NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. N.M.*, 2019 NSCA 4

Date: 20190123
Docket: CAC 469414
Registry: Halifax

Between:

N.M.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4(1) and (2) of the *Criminal Code*

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	October 3, 2018, in Halifax, Nova Scotia
Subject:	*W.(D.)* analysis relating to credibility; use of out of box demeanour
Summary:	The appellant was convicted of nine sexual offences. The complainant was his daughter who testified the sexual abuse began when she was four years of age and continued until she was 15. At trial, the trial judge permitted the complainant to testify via closed circuit television. The Crown had neither filed a formal motion, nor any affidavit evidence in support of its request to have the complainant testify remotely.

The trial judge identified credibility as being a "key issue". He found the evidence of the complainant to be "compelling". On the other hand, the trial judge noted concerns with the appellant's evidence that negatively impacted on his credibility.

At a later sentencing hearing, the trial judge imposed concurrent sentences of four years. The appellant appealed both conviction and sentence. Given the outcome of the conviction appeal, it was not necessary to address the issues raised with respect to the sentences imposed.

Issues: (1) Did the trial judge's *W.(D.)* analysis give rise to sufficient concern to justify appellate intervention?

(2) Did the trial judge use the appellant's out of box demeanour in his credibility assessment and, if so, does that justify appellate intervention?

(3) Did the trial judge's decision to permit the complainant to testify via closed-circuit television raise concerns justifying appellate intervention?

Result: Appeal allowed and conviction set aside on the basis of Issues 1 and 2.

With respect to Issue 1, the reasons of the trial judge were insufficient to establish that the principles underpinning *W.(D.)* were properly applied by the trial judge. This, along with the trial judge's failure to consider evidence potentially supportive of the defence, renders his ultimate credibility determination and subsequent finding of guilt problematic.

With respect to Issue 2, the trial judge clearly placed major emphasis on the appellant's demeanour while listening to the testimony of other witnesses. This negatively impacted on the trial judge's view of the appellant's credibility. It was an error for the trial judge to rely on the appellant's demeanour in such a significant fashion.

With respect to Issue 3, although preferred practice would have the Crown file a formal motion with supporting affidavit evidence, in the circumstances of this case, the Court was of the view that the trial judge did not err in permitting the complainant to testify via closed-circuit television.

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Judges:	Bryson, Saunders and Bourgeois, JJ.A.
Appeal Heard:	October 3, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Bryson and Saunders, JJ.A. concurring
Counsel:	Robert J. Currie and Lee V. Seshagiri, for the appellant James A. Gumpert, Q.C. and Constance MacIsaac, 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 victim 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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Reasons for judgment:

[1] Following a two-day trial in Provincial Court, the appellant, N.M., was found guilty of nine sexual offences. The complainant was his eldest daughter, S.M., who alleged her father had engaged in various forms of sexual contact with her. She testified the sexual abuse began when she was four years of age, and continued on a frequent basis until she was 15.

[2] After hearing the evidence, including the testimony of the appellant, and considering the submissions of counsel, Judge Paul Scovil issued a written decision (unreported), concluding that the Crown had proven the charges beyond a reasonable doubt. The trial judge recognized that credibility was "a key issue". He found the evidence of the complainant to be "compelling". On the other hand, the trial judge noted concerns with the appellant's evidence that negatively impacted on his credibility.

[3] At a later sentencing hearing, the trial judge imposed concurrent sentences of four years in relation to the offences.

[4] The appellant appeals to this Court, alleging the trial judge made fatal errors in relation to his credibility assessment and the sentencing. For the reasons to follow, I would grant the appeal on conviction, set aside the guilty findings and return the matter for a new trial. As such, it is not necessary to address the issues raised regarding the sentence imposed.

The decision under appeal

[5] To put my analysis in context, it is helpful to set out certain aspects of the trial decision. The Crown called the evidence of two police officers, the complainant (S.M.), the complainant's younger sister (M.M.) and the complainant's mother (K.M.). The appellant testified on his own behalf. The evidence of the police officers is not relevant to the issues raised on appeal.

[6] The complainant and her sister were permitted to testify via closed-circuit television (CCTV). They were 19 and 15 years of age, respectively, at the time of trial. The complainant was further permitted to have a support person present with her during her testimony. In his written reasons, the trial judge set out the complainant's evidence as follows:

[9] The Crown called N.M.'s daughter, S.M. She was born on *, 1997. She currently lives with her mother and sister. Prior to a separation of her parents she resided with her entire family including the accused. Her mother and father separated on February 14th, 2015. There was also a prior separation when S.M. was between grade one and two in the summer. She described her father as emotionally abusive and controlling.

[10] S.M. described a sexual relationship with her father that commenced when she was four years old. The activity continued to occur for about ten years. S.M. described the last of such activity when the accused pulled her on his lap and placed his hands into her genital area, saying, "Oh you know you want it." She believed that specific incident occurred on New Years 2015 on Main Street in *.

[11] S.M. went on to describe that prior to the last event there were incidents where, when she wanted buy [*sic*] things or need school money, her father would convince her to perform sexual acts on him in order to obtain them. She moved out of the family home at age 16.

[12] S.M. described earlier contacts where her father brought her upstairs and had her feel his penis underneath his jeans. She felt she was four years old at the time. She then estimated over one hundred sexual encounters between her and her father. She recounted one specific time which the accused took her into the basement alone and took off her clothes. He then fondled her breasts and inserted his fingers into her vagina. N.M. then took his own pants off and masturbated until he ejaculated on S.M.'s back. At this point, in S.M.'s evidence, her father N.M broke down in Court sobbing.

[13] S.M. went on to describe *, * County between grade two and ten.

[14] She went on to describe the accused touching her nipples with his mouth together with other occurrences. He would sometimes wake her up in the morning by touching her vagina and breasts. This would occur sometimes when her mother was away. She described performing oral sex on her father on just one occasion.

[15] She indicated sexual activity happened so often between her and her father it had become confusing as to what happened and when. She described how these incidents would sometimes occur when she would ask her father for expenditures of items that would be withheld until she provided sexual favours.

[16] S.M. indicated that these sexual encounters would occur as many as four times a week, often when either her mother was out or when everyone was asleep.

[17] In cross-examination S.M. described a fight with her parents over drug paraphernalia and the fact that she stayed overnight at her boyfriend's. This occurred about five months prior to her giving a statement to the police regarding these matters.

[7] The younger sister's evidence was noted as follows:

> [18] The Crown also called M.M. to testify. She is the sister of S.M. She identified S.M. as her father's favorite child growing up. He bought her more things. As a consequence of this action, M.M. felt the way they were treated was unfair. M.M. recalled one occasion where she saw her sister S.M. sitting on her father's lap. She observed her father's hand lower on S.M's back that [*sic*] what appeared to be inappropriately below the pant line and inside of her pants.

[8] The complainant's mother's evidence was recounted by the trial judge as follows:

> [19] The Crown called K.M., the mother of S.M. and wife of N.M. She confirmed areas the family lived in, as well as the fact there were opportunities for N.M. to be alone with the complainant. In cross-examination, she felt N.M. treated the children equally as far as gifts.

[9] The appellant's evidence was set out in four paragraphs of the trial judge's reasons:

> [20] The accused took the stand himself. He described S.M. as a "rough customer" as a teen. Further, that he was hard on her. He then indicated at times he would get soft and buy her things. He stated S.M. "always got out of control", that he would have to go pick up S.M. when she was drunk and she would vomit in his vehicle. S.M. would threaten him. He described a physical struggle between S.M. and her mother. That argument ended up being physical with him as well. He described her behaviour as getting to the point he would deal with her.
>
> [21] The accused was only asked once in direct examination about the incidents before the Court. His counsel said to him "did any of that occur". His only reply was "no".
>
> [22] In cross-examination, the accused was asked about two exceptional outbursts in Court. He explained them as shock as [*sic*] what his daughter had said and that he had been away from his daughters for two years. The courtroom outburst during M.N.'s [*sic*] evidence came when his daughter described him having his hand down the back of S.M.'s pants. At that point the accused started to leave the courtroom. He had to be admonished by the Court to sit back in the courtroom. N.M replied that the testimony of S.M was "frigging bullshit". In cross-examination, he explained it away as worry that K.M. [*sic*] was going to concoct evidence to support S.M. against him.
>
> [23] N.M. also confirmed that he had many opportunities to be alone with S.M. N.M. did say he had no recollection of the incident described by K.M. [*sic*] where S.M. was sitting in his lap. N.M. denied his children ever being in bed with him except maybe as babies.

[10] The trial judge recognized that credibility was central to the case before him. After setting out the law he used to guide his deliberations, the trial judge gave his reasons for finding the appellant guilty:

> [34] Here I found the demeanour of the accused, together with other factors which I will outline, such that I find where his evidence differs from other witnesses to be evidence that I do not accept. His outburst in Court and his demeanor while observing Crown witnesses made a marked impact on his credibility. His short denial devoid of any substance, when compared against the whole of the evidence elicited by the Crown rings hollow and is not accepted.
>
> . . .
>
> [38] The accused, as well, went to extreme to vilify and impeach S.M.'s character. I find that it was unwarranted and designed to castigate a truthful witness.
>
> [39] The evidence of the complainant, S.M., was compelling. While there were some inconsistencies, they did not detract from her overall credibility. Her evidence clearly showed that N.M. sexually assaulted her over much of her young life. Her evidence showed opportunity for the accused to have been able to engage in the conduct she described. As well, her testimony that purchases were made or withheld for purposes of sexual predation were compelling.
>
> [40] I additionally find that S.M.'s sister's evidence of seeing her father in a position of potential impropriety to be corroborative of the sexual assaults. Even without the evidence of K.M., I would find evidence of sexual assaults by N.M on his daughter to be proven beyond a reasonable doubt.

[11] Paragraphs [35] to [37] of the trial judge's reasons omitted above relate to his conclusion that certain events surrounding the appellant's arrest were irrelevant. Those reasons have not been placed in issue on appeal. As such, the entirety of the trial judge's reasons for finding the appellant guilty are contained in the paragraphs quoted above.

Issues

[12] In his Notice of Appeal, the appellant sets out the following grounds of appeal relating to his conviction:

1. The trial judge erred in his assessment of the appellant's credibility; and
2. The trial judge provided insufficient reasons to convict the appellant.

[13] In his factum, the appellant submits that the trial judge's credibility assessments were unfair in that

- The trial judge gave an erroneous self-instruction on *W.(D.)* (*R. v. W.(D.)*, [1991] 1 S.C.R. 742), with a resulting misapplication to the evidence;
- The trial judge erroneously relied on the appellant's demeanour outside the witness box;
- The trial judge erroneously allowed the complainant to testify via CCTV; and
- The trial judge erred in his treatment of corroborative evidence and applied different levels of scrutiny as between the Crown and defence.

[14] After having considered the submissions and reviewing the record, I would reframe the issues as a three-part question. Should the appeal be allowed because of the trial judge's:

1. articulation and application of the *W.(D.)* analysis?
2. use of the appellant's out of box demeanour in his credibility assessment?
3. decision to permit the complainant to testify via CCTV?

[15] The appellant's concerns regarding the trial judge's treatment of corroborating evidence will be intertwined in the analysis to follow.

Standard of Review

[16] I will return to the standard of review when addressing the issues above. For now, it suffices to reiterate the lens through which this Court considers alleged errors of law and fact.

[17] Succinctly, the trial judge must have correctly identified and applied the relevant law. Short of palpable and overriding error, we must defer to the trial judge's factual findings. Absent an error of legal principle, deference is also afforded to a trial judge's credibility assessment. In *R. v. G.E.H.*, 2012 NSCA 69, this Court said:

> [15] The appellant submits that the judge erred in his assessment of credibility and reliability. The unique position that a trial judge enjoys in being able to see

> and hear the witnesses has been emphasized many times: see *R. v. Gagnon*, 2006 SCC 17 at ¶ 11; *R. v. R.E.M.*, 2008 SCC 51 at ¶ 68. Findings of credibility are entitled to deference and intervention on appeal is rare: see *R. v. Dinardo*, 2008 SCC 24 at ¶ 26. Appellate courts have been cautioned against substituting their decisions on credibility. They should not parse, dissect or microscopically examine a trial judge's reasons for judgment: *R. v. C.L.Y.*, 2008 SCC 2 at ¶ 11. Rather, the decision should be read as a whole.

Analysis

Did the trial judge's W.(D.) analysis give rise to sufficient concern to justify appellate intervention?

[18] When setting out the law, the trial judge wrote:

> [24] It is the most fundamental rule that a trial judge must follow, that there lies on the accused a presumption of innocence which follows him throughout the trial and into my deliberation as well.
>
> [25] The Crown must prove beyond a reasonable doubt the guilt of the accused on each and every element of the offence. (see *R. v. Vaillancourt* [1987] 2 S.C.R. 636) That principle of reasonable doubt applies to issues of credibility as well as fact. (see *Ay* [1994] B.C.J. No. 2024.
>
> [26] It is of crucial importance in a case such as this that those factors which the Supreme Court of Canada laid out in *R. v. W.D* [1997] [*sic*] 1 S.C.R. 742 be applied when judging this matter.
>
> [27] These factors are as follows:
>
> - If I believe that evidence which might show the innocence of the accused or cast a reasonable doubt on the Crown's case, I must acquit.
>
> - If I am left being unsure as to whether I believe the evidence of N.M., I must acquit.
>
> - Even if I accept the evidence of N.M then before I convict I must be convinced beyond a reasonable doubt of the guilt of the accused on all the evidence.
>
> [28] The principle of *W.D.* attach to finding [*sic*] of credibility as well. **In the matter before me, credibility is a key issue.** (Emphasis added)

[19] The trial judge was attempting to reference Justice Cory's three-pronged approach found at page 758 of *W.(D.)*. It provides:

> First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[20] The Crown acknowledges that there is an error in the third step articulated by the trial judge, but submits that the words "do not" were unintentionally omitted. It argues the trial judge clearly intended to state: "Even if I **do not** accept the evidence of N.M. then before I convict I must be convinced beyond a reasonable doubt of the guilt of the accused on all the evidence".

[21] The appellant argues that the error is not just a typographical slip, but indicative of a larger concern with the trial judge's understanding and application of the *W.(D.)* principles. In addition to the conceded error in the third prong, the appellant says the trial judge also completely omitted Justice Cory's second consideration – if the trial judge did not believe the testimony of the accused, he was still required to consider whether he was left in reasonable doubt by it.

[22] The appellant says that the trial judge's error becomes clear when one considers the likely genesis of the phrasing he used. It is submitted that the wording used by the trial judge stems from the Supreme Court of Canada's decision in *R. v. J.H.S.*, 2008 SCC 30 where Justice Binnie addressed the consequences when a trier of fact is uncertain "whether to believe the accused's testimony or not" (at para. 11). The appellant says that Justice Binnie's comment in *J.H.S.* was intended to supplement the three steps in *W.(D.)*, not replace any of them.

[23] I agree with the appellant's view of the import of *J.H.S.* In *R. v. P.D.B.*, 2014 NBQB 213, Justice Ferguson helpfully explains the modification of *W.(D.)*:

> [67] The test outlined by Cory J. in *W. (D.)* is as follows, although I have incorporated the second assessment element arising from *J.H.S.* that was not part of the original three *W.D.* credibility evaluation guidelines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.
>
> Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

> Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused. (Emphasis in original)

[24] The appellant's complaints with the trial judge's analysis engage not only a consideration of the *W.(D).* framework, but also principles relating to the sufficiency of reasons and the misapprehension of evidence. It is helpful at this juncture to set out a number of them.

[25] The following general principles are of assistance when considering the trial judge's *W.(D.)* analysis:

- The purpose of the *W.(D.)* framework is to "explain what reasonable doubt means in the context of evaluating conflicting testimonial accounts" where the credibility of those accounts are at issue (*J.H.S.* at para. 9);
- An allegation that a judge erred in applying *W.(D.)* is a question of law, reviewable for correctness (*R. v. J.A.H.*, 2012 NSCA 121 at para. 7);
- Failing to use the precise wording in *W.(D.)* is not fatal, either before a jury (*W.(D).* at pg. 758; *J.H.S.* at para. 14), or by a judge alone (*R. v. Vuradin*, 2013 SCC 38 at para. 26);
- An exact articulation of the three factors in *W.(D.)* will not prevent appellate intervention if a trial judge's reasons reveal that the underlying principle of reasonable doubt was not applied correctly (*R. v. J.P.*, 2014 NSCA 29 at paras. 62 to 64, 73 and 85);
- In considering a trial judge's reasons, they should not be "cherry-picked", or parsed, but rather considered as a whole to determine whether the trial judge correctly applied the principles *W.(D.)* intended to safeguard.

[26] The following principles relate to the sufficiency of reasons in the context of a *W.(D.)* analysis:

- If the trial judge's reasons are such that an appellate court cannot determine whether the trial judge properly applied the burden of proof and principle of reasonable doubt to credibility, intervention is warranted (*R. v. Sheppard*, 2002 SCC 26 at para. 68; *R. v. Graves*, 2000 NSCA 150 at para. 23);

- In terms of the adequacy of reasons, a bare rejection of the accused's evidence will be found to be sufficient, provided that the trial judge has undertaken a "considered and reasoned acceptance" of the complainant's evidence. In *R. v. R.D.*, 2016 ONCA 574, Justice Laskin explained:

> [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.
>
> [19] In *J.J.R.D.*, Doherty J.A. placed his point about the sufficiency of reasons in the context of the evidence as a whole and the reasonable doubt standard. The accused's denial in that case, when "stacked beside" the complainant's evidence and her diary entries, "did not leave the trial judge with a reasonable doubt." And so Doherty J.A. explained that "an outright rejection of an accused's evidence" may be "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence…" (emphasis added). In doing so, he addressed the need for the trial judge to be convinced that the conflicting credible evidence established the accused's guilt beyond a reasonable doubt.
>
> [20] The burden of proof point: a trial judge who says only "I reject the accused's evidence because I accept the complainant's evidence" risks being held by an appellate court to have chosen which of the two parties to believe and failed to determine whether, on all the evidence, the accused's guilt had been proved beyond a reasonable doubt. That risk is what Cronk J.A. cautioned about in *O.M.* But, as *O.M.* also shows, a trial judge can still reject an accused's evidence because either the complainant's evidence or other evidence establishes the accused's guilt beyond a reasonable doubt. Thus, *J.J.R.D.* and *O.M.* are entirely consistent.
>
> [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. (Emphasis in original)

[27] With respect to the misapprehension of evidence, Justice Watt recently explained in *R. v. Doodnaught*, 2017 ONCA 781:

> 71 A misapprehension of evidence may involve a failure to consider relevant evidence; a mistake about the substance of evidence; a failure to give proper

> effect to evidence or some combination of these failings: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218. To succeed before an appellate court on a claim of misapprehension of evidence, an appellant must demonstrate not only a misapprehension of the evidence, but also a link or nexus between the misapprehension and the adverse result reached at trial.
>
> 72 To determine whether an appellant has demonstrated that a misapprehension of evidence has rendered a trial unfair and resulted in a miscarriage of justice, an appellate court must examine the nature and extent of the misapprehension and its significance to the verdict rendered by the trial judge in light of the fundamental requirement of our law that a verdict must be based exclusively on the evidence adduced at trial. The misapprehension of evidence must be at once material and occupy an essential place in the reasoning process leading to the finding of guilt: *Morrissey*, at p. 221.
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> 73 The standard set for misapprehension of evidence to warrant appellate reversal is stringent. An error in the assessment of the evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground: *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 56.
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> 74 Where an appellant alleges a misapprehension of evidence, an appellate court should first consider the unreasonableness of the verdict rendered at trial. A verdict may be unreasonable because it is one that could not have been reached by a properly instructed trier of fact acting reasonably, or because it can be seen from the reasons of the trial judge that the verdict was reached illogically or irrationally, in other words, due to fundamental flaws in the reasoning process: *Sinclair*, at paras. 4, 44.
>
> 75 Where an appellant succeeds in establishing that a verdict is unreasonable, an appellate court will enter an acquittal. On the other hand, where the appellate court is satisfied that the verdict is not unreasonable, the court must determine whether the misapprehension of evidence occasioned a miscarriage of justice. An appellant who shows that the error resulted in a miscarriage of justice is entitled to a new trial: *Morrissey*, at p. 219.

[28] From the principles set out above, it is clear that the trial judge's misstatement of *W.(D.)* would be inconsequential if his reasons otherwise demonstrate that he applied the proper burden of proof to his credibility analysis. After a full review of the record, I am not satisfied that the trial judge's reasons demonstrate a proper application of the principles *W.(D.)* was intended to safeguard. The inadequacy of the trial judge's reasons and his failure to consider corroborative evidence potentially supportive of the appellant render his ultimate credibility determination and subsequent findings of guilt problematic.

[29] To explain this conclusion, it is helpful to recall that the trial judge identified the assessment of credibility as being a "key issue." It is also helpful to repeat the trial judge's reasons for finding the appellant lacked credibility, which led to a finding of guilt:

> [34] Here I found the demeanor of the accused, together with other factors which I will outline, such that I find where his evidence differs from other witnesses to be evidence that I do not accept. **His outburst in Court and his demeanor while observing Crown witnesses made a marked impact on his credibility. His short denial devoid of any substance**, when compared against the whole of the evidence elicited by the Crown rings hollow and is not accepted.
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> [38] The accused, as well, **went to extreme to vilify and impeach S.M.'s character.** I find that it was unwarranted and designed to castigate a truthful witness.
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> [39] **The evidence of the complainant, S.M., was compelling.** While there were some inconsistencies, they did not detract from her overall credibility. Her evidence clearly showed that N.M. sexually assaulted her over much of her young life. Her evidence showed opportunity for the accused to have been able to engage in the conduct she described. As well, her testimony that purchases were made or withheld for purposes of sexual predation were compelling.
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> [40] I additionally find **that S.M.'s sister's evidence of seeing her father in a position of potential impropriety to be corroborative of the sexual assaults. Even without the evidence of K.M., I would find evidence of sexual assaults by N.M. on his daughter to be proven beyond a reasonable doubt.** (Emphasis added)

[30] The trial judge's reasoning demonstrated that his credibility conclusion was founded on:

- the appellant's demeanour;
- the appellant's short denial;
- the appellant's "extreme" attempts to vilify the complainant;
- the compelling nature of the complainant's evidence, including on the issues of opportunity, and that purchases were made or withheld to facilitate the abuse;
- the younger sister's observation was corroborative of the sexual assaults; and
- the evidence of K.M. also supporting a finding of guilt.

[31] The trial judge's assessment of the appellant's demeanour will be addressed later in my analysis. My concern at this point relates to the trial judge's treatment of the evidence of K.M., the complainant's mother. There is, in my view, valid concern that the trial judge either misunderstood or failed to consider the evidence of this witness. In summary, the evidence of K.M. did not provide evidence of sexual assaults perpetrated on the complainant by the appellant. To the contrary, in many respects, it was supportive of the defence and, if accepted, capable of raising a reasonable doubt. Further, if accepted, K.M.'s evidence was relevant to the factors upon which the trial judge based his credibility determination.

[32] The trial judge's three-sentence review of K.M.'s evidence can be found earlier herein (see [8]). In addition to the evidence referenced by the trial judge, K.M. also testified that:

- she remained separated from the appellant and did not plan to reconcile with him;
- the complainant and the younger sister were residing with her;
- she did not believe that the appellant treated any of the children differently. She testified in direct:

Q. Okay. Now can I ask you, in terms of your observations of, of your husband [N.M.] and his three children, can you tell us what kind of relationship he, he had with [S.M.], from your observations?

A. A good one, until she turned into a teenager.

Q. Okay. And how did the relationship that he had with [S.M.] compare in your observation to the relationship he had with his other two children?

A. I don't know what you mean.

Q. Well, was it the same or different, the relationship that, that you saw that [N.M.] had with [S.M.], compared to the relationship...

A. I felt it was the same.

Q. Okay. So you, you in your observations thought the relationship that your husband had with [S.M.] was the same as the relationship he had with your two other siblings, not, not different at all?

A. Yeah.

- she and the appellant jointly shared parenting responsibilities in the household, including discipline of the children. She testified in direct:

Q. Okay. Now, can...I want to ask you a little about the, the parenting in the, in the household. And I would like to know, were, were both you and [N.M.]

involved in the setting of rules and the enforcing of rules with respect to your three children?

A. Yes.

Q. Okay. And was that task shared equally or otherwise?

A. Equally.

Q. Okay. And was...in terms of that setting of rules and enforcing them, were there various tasks that you took on that he didn't take on or was it just right down the middle with respect to everything?

A. It was a team effort.

Q. A team effort? Okay. And so the setting of rules with respect to curfews and the enforcing of that, was that jointly shared?

A. Yes.

- she never observed anything inappropriate occurring between the appellant and the complainant, and had no indication that the complainant may have been sexually abused by the appellant until a month following her separation from him (March 2015);

- she had no recollection of observing the appellant in bed with the complainant, other than when she was a small baby;

- she described an incident in February 2015 that resulted in the complainant leaving the family home. She testified:

Q. Okay. There was, I guess an incident shortly before that in February, around Valentine's Day?

A. Yeah.

Q. Can you take me back? Did they have some sort of fight between the two of them?

A. It was the fight between me,...

Q. Ah, ah...

A. ...me and [S.M.] and [N.]...

Q. Okay. And what was this...

A. Well, we were arguing with her because she was spending a lot of time with her boyfriend. **And she was spending a lot of time away and starting to rebel a lot. Like, getting drunk and we suspected drugs, like, marijuana.**

Q. Yes.

A. So, this particular day she had just been at [J.'s], her boyfriend's, **for I think four nights.** And she came home and she wasn't even home for an hour

and she was announcing she was going to a friend's house. And I said, I just need you to stay home, [S.M.], and spend time with the family. Why are you always spending time away? **And that's when she really...she was hysterical** and she just wanted to go.

Q. Okay. Was it she...had she been gone for multiple nights at that point?

A. Yes.

Q. And did you know where she was or just assumed that she was at her boyfriend's?

A. I assumed she was.

Q. Okay. So she didn't announce where she was going when she'd leave?

A. She would usually leave with him in the car, so.

Q. Okay. And was this common at that point?

A. Pardon?

Q. Was that common at that point? **Was she just leaving here and there?**

A. **Yes.**

Q. Okay. And I think we heard a bit about a curfew. So was she technically under a curfew at that time?

A. Yes.

Q. Can you describe what happened in the...it was in her bedroom this fight occurred in February?

A. Right.

Q. So what, what physically occurred between everyone?

A. I was in the room telling her not to pack, to stay home. **And [N.] came in and said, what's going on? And she lunged at him and was striking him with her fists.**

Q. Yeah.

A. So he took her arms and he put her on her bed to control her.

Q. Okay.

A. **And then she started kicking him on his chest...**

Q. Okay.

A. ...and then she flip...rolled off the bed. And then after that, we just drove her to where she wanted to go.

Q. Okay. Would it be fair to say that she was kicked out at that point or was she free to come home?

A. She wasn't kicked out. She just chose to not come back. Not to come home.

Q. And that was the last time that she came to the house?

A. Yes. (Emphasis added)

[33] None of the above testimony was referenced by the trial judge. He did not make any adverse finding with respect to K.M.'s credibility. The potential relevance of K.M.'s evidence is heightened when one considers the following aspects of the complainant's evidence (also not referenced by the trial judge):

- she testified the appellant was "emotionally abusive" and "controlling" towards the whole family and a "monster". This was potentially inconsistent with K.M.'s description of shared parenting and discipline roles between them;

- she testified her father first sexually assaulted her at the age of four. She described he took her to his upstairs bedroom and got in the bed where sexual touching took place. She testified her mother was home and walked by the bedroom when they were in bed together. This is potentially inconsistent with K.M. testifying she had no recollection of seeing the appellant and the complainant in bed, except as a small baby;

- she testified her mother had asked her three times when she was "really young" whether anything inappropriate was occurring between her and the appellant. This is potentially inconsistent with K.M.'s testimony that she had no reason to suspect alleged sexual abuse of the complainant during the marriage;

- with respect to the incident in February 2015, the complainant testified:

Q. W ... , what had led to that? Or you leaving the home?

A. Uhm, I came home, uhm, from spending the night with my boyfriend and we got into a fight because my mom found drug par ... , paraphernalia in my room and my dad was mad at me because I had left home with my boyfriend.

Q. Okay, so you had gone out for the night without telling anybody?

A. I, I told them where I was going but my dad didn't know I was spending the night with my boyfriend.

Q. And was the argument with your mother or your father?

A. It was with my mom at first and then my dad intervened.

Q. Okay. And where did it take place?

A. Uhm, It was in my bedroom.

Q. So this was about five months before you gave your statement with police?

A. Yes.

Q. And it escalated at some point? Can you tell me what happened in that argument?

A. Uhm we started yelling at each other and we started swearing and cursing and at one point, my dad came towards me and I lifted up my arms because I thought he was going to hit me and, **at that point, we just started to fight with each other and he ended up hitting me in the face and I ended up on the other side of the room on the floor.**

Q. Okay. And you say you lifted your arms up. Are you saying that you hit his face with your hand or your forearms or what part?

A. I lifted up my arms in defence because I thought he was going to.

Q. Okay. And did any part of your arms or hands hit his face?

A. No.

Q. Okay. And did you, I guess, what did he do, did he try to restrain you or anything like that, how did he deal with you, physically?

A. It was more of a pushing me away from him than hitting me.

Q. Was he trying to get between you and your mother?

A. No. My mother was on the other side of the room.

Q. Okay and did you kick him at any time?

A. No.

Q. And so he was coming at you. Are, you're saying that you didn't hit him first?

A. I don't believe I did, no.

Q. And you said your mother was there. Was there anybody else present besides your father and you?

A. Uhm, my brother was home but he wasn't in the room when it was happening.

…

Q. And you said you had spent the night at your boyfriend's that night, the previous night. **Is it possible you were gone for four days?**

A. No.

Q. And you said she had found drug paraphernalia. That was a, a marijuana pipe?

A. Yes.

Q. And what happened after that? So after everyone cooled down?

A. Uhm, I was going to leave my house but my parents wouldn't let me walk so they drove me to my boyfriend's house and I never went home after that.

Q. So both your mother and father drove you to your boyfriend's after that?

A. Yes.

Q. And that's the last time you saw your father in person?

A. Yes.

Q. And it was your last time in that house?

A. Yes. (Emphasis added)

[34] There are a number of inconsistencies between K.M.'s description of the February 2015 altercation and that of the complainant. K.M.'s evidence, if accepted, suggests the complainant may have been the aggressor, lunging at the appellant and striking him. If accepted, the trial judge could have questioned why the complainant's version differed, and whether she was attempting to demonize the appellant. A full consideration of this evidence may have given rise to potential credibility concerns relating to the complainant's evidence.

[35] I return to the factors articulated by the trial judge that informed his credibility determination. I remain mindful of the deferential lens through which the trial judge's credibility assessment must be viewed. However, the record, including the evidence reviewed above, in concert with the trial judge's reasons, satisfy me that his credibility assessment was such that it may have resulted in a miscarriage of justice.

[36] The trial judge found the appellant "went to extreme to vilify and impeach" the complainant's character and that "it was unwarranted and designed to castigate a truthful witness." The trial judge did not explain how the appellant went to extreme lengths to vilify the complainant. Looking elsewhere in his reasons, a possible explanation is his reference to the complainant's evidence:

> [20] The accused took the stand himself. He described S.M. as a "rough customer" as a teen. Further, that he was hard on her. He then indicated at times he would get soft and buy her things. He stated S.M. "always got out of control", that he would have to go pick up S.M. when she was drunk and she would vomit in his vehicle. S.M. would threaten him. He described a physical struggle between S.M. and her mother. That argument ended up being physical with him

> as well. He described her behaviour as getting to the point he would deal with her.

[37] With respect, it is difficult to understand how the trial judge concluded the appellant "went to extreme to vilify" the complainant, in light of the evidence of the mother, K.M. As noted above, K.M.'s testimony supported that the complainant at age 15 was drinking, using drugs and staying out for multiple days in a row with her boyfriend. It further supports the appellant's assertion that the complainant was the aggressor in the physical altercation described. Yet none of this evidence was referenced by the trial judge. This is troublesome.

[38] In his credibility analysis, the trial judge's only reference to K.M.'s evidence is as follows:

> [40] I additionally find that S.M.'s sister's evidence of seeing her father in a position of potential impropriety to be corroborative of the sexual assaults. **Even without the evidence of K.M., I would find evidence of sexual assaults by N.M. on his daughter to be proven beyond a reasonable doubt.** (Emphasis added)

[39] In oral argument, the appellant submitted that the above suggests the trial judge found K.M.'s evidence to be supportive of a finding of guilt, and gives rise to a misapprehension on the trial judge's part. The Crown argues that the trial judge was clearly referencing the complainant's sister and, as such, the above passage ought to have read "M.M.", not "K.M." In my view, it does not really matter what was intended by the trial judge. Both alternatives demonstrate that the trial judge found the appellant's, in his view, "extreme" attempt to "vilify" the complainant negatively impacted on his credibility. The trial judge had similar evidence from K.M., which, if accepted, raised similar serious concerns about the complainant's behaviour. The trial judge either failed to consider this evidence, or insufficiently addressed it in his reasons. In the circumstances, the trial judge's finding regarding the appellant's vilification of the complainant is suspect.

[40] It is impossible to know, absent the finding of vilification or had the mother's corroborating evidence of the complainant's behaviour been accepted by the trial judge, whether a reasonable doubt would have been raised. On this basis alone, I would set aside the findings of guilt.

[41] In addition to the above, the evidence of K.M., if accepted, could raise credibility concerns relating to the complainant. For example, perhaps, it may have been concluded that the complainant, in her descriptions of the appellant and

the February altercation, was attempting to vilify the appellant. We do not know whether the trial judge considered and rejected such potential implications arising from K.M.'s evidence. In my view, the record here required the trial judge to provide a more thorough review of the impact, if any, of K.M.'s evidence on the complainant's credibility. Based on the evidence before him, he did not provide a "considered and reasoned acceptance" of the complainant's evidence. As such, his cursory finding that she was credible was not an adequate basis for rejecting the appellant's evidence.

[42] The trial judge also considered the appellant's "short denial devoid of any substance" to be a factor weighing negatively against his credibility. Again, I look to the trial judge's evidentiary review to ascertain his meaning of "short denial". He wrote:

> [21] The accused was only asked once in direct examination about the incidents before the Court. His counsel said to him "did any of that occur?". His only reply was "no".

[43] I take no issue with the trial judge's characterization of the exchange between the appellant and his counsel at the end of his direct examination. Counsel did not put the various allegations to the appellant individually, opting rather to elicit the generalized denial described by the trial judge.

[44] A review of the record does, however, disclose that this was not the only denial of the allegations made against him. For example, the appellant testified that he would not have been in bed with any of the children beyond their infancy (the evidence of K.M. was similar on this point), nor did he recall any occasion where he had his hand down the back of the complainant's pants (as described by the complainant's sister). He conceded it was possible something like this occurred, but he may have been consoling her, not doing "something that's terrible." The trial judge was alive to this evidence. He wrote:

> [23] N.M. also confirmed that he had many opportunities to be alone with S.M. N.M. did say he had no recollection of the incident described by K.M. [*sic*] where S.M. was sitting in his lap. N.M. denied his children ever being in bed with him except maybe as babies.

[45] It is difficult to see how the appellant's evidence did not constitute denials of the specific allegations made against him. Further, in cross-examination, the appellant described his outburst in court while listening to the complainant as being triggered by emotional upset, querying "How would you like your kid to say

that to you **if it wasn't true?**" The record discloses that the appellant's denial was not an isolated incident in his evidence, but a repeated theme.

[46] The alleged incident of the appellant rubbing the complainant's lower back was also used by the trial judge as a factor weighing negatively against the appellant's credibility. He found S.M.'s recall of the complainant sitting on her father's lap in the dining room as an instance of "potential impropriety", which was corroborative of the claims of sexual assault. The problem with this conclusion is that the complainant's descriptions of the sexual assaults neither referenced this incident specifically, nor were the other assaults that she described similar in nature.

[47] A parent rubbing the lower back of his child is not, without more, clearly sexual in nature. It appears the trial judge recognized this interaction may have been innocent by virtue of his characterization of it as a "potential impropriety". Given the presumption of innocence, the appellant's credibility ought not to have been dismissed on the basis of conduct that was only potentially inappropriate.

[48] For the reasons above, I am not satisfied that the trial judge properly applied the principles contained in *W.(D.)* and, consequently, the burden of proof to all of the evidence before him. Although based on the evidence it was open to the trial judge to find the appellant lacked credibility, his reasons for doing so are problematic. It is unclear whether the trial judge considered all relevant evidence, including that which, if accepted, may have influenced his credibility assessment and potentially raised a reasonable doubt. As noted earlier, I would allow this ground of appeal.

Did the trial judge use the appellant's out of box demeanour in his credibility assessment and, if so, does that justify appellate intervention?

[49] With respect to the role of demeanour in assessing credibility, the trial judge wrote:

> [29] In the following [*sic*] *W.D.*, Courts must first examine the evidence of the accused in determining if he should be acquitted. Here N.M. denied the allegation made against him by his daughter. When considering the credibility of a single witness **the court must examine and scrutinize all the evidence**.
>
> [30] In *R. v. D.D.S.* [2006] N.S.J. No. 103 (NSCA), Justice Saunders wrote:
>
> > … it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility.

> There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. **Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative.** Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[31] **While demeanour can not be the sole determinative of credibility it can be highly instructive**; in *Police v. Razamjoo*, [2005] D.C.R. 408, A New Zealand Court commented as follows:

> … there are types of situations … in which the demeanour of a witness undergoes a quite dramatic change in the course of his evidence. The look which says "I hoped to be asked that question", sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language. The witness who moved from expressing himself calmly to an excited grabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; the witness who at a particular point becomes flustered and sweaty, all provide examples of circumstances which, despite cultural and language barriers, convey, at least in part by his facial expression, a message touching credibility. [para.78]

[32] The Supreme Court of Canada has also weighed in on the ability of a trial judge to consider demeaner [*sic*]. In *R. v. Lifchus* [1997] 3 S.C.R. 320, Justice Cory stated:

> … **there my [*sic*] be something about a person's demeanor in the witness box which will lead a juror to conclude that the witness is not credible**. It may be that the juror is unable to point to the precise aspect of the witness's demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of the witness's demeanor cannot be taken into consideration in the assessment of credibility.

[33] And finally, there are the comments of Justice O'Halloran in *Fornya v. Chorney* [*sic*] when he said:

> The credibility of [an] interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The

> test must reasonable [*sic*] subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the pace and in those conditions. (Emphasis added)

[50] The appellant argues that the use of demeanour in the assessment of a witness' credibility has, in recent years, been viewed more cautiously than the approach endorsed by the trial judge. He submits that it is clear from the reasons that the trial judge did not use a cautionary approach, but instead considered demeanour to be "highly instructive" in assessing credibility. Further, and of greater significance, the appellant says that the trial judge's clear reliance on his demeanour outside the witness box is highly problematic.

[51] The Crown submits that the trial judge made no error in referencing the appellant's demeanour, whether inside or outside the witness box. Relying on a recent decision of the Ontario Court of Appeal in *R. v. T.M.*, 2014 ONCA 854, the Crown says that modest reliance on demeanour out of the box is acceptable. Here, the Crown argues that the trial judge's reliance on the appellant's demeanour was modest, and his credibility determination was anchored in several other well-explained factors. I will return to *T.M.* shortly.

[52] With respect to the use of demeanour evidence generally to assess witness credibility, Justice Beveridge in *R. v. W.J.M.*, 2018 NSCA 54, recently wrote:

> [45] First of all, courts have long recognized that reliance on demeanor must be approached with caution. It is not infallible and should not be used as the sole determinant of credibility. This was succinctly summarized by Epstein J.A., writing for the Court in *R. v. Hemsworth*, 2016 ONCA 85:
>
> > [44] This court has repeatedly cautioned against giving undue weight to demeanour evidence because of its fallibility as a predictor of the accuracy of a witness's testimony: *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, 99 O.R. (3d) 1, at para. 66; *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362. As I indicated in *Rhayel*, at para. 85, "[i]t is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom."
> >
> > [45] Although the law is well settled that a trial judge is entitled to consider demeanour in assessing the credibility of witnesses, reliance on

> demeanour must be approached cautiously: see *R. v. S. (N.)*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 18 and 26. Of significance in this case is the further principle that a witness's demeanour cannot become the exclusive determinant of his or her credibility or of the reliability of his or her evidence: *R. v. A. (A.)*, 2015 ONCA 558, 327 C.C.C. (3d) 377, at para. 131; *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.), at pp. 313-14.

[53] With respect to the use of out of box demeanour, the appellant agrees with the Crown that *T.M.* is the leading authority. There, the Ontario Court of Appeal dismissed the appeal of T.M., who had been convicted of a number of charges relating to the historical sexual abuse of his daughter and step-daughter. One of the grounds of appeal alleged the trial judge had erroneously relied upon the appellant's courtroom demeanour while listening to the testimony of other witnesses.

[54] Writing for the Court, Laskin, J.A. explains:

> [51] As is evident from this passage, the trial judge was commenting on the appellant's demeanour during the complainants' testimony and before the appellant himself testified. Yet, when the appellant did testify, the trial judge did not ask him to explain his demeanour, nor did he alert defence counsel that he may comment on it in his reasons.
>
> [52] The appellant submits that the trial judge erred by relying on the appellant's demeanour when he was not on the witness stand giving evidence as a basis to reject his evidence. He argues that what he did while sitting beside his lawyer at the counsel table during his daughters' testimony had no probative value. Yet the trial judge relied on the appellant's courtroom demeanour, and his reliance cannot be excused by a saving comment that he was only making an observation and not judging the appellant on his demeanour.

[55] After reviewing several earlier decisions regarding the use of out of box demeanour in the assessment of credibility, Laskin, J.A. concludes:

> [64] The final concern relates to the first concern. Our court has emphasized that the probative value of an accused's apparently calm reaction to an allegation of sexual abuse is highly suspect. Accused testify in the unfamiliar and stressful environment of the courtroom. Without a baseline to judge how they react to a stressful situation, their demeanour, even while testifying, is susceptible to misinterpretation. See *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.); *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161 (C.A.); and *R. v. Bennett* (2003), 67 O.R. (3d) 257 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 534. And the risk of misinterpretation is even higher when the accused is not testifying, but is simply sitting in the courtroom.

> [65] In *Owens* the trial judge had a baseline – the accused's own evidence. The trial judge in this case had no baseline at all. He had no evidence how the appellant would ordinarily react to a false allegation, especially one made by a family member. He had no idea even what the appellant was reading while S.M. testified. As counsel for the appellant asked rhetorically in their factum: "Did the appellant stand a better chance if instead of quietly reviewing material he shouted down the complainant, the court, and the Crown?"
>
> [66] Because of these concerns, *Owens* is best restricted to its facts – to cases in which accused put in issue their normal reaction to stressful situations or serious allegations. Because the appellant did not do so, *Owens* has little or no relevance to this case.
>
> [67] What then of the trial judge's finding concerning the appellant's credibility? **I would be troubled by the trial judge's rejection of the appellant's evidence if I thought it was based solely or even primarily on the appellant's demeanour outside the witness box. But I do not think that it was.** Even discounting the trial judge's saving comment, **at most he placed modest reliance on the appellant's courtroom demeanour.** I do not think any "manifest unfairness" arises from his having done so. **He gave other cogent reasons for rejecting the appellant's evidence.** For example, the trial judge compared the appellant's cross-examination with his examination-in-chief, and said:
>
> > In cross-examination, he was a very different person. I found that he was flippant, he was argumentative, he was unresponsive to questions. He further exhibited a lack of candor when responding to questions. At one point he rebuffed the Crown Attorney for asking longwinded questions. Mr. Larsh did not ask him longwinded questions. On a number of occasions he paused and seemed to be stalling for time before answering a question. That goes to candor. He complained that he didn't understand questions put to him yet the questions that were put to him were as simple as the ones put to him in-Chief by Mr. McLean.
>
> [68] **And significantly, the trial judge's considered acceptance of the credibility of the complainants' evidence was itself a reason and compelling explanation for his rejection of the appellant's evidence:** see *R. v. D. (J.J.R.*) (2006), 215 C.C.C. (3d) 252, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 69, at para. 53. (Emphasis added)

[56] I am satisfied that the trial judge utilized the appellant's out of box demeanour as a major factor in assessing his credibility. The only aspects of his demeanour to which the trial judge made mention were the appellant's "two exceptional outbursts" during the course of listening to his daughters' testimony. If there were anything about the appellant's testimonial demeanour that the trial judge found troublesome, he did not mention it in his written decision.

[57] I am further satisfied that, unlike the circumstances in *T.M.*, here the trial judge placed much more than modest reliance on the appellant's out of box demeanour. In his reasons, the trial judge specified that the appellant's outbursts while observing the testimony of Crown witnesses made a "marked impact on his credibility." There is no doubt the appellant's reaction to the complainant's evidence (crying while she recounted alleged incidents of sexual assault) and his verbal outburst while listening to his younger daughter (he called her evidence "frigging bullshit") were key to the trial judge's finding that he lacked credibility.

[58] There are two problems with the trial judge's conclusion. Again, unlike in *T.M.*, the trial judge's reasons do not provide other cogent reasons for rejecting the appellant's evidence. As explained above, the other factors identified by the trial judge in his credibility assessment give rise to concern. Secondly, the trial judge provided no explanation as to why the appellant's outbursts negatively impacted upon his credibility. As argued by counsel in submissions, the appellant's reactions to hearing the evidence of his daughters could have just as likely been, as he explained in cross-examination, triggered by the emotional upset of hearing untrue allegations levelled against him. Here, the trial judge had no measure of how the appellant would normally react to such circumstances. Nor had the appellant put his own demeanour into question. In my view, it was inappropriate for the trial judge to place such significant reliance on the appellant's out of box demeanour, especially in the absence of reasons explaining why it served to make a "marked impact" on his credibility.

[59] I would allow this ground of appeal.

Did the trial judge's decision to permit the complainant to testify via closed-circuit television (CCTV) raise concerns justifying appellate intervention?

[60] I am of the view that the trial judge's decision to permit the complainant to testify via CCTV would not, on its own, justify appellate intervention. The concerns raised by the appellant do, however, warrant comment and caution.

[61] At the outset of trial, the Crown made a motion to permit the complainant to testify via CCTV. There was no formal motion filed, nor an affidavit filed either by the complainant or someone else with evidence in support of the order sought. The request was opposed by the appellant's trial counsel, who argued that the Crown had failed to file any evidence in support of the motion. In granting the request, the trial judge said:

> … In relation to the individual who's 19. She is, just turned 19. The indications are that she will have difficulty communicating that evidence given the familial proximity. That is understandable. Given all the other factors, I will order that she do that as well. That she give her evidence by virtue of closed circuit TV.

[62] On appeal, the appellant repeats his assertion that the trial judge ought not to have granted the request without any evidentiary foundation being provided. He says the lack of sworn evidence in support of the motion was fatal. The Crown responds with the contention that sworn evidence was not necessary in the present instance in order for the trial judge to properly exercise his discretion.

[63] In ultimately accepting the Crown's view, it is helpful to consider the relevant provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The motion was brought under s. 486.2 of the *Code*, the relevant subsections of which provide:

> Other witnesses
>
> (2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.
>
> …
>
> Factors to be considered
>
> (3) In determining whether to make an order under subsection (2), the judge or justice shall consider
>
> (a) the age of the witness;
>
> (b) the witness' mental or physical disabilities, if any;
>
> (c) the nature of the offence;
>
> (d) the nature of any relationship between the witness and the accused;
>
> (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
>
> (f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
>
> (f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;

> (g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
>
> (h) any other factor that the judge or justice considers relevant.

[64] I note that the wording in s. 486.2(2) has changed, having been amended in 2015 by the *Canadian Victims Bill of Rights Act*, S.C. 2015, c. 13, s. 15. The preceding version provided:

> (2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order **is necessary to obtain** a full and candid account from the witness of the acts complained of. (Emphasis added)

[65] The addition of "or would otherwise be in the interest of the proper administration of justice" adds a second basis upon which a motion could be granted. Further, the change of wording from "is necessary to obtain a full and candid account" to the current "would facilitate the giving of a full and candid account" reflects a newly lowered threshold (see for example *R. v. K.P.*, 2017 NLPC 1317P00067; *R. v. Turnbull*, 2017 ONCJ 309). There has been only one appellate decision addressing s. 486.2(2) since the 2015 amendments—*R. v. Hoyles*, 2018 NLCA 46, a case relied upon by the Crown.

[66] In *Hoyles*, the Court dismissed an appeal, finding that formal evidence is not a mandatory requirement in a motion under s. 486.2(2). Writing for the Court, Justice Hoegg stated:

> 11 I would first observe that evidence is not always required to support an application under sections 486.1(2) or 486.2(2). For instance, the nature of the offence, a factor for consideration in both sections, is a matter of record. Other factors, like the age of the witness, whether the witness has mental or physical disabilities, the nature of the relationship between the witness and accused, may also be matters of record or patently obvious from observation. **While a judge's exercise of discretion must be properly exercised, and must have some proper basis, it can be properly exercised on the basis of the record before him or her and submissions made**, as Goodridge C.J.N.F. stated at paragraph 42 of *R. v. Merdsoy* (1994), 121 Nfld. & P.E.I.R. 181, 91 C.C.C. (3d) 517 (Nfld. C.A.):
>
> > The exercise of discretion is generally not attended by extended arguments or evidence. An application is made and the reasons for it are expressed; it may be opposed and the reasons for opposition are expressed. Knowledge

> of things arising out of the trial process which must be obvious to the trial judge may be presumed.
>
> This is not to say that formal evidence is never necessary, or that it is not a good idea. Rather, it is to say that trial judges make proper discretionary rulings day in and day out in the absence of formal evidence. In this case, the record disclosed the history of the case, the age of the complainant, and the nature of the offences, all criteria for consideration. As well, both Crown and Defence Counsel made submissions with respect to the information available. (Emphasis added)

[67] The appellant submits that the approach adopted in *Hoyles* should not be endorsed by this Court. In support of his argument, he points to a recent decision of this Court, *R. v. S.D.L.*, 2017 NSCA 58, which he says is inconsistent with permitting a motion brought under s. 486.2 to succeed in the absence of an evidentiary foundation. In *S.D.L.*, the appellant successfully challenged a trial judge's decision to permit Crown witnesses, notably a complainant in a sexual assault trial, to testify via video link under s. 714.1 of the *Code*. This Court found that the trial judge's decision led to a miscarriage of justice. In the Court's decision, Chief Justice MacDonald set out "guiding principles" as follows:

> [32] With this background, I would propose the following guiding principles for Nova Scotia trial judges, when considering s. 714.1 applications:
>
> 1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.
>
> 2. That said, when credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
>
> 3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.
>
> 4. The more significant or complex the proposed video link evidence, the more guarded the court should be.
>
> 5. When credibility will not be an issue, the test should be on a balance of convenience.
>
> 6. **Barring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit.** Should cross examination be required, that could be done by video link.
>
> 7. When authorized, the court should insist on advance testing and stringent quality control measures that should be monitored throughout the

> entire process. If unsatisfactory, the decision authorizing the video testimony should be revisited.
>
> 8. Finally, it is noteworthy that in the present matter, the judge authorized the witnesses to testify "in a courtroom…or at the offices of Victims' Services…". To preserve judicial independence and the appearance of impartiality, the video evidence, where feasible, should be taken from a local courtroom. (Emphasis added)

[68] In my view, the outcomes in *Hoyles* and *S.D.L.* are not in conflict. It is significant that the decisions involved different sections of the *Code*. Chief Justice MacDonald's guiding principles were specifically noted to be in relation to s. 714.1, which provides:

> 714.1 A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including
>
> (a) the location and personal circumstances of the witness;
>
> (b) the costs that would be incurred if the witness had to be physically present; and
>
> (c) the nature of the witness' anticipated evidence.

[69] Clearly, the two *Code* provisions incorporate different tests, with different legislated factors a trial judge should consider, if relevant. To permit a witness to testify via video link or by another form of technology, s. 714.1 mandates a trial judge to consider whether such would be "appropriate in all the circumstances." This is much different than the test in s. 486.2(2) requiring a trial judge to consider whether testifying via CCTV "would facilitate the giving of a full and candid account by the witness", or "would otherwise be in the interest of the proper administration of justice."

[70] I adopt the above reasons set out in *Hoyles*. In the present case, the trial judge was aware of the nature of the charges, the familial relationship between the accused and the complainant and her age. In such circumstances, I do not find the trial judge erred in exercising his discretion under s. 486.2(2). That being said, such motions should not be advanced by the Crown as an after-thought at the commencement of trial. Neither should such requests be granted perfunctorily. Preferred practice would see a written motion, accompanied by an affidavit or affidavits in support, which might be challenged or tested by cross-examination,

and followed by submissions from both the Crown and the accused. I would dismiss this ground of appeal.

Conclusion

[71] On the basis of the reasons above, I would grant the appeal, set aside the appellant's convictions and order a new trial.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Saunders, J.A.