant or Mrs. P.C. In fact, only positive references can be found. The trial judge did not provide any reasons for accepting the prosecution case. There is simply her conclusion that the Crown had proven its case.

[59] A trial judge need not refer to every argument made by counsel. Here, the appellant urged that there was no opportunity for the incident to have occurred. In addition, that there was ample uncontradicted evidence of: the age and interest gap between the appellant and his older brother; their intensely private nature; and, the obvious improbability of having three children sleeping in a single top bunk. Any one of these issues could serve to enhance the appellant's denial and detract from the vigour of the complainant's claim.

[60] How did the trial judge deal with these live issues? She did not. No mention is made of them—apart from her flawed view of the evidence about opportunity.

[61] While it is not difficult to conclude that the trial judge must have rejected the appellant's denial, it was not based on a considered and reasoned acceptance of the complainant's evidence. I would allow the appeal based on the insufficiency of reasons.

[62] The Crown, in its factum, candidly acknowledged the troublesome nature of the trial judge's reasons:

> 1. To say the least, the Trial Judge's reasons in this appeal are less than ideal. Reviewing them has caused anxious consideration for the Respondent.

[63] In addition, the trial judge plainly misapprehended the evidence on the key issue of whether there was even an opportunity for the appellant to have committed the offence.

[64] Evidence of opportunity can be important. It can either tend to establish guilt or, in some circumstances, its absence can preclude liability (*R. v. Doodnaught*, 2017 ONCA 781 at paras. 66-70 and 83).

[65] In this case, if the evidence of the appellant and Mrs. P.C. were accepted or raised a reasonable doubt about opportunity, the Crown would fail to prove the allegation.

[66] The importance of this issue is conceded in the Crown's factum:

> 5. The basis for the Trial Judge's verdict can be discerned if this Court is satisfied when the Trial Judge's reasons are read in context that:
>
> - **The Trial Judge was able to make a factual finding that the Appellant had the opportunity to commit the sexual assault;**
> - The Trial Judge rejected the Appellant's denial;
> - The Trial Judge considered the reliability of K.R.'s evidence and, in the context of all the evidence, found her evidence credible. Finding K.R. credible in the circumstances of this case would explain in large part why the Appellant's denial was rejected;
> - The Trial Judge correctly applied the burden of proof by following the test to assess credibility set out in *W. (D.)* and did not engage in a credibility contest.
>
> 6. **If this Court is not satisfied the Trial Judge's reasons, when read in context, do not disclose all of the above-noted points, the appeal should be granted.** If this Court is satisfied the Trial Judge's reasons do disclose the basis for her verdict, this appeal can be dismissed.
>
> [Emphasis added]

[67] The appellant does not suggest that the guilty verdict is unreasonable or not supported by the evidence. The trial judge could have rejected the evidence of Mrs. P.C. and the appellant and found that the appellant had the opportunity to have committed the offence. The problem is that the trial judge misapprehended the evidence along the path to her finding that the appellant had the opportunity to have committed the offence.

[68] Whether the sexual conduct could have occurred as alleged was very much a live issue. The evidence about opportunity sharply conflicted. The complainant testified that she and her siblings stayed overnight at the appellant's house on five or six occasions. On one of those, the appellant and his brother had her engage in sexual conduct. After the conduct, she went back to bed for the night.

[69] The complainant's mother testified that there were multiple times in later years that her children stayed overnight at the appellant's house.

[70] On the other hand, the appellant denied that the complainant and her siblings ever stayed overnight at his home. Mrs. P.C. testified that she never babysat the complainant and her siblings at her home. When she was asked to babysit, she would to go the R. home, but never stayed there overnight. Usually Mr. R. would be home by 2:00 a.m. and she would then go home to her own house.

[71] Mrs. P.C. was adamant that Mrs. R. and the complainant were incorrect—the R. children were never babysat at her home.

[72] Faced with this clear conflict in the evidence on opportunity, the trial judge was required to make credibility findings. She could have disbelieved Mrs. P.C.'s evidence or found it to be credible and hence raise a reasonable doubt.

[73] Unfortunately, the trial judge did neither. Instead, she misapprehended Mrs. P.C.'s evidence. This underpinned her finding of opportunity. She said Mrs. P.C. had testified that even if the complainant and her siblings were being babysat at her home, she would send them home, even if it was 2:00 in the morning:

> [23] . . . Mrs. P.C. also stated that if any kid stayed, they stayed in her bedroom**, but then she said even if it was 2:00 A.M. K.R. would have gone home**. The defendant said he cannot recall K.R. spending the night and that some kids did stay but it was past these dates.
>
> [Emphasis added]

[74] However, Mrs. P.C. was emphatic that the R. children were never babysat at her home. She would always go to the R. home. Mrs. P.C. never stayed overnight—*she* would go home even if it was 2:00 in the morning.

[75] The misapprehension of Mrs. P.C.'s evidence created the foundation for the trial judge to find that the appellant had the opportunity to have committed the offence. Immediately after referring to her evidence, she found:

> [24] Based on the evidence before me, I find that Mrs. P.C. did babysit K.R. and her brothers at P.C.'s home on a few occasions, and even if she did send them home at 2:00 A.M., **it is still possible that this instance could have occurred prior to K.R. going home.**
>
> [Emphasis added]

[76] As noted earlier, the Crown conceded that the trial judge misapprehended Mrs. P.C.'s evidence, but suggests the misapprehension was not material. I am unable to accept this proposition, particularly in light of the Crown's repeated acknowledgement that opportunity to commit the offence was a material or substantive issue.

[77] The "evidence" the trial judge referred to in para. 24 of her decision did not exist. She used it to reconcile conflicting evidence and to make a key finding that the appellant had the opportunity to have committed the offence.

[78] This material misapprehension led to a miscarriage of justice. It was not based on the evidence adduced at trial. The conviction cannot stand. In addition, the trial judge's misapprehension also amounts to an error in law (*R. v. P.(J.)*, *supra*). I would decline to apply the curative proviso.

[79] I would therefore allow the appeal and order a new trial.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.