NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. J.M.S.*, 2020 NSCA 71

Date: 20201110
Docket: CAC 485657
Registry: Halifax

Between:

J.M.S.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	By written submissions. Last submissions received August 19, 2020.
Subject:	Criminal law—sexual assault—credibility
Summary:	J.S. was charged with sexual assaults contrary to s. 271 of the *Criminal Code*. The allegations were that he had assaulted his stepdaughter A.C. when she was a child. A.C. testified to the assaults. J.S. denied them. The judge of the Provincial Court accepted A.C.'s evidence and rejected J.S.'s denials, found there was no reasonable doubt and convicted J.S. J.S. appealed to the Court of Appeal.
Issues:	J.S. submitted the judge erred in law by: (1) applying different levels of scrutiny to assess his credibility and the credibility of J.C., (2) giving inadequate reasons for rejecting J.S.'s evidence, and (3) offending the second branch of the *W.(D.)* test.
Result:	The Court of Appeal dismissed the appeal.

The Crown and defence advanced submissions with different degrees of detail and suggested cogency. The judge dealt with the submissions that were made to him. This alone does not offend the principle against significantly different levels of scrutiny.

The judge's reasons sufficed. They allowed the Court of Appeal to understand why the judge decided as he did and to conduct appellate review.

The judge expressly rejected J.S.'s denials, from which the Court of Appeal deduced J.S.'s evidence did not leave the judge with a reasonable doubt. This satisfies the second branch of the *W.(D.)* test.

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Judges:	Farrar, Fichaud and Derrick JJ.A.
Appeal Heard:	By written submissions. Last submissions received August 19, 2020.
Held:	Appeal dismissed, per reasons for judgment of Fichaud J.A, Farrar and Derrick JJ.A. concurring
Counsel:	Philip J. Star, Q.C. and Kiel D. Mercer for the Appellant Jennifer MacLellan, Q.C. 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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.

Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application
(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation
(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

[1] J.S. was charged with sexual assaults contrary to s. 271 of the *Criminal Code*. The Crown alleged J.S. had committed the assaults against his stepdaughter A.C. between January 1, 1986 and December 31, 1994. The assaults allegedly began when she was two years old and continued until she was in grade 4.

[2] The allegations were grouped according to four locations.

[3] After a two-day trial in the Provincial Court of Nova Scotia, Judge James Burrill convicted J.S. of three counts—*i.e.* the assaults alleged to have occurred at Regent Street in Yarmouth, Hardscratch Road in Brooklyn and Robert's Island in Yarmouth County. The Judge found A.C.'s testimony, that the assaults occurred, to be credible and rejected J.S.'s denials as not credible. He acquitted J.S. of the offence alleged to have occurred in Kemptville, Yarmouth County, respecting which A.C. had little memory.

[4] J.S. appeals. He submits the judge applied different levels of scrutiny to assess his credibility and that of A.C., the judge's reasons were insufficient and the judge's reasoning offended the second branch of the *W.(D.)* test.

The Judge's Reasons

[5] Central to the issues on appeal are the Judge's reasons, given orally and later transcribed under Judge Burrill's signature.

[6] The Judge began by summarizing A.C.'s testimony on the alleged sexual assaults at each of the four locations. Her testimony respecting Regent Street, Hardscratch Road and Robert's Island was specific. The Judge said, as to Kemptville, A.C. "doesn't remember much about what occurred there at that location".

[7] The Judge noted A.C.'s testimony that, until December 17, 2011, she informed nobody of these incidents, then told her boyfriend and later the police.

[8] Judge Burrill then identified the critical issue: "the case revolves around the issue of credibility and reliability of the evidence that is presented by the Crown". He noted A.C. "says that these incidents occurred and the accused in his evidence has denied that he touched [A.C.] or had her touch him in any sexual way whatsoever".

[9] The Judge turned to the applicable principles of criminal law:

> In deciding this case, it's important to review principles that govern the application of our criminal law. As the accused sits before the court, he is presumed innocent of these charges. The presumption of innocence remains with him throughout this case unless the Crown has, based on the evidence, satisfied me beyond a reasonable doubt that the accused is guilty and that brings me to the second fundamental principle of our criminal justice system is [*sic*] that the accused cannot be found guilty unless his guilt is proved beyond a reasonable doubt on each of the charges or can't be found guilty on any particular charge unless that charge is proven beyond a reasonable doubt.
>
> …
>
> In coming to my decision, I have considered all of the evidence that has been presented at this trial, assessed it in the context of the whole and as I listen to each of the witnesses testify, I have determined what or how much I can believe in relation to what each of the individuals has said.
>
> The principles of the case of *R. v. W.D.* apply and they can be summarized as follows:
>
> First of all, having heard the accused's evidence, if I believe his evidence, I must find him not guilty for if I believe his evidence, he never abused [A.C.] and he should be found not guilty.
>
> If his evidence leaves me in a state of reasonable doubt then I must also find him not guilty because if I have a reasonable doubt as to whether or not his evidence is correct or if I am left in a state of reasonable doubt by it, by its very definition, the Crown would not have proven its case beyond a reasonable doubt because a reasonable doubt would be present in my mind and it would be something that he is entitled to and, again, I would find him not guilty.
>
> It would only be if I reject his evidence that I would go on to consider the rest of the evidence and determine whether, on the basis of the evidence that I do accept, whether the Crown has proven the case beyond – their case beyond a reasonable doubt either collectively or individually.

[10] Judge Burrill then summarized the positions of the parties on the evidence and credibility of A.C. and J.S.

[11] First, the Crown's position:

> The Crown has argued that reason and common sense should govern in an analysis of the evidence as I assess it, that while the matters happened over twenty years ago and the complainant is testifying as an adult, she is testifying to events that happened to her as a child and her ability to recall certain details are a factor to consider and that although adult standards of credibility must be applied to an

> assessment of her evidence today, it must be remembered that she is testifying to events that occurred when she was a child.
>
> The crown urges me to reject the evidence of [J.S.] as incredible. The Crown argues that in relation to the first complaint that [A.C.] ever made about getting to touch her "Daddy's bird" as she put it, was something that resulted, we even know on [G.C.'s] evidence, her mother's evidence, resulted in an argument and that it was something that he should clearly remember as having happened yet he unusually, the crown suggests, couldn't remember nor discuss anything about that – that incident.
>
> The Crown urges me to reject his testimony and accept the evidence of [A.C.].

[12] Next the defence's position. Defence counsel's closing submission had pointed to a number of weaknesses and inconsistencies in A.C.'s evidence related to household dynamics, lying, drugs, alcohol and school problems. Over five pages, the Judge dealt with each of the defence's points and placed them in context. Judge Burrill found, in some respects, her evidence was confusing, inconsistent or exaggerative. Later I will expand on the Judge's treatment of the defence's submissions (paras. 23–27).

[13] The Judge noted the defence's points merited significant consideration:

> On several of the points that I have identified, it has caused me to approach the evidence cautiously with regard to the allegations that are presented. It has caused me to consider whether, in light of those issues that I have identified that, the evidence that she gives has caused me to assess whether or not they can form a foundation for proof beyond a reasonable doubt.

[14] The Judge then re-summarized the submissions of the defence and Crown on A.C.'s credibility and reliability. Judge Burrill concluded:

> As I have considered the evidence, as I said, I have considered the evidence in the context of the whole. I have seriously considered the external and internal inconsistencies with regard to [A.C.'s] testimony. In my view, however, they do not detract significantly from her credibility with regard to the allegations of sexual abuse that she has made.

[15] The Judge found J.S.'s denials to be not credible:

> With regard to the evidence of the accused, I have considered his denials. I have considered the arguments that have been put forth in favour of his credibility and against it and in a word, I do not believe his denials and I reject his denials.

[16] Finally, as to reasonable doubt, the Judge said:

> That does not end the matter. I go on to consider the evidence primarily of [A.C.] and with regard to her evidence as to how she was touched, how she was invited to touch and how she was assaulted, I accept her testimony and find that it proves the offences beyond a reasonable doubt. Each individual offence before the court is proven beyond a reasonable doubt with the exception of the two offences that are alleged to have occurred at Kempt [Kemptville], being numbers 2720016 and 2720017. I listened carefully to her evidence in regard to that. She does not have a good memory of what took place there. She acknowledges that she recalls some touching but the descriptions of the touching were such that it left me in a state of reasonable doubt as to whether or not she was touched for a sexual purpose or was sexually assaulted by him while living at that address between December 1st, 1991 and December 31st, 1993.
>
> In particular, with regard to the factual findings of the – the court, I find that the incidents that she occurred [*sic*] on Regent Street, on the Hardscratch Road and Robert's Island did occur, that they have been proven beyond a reasonable doubt and I find the accused guilty of those charges.

Issues

[17] J.S. submits the Judge erred by (1) applying a different level of scrutiny to his credibility than to A.C.'s, (2) providing insufficient reasons for rejecting J.S.'s credibility and (3) failing to apply the second prong of *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

First Issue: Different Levels of Scrutiny?

[18] J.S.'s factum submits:

> 17. It is respectfully submitted that the Trial Judge accepted the Complainant's evidence despite noting multiple inconsistencies in her evidence. Conversely, in one sentence, the Trial Judge rejected the Appellant's evidence without noting any weaknesses, inconsistencies or lack of reliability. It is the Appellant's respectful position that this is an error of law requiring this Honourable Court to intervene.

[19] In *R. v. Radcliffe*, 2017 ONCA 176, Watt J.A. for the Court stated four principles to govern a challenge of uneven scrutiny:

> [22] In my assessment of this claim of uneven scrutiny, I keep in mind several basic principles.
>
> [23] First, as the appellant recognizes, this is a difficult argument to make successfully. The reasons are twofold. Credibility findings are the province of the trial judge. They attract significant appellate deference. And appellate courts

> invariably view this argument with skepticism, seeing it as little more and nothing less than a thinly-veneered invitation to re-assess the trial judge's credibility determinations and to re-try the case on an arid, printed record: [citations omitted].
>
> [24] Second, to succeed on an uneven scrutiny argument, an appellant must do more than show that a different trial judge assigned the same task on the same evidence could have assessed credibility differently. Nor is it enough to show that the trial judge failed to say something she or he could have said in assessing credibility or gauging the reliability of evidence: [citation omitted].
>
> [25] Third, to succeed on the argument advanced here, the appellant must point to something, whether in the reasons of the trial judge or elsewhere in the trial record, that makes it clear that the trial judge *actually* applied different standards of scrutiny in assessing the evidence of the appellant and the complainant [Watt J.A.'s italics; citations omitted].
>
> [26] Fourth, in the absence of palpable and overriding error, there being no claim of unreasonable verdict, we are disentitled to reassess and reweigh evidence; [citations omitted]

[20] In *R. v. Kiss*, 2018 ONCA 184, Paciocco J.A. for the Court said:

> [83] This is a notoriously difficult ground of appeal to succeed upon because a trial judge's credibility determinations are entitled to a high degree of deference, and courts are justifiably skeptical of what may be veiled attempts to have an appellate court re-evaluate credibility: [citations omitted]. An "uneven scrutiny" ground of appeal is made out only if it is clear that the trial judge has applied different standards in assessing the competing evidence [citation omitted]. Where the imbalance is significant enough, "the deference normally owed to the trial judge's credibility assessment is generally displaced" [citations omitted].

Adopting this passage: *R. v. Willis*, 2019 NSCA 64, para. 40, per Wood C.J.N.S.

[21] Did Judge Burrill's reasons display a significant disparity of scrutiny?

[22] First A.C.'s evidence.

[23] In his post-trial argument, J.S.'s counsel submitted that A.C.'s evidence reflected a number of concerns. The Judge's reasons dealt with each point.

[24] The Judge said some of the concerns related to the period of the A.C.'s life after the time covered by the charges, that A.C.'s testimony was focused on the events related to the charges and, when pointed to a particular incident, she was not evasive:

> … with regard to the drugs, alcohol use and school problems that incidents concerning that and lying within the household were incidents that occurred primarily after the last allegation is – is made – was made after the Robert's Island incident. I point that out not to say it's not important but as [A.C.] addressed those issues in her testimony, it's clear to the court that she was focused primarily in dealing with those issues about her, whether she presented a difficulty in the household, to issues that arose primarily while she was still in the lower grades in school before the incidents had stopped. When pointed to any particular incidents, she confirmed issues about alcohol use/drug use starting at age 12 after these incidents were over.

[25] With regard to events at the time of the alleged offences, Judge Burrill found A.C. to be generally an accurate historian, as acknowledged by the defence:

> The defence acknowledges that with regard to time and place and events going on in their lives apart from the allegations of sexual abuse that there was a lot of common ground between the evidence, a common ground that convinces the court that with regard to chronology and such that [A.C.] was an accurate historian with regard to where they lived when, who worked where, that is; where her parents and stepparent worked during the relevant period of time.

[26] Nonetheless, the Judge found some inconsistencies in her evidence related to the alleged assaults. At the trial she spoke of an incident of oral sex that she had not related at the preliminary inquiry; she explained she had overlooked it. Her police statement said she did not believe she wore a bra during an incident, but at trial she said J.S. had ripped it off. There was inconsistency between her police statement and her testimony whether, on one occasion, he took off her underwear or asked her to remove that item. She gave inconsistent statements as to the first occasion of sexual intercourse with J.S., which she explained in a manner that the Judge found to be "confusing".

[27] The Judge said these points "caused me to approach the evidence cautiously" and to "consider whether, in light of those issues that I have identified that, the evidence that she gives has caused me to assess whether or not they can form a foundation for proof beyond a reasonable doubt". He concluded:

> … I have seriously considered the external and internal inconsistencies with regard to [A.C.'s] testimony. In my view, however, they do not detract significantly from her credibility and do not detract from her credibility with regard to the allegations of sexual abuse that she has made.

[28] Next is J.S.'s evidence.

[29] The Crown's post-trial submission on J.S.'s credibility consisted entirely of the following:

> [J.S.], of course, testified. It's basically a simple denial that anything of any sexual nature took place and, strangely enough, that he did have a seemingly good relationship with [A.C.] up until, well, not that long ago. I guess, seems as though it was up 'til she called him to discuss these incidents and, yes, [A.C.] viewed [J.S.] as her father and treated him like her father and … and, again, this is, I would submit, not an unusual situation in terms of when, for instance, in domestic assaults, we see victims, I submit, on a regular basis protecting their abuser from the Court process.
>
> One thing with respect to [J.S.'s] testimony, I … submit it was quite unusual that he couldn't remember the incident that both [A.C.] and [G.C.] [A.C.'s mother] clearly remembered in that [A.C.] disclosed to her mother that she got to touch Dad's … Daddy's bird. I submit because of how shocking that allegation would have been and because the … because of the argument that followed, this should have been something, clearly, that [J.S.] would remember.

[30] The Judge's Decision set out the Crown's submission (above, para. 11), then cited the point as a basis for his rejection of J.S.'s denial:

> … I have considered the arguments that have been put forth in favor of his credibility and against it and in a word, I do not believe his denials and I reject his denials.

The Crown made only one "argument against" J.S.'s credibility. The Judge set it out earlier in his Decision, then said he "considered" it for his finding. Clearly, for his assessment of J.S.'s credibility, Judge Burrill was referring to the incident when A.C. told her mother that she had touched "Daddy's bird".

[31] Does the Judge's use of that single incident to assess J.S.'s credibility establish a significant disparity in the level of scrutiny? It helps to summarize the evidence on the incident.

[32] A.C. was two years old at the time. She, her mother G.C. and J.S. lived on Regent Street.

[33] A.C. testified as follows. Her mother G.C. was out. J.S. was on the couch with A.C. on his chest. He exposed himself and A.C. touched his penis. Her mother came home. A.C. "ran right up to her and told her I got to touch Dad's bird and that I actually touched [J.S.]'s bird". Then, according to A.C., "[t]here was a

fight" and "[G.C.] and [J.S.] started arguing back and forth and discussing what I had just said to them".

[34] A.C.'s mother G.C. testified. She confirmed that her daughter had told her this. G.C. said J.S. "threw a fit", he "[j]ust got mad, angry and screaming, yelling, throwing things at me", and he called [A.C.] "a liar".

[35] J.S. testified:

> Q. Okay, and do you remember the … you were home when [A.C.] announced to her mother that she had touched Dad's bird, do you remember that?
>
> A. You know, that … I … not totally. I don't remember that.

[36] This incident was not purely a "he said/she said" episode. It stood out because there was a corroborating witness, G.C. Of course, G.C. could not corroborate the alleged assault as she was not present. But she corroborated A.C.'s testimony of the aftermath—J.S.'s vehement reaction—when all three were present.

[37] The Crown submitted his vehement reaction was not something J.S. would forget. Consequently his testimony was not just forgetful, but untruthful.

[38] Judge Burrill dealt with the Defence's detailed submissions on A.C.'s credibility with a detailed analysis. He also set out and considered the Crown's single but, in the Crown's view, cogent submission on J.S.'s credibility. He concluded with a finding that accepted the Crown's point. That finding reflects no palpable error and suggests no unreasonable verdict. Credibility is the trial judge's province. It is not for an appeal court to reassess from the transcript's dry ink.

[39] The submissions by the Crown and Defence presented the Judge with different levels of detail and suggested different degrees of cogency. The Judge considered the submissions as they were presented. That, in itself, does not offend the rule against significantly different levels of scrutiny. I would dismiss this ground of appeal.

Second Issue: Sufficiency of Reasons

[40] J.S.'s factum summarizes his submission:

> 24. Following *Vuradin* [*R. v. Vuradin*, [2013] 2 S.C.R. 639] and *J.C.* [*R. v. J.C.*, 2018 NSCA 72], there should at least be a considered and reasoned

> acceptance of Crown evidence prior to a bare rejection of Defence evidence. In the case at bar, the Trial Judge noted multiple significant inconsistencies in the Complainant's evidence. Despite this, he went on to accept her evidence and outright rejected the Defendant's evidence. However, the Trial Judge failed to explain why he accepted the Complainant's evidence over the Appellant's evidence which in the context of this case is an error of law.

[41] The Supreme Court of Canada has articulated the principles that govern a challenge of insufficient reasons.

[42] In *R. v. Gagnon*, [2006] 1 S.C.R. 621, Justices Bastarache and Abella for the Court said:

> 13 Eight years later, in *Sheppard* [*R. v. Sheppard*, [2002] 1 S.C.R. 869], a case in which the trial judge's reasons were virtually nonexistent, this Court explained that reasons are required from a trial judge to demonstrate the basis for an acquittal or conviction. Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required.

[43] In *R. v. Vuradin*, *supra*, Justice Karakatsanis for the Court said:

> [4] The trial judge's reasons are sparse and do not directly address the appellant's evidence. For the reasons that follow, however, I agree with the majority in the Court of Appeal that the trial judge's reasons were sufficient and that the trial judge did not err in his application of the burden of proof.
>
> …
>
> [10] An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach: [citation omitted]. An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review": [citing *R. v. Dinardo*, [2008] 1 S.C.R. 788]
>
> [11] Here, the key issue at trial was credibility. Credibility determinations by a trial judge attract a high degree of deference. In *Dinardo*, Charron J. explained:
>
> > Where a case turns largely on determinations of credibility, the sufficiency of reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible

> error [citing *R. v. Braich*, [2002] 1 S.C.R. 903, para. 23]]. As this Court noted in *R. v. Gagnon* [citation omitted], the accused is entitled to know "why the trial judge is left with no reasonable doubt" …. [para. 26].
>
> [12] Ultimately, appellate courts considering the sufficiency of reasons "should read 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": [citing *R. v. R.E.M.*, [2008] 3 S.C.R. 3, para. 16]. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did" (para. 17).
>
> [13] In *R.E.M.*, this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt (see para. 66).
>
> …
>
> [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 trial judge decided as he did on the counts relating to the complainant? In this case, the trial judge's reasons satisfy this threshold.

[44] Judge Burrill found A.C.'s evidence to be accurate for the charges related to Regent Street, Hardscratch Road and Robert's Island. Contrary to J.S.'s submission, the Judge explained why he accepted her evidence. I have discussed this earlier (paras. 23-27). It is also apparent why the judge rejected J.S.'s denials, as I have explained above (paras. 29-38).

[45] In my view, the Judge's reasons are neither inadequate, nor do they prevent appellate review under *Gagnon*'s tests. I understand why he accepted A.C.'s testimony and rejected J.S.'s denials. To answer *Vuradin*'s core question, the reasons show why the judge decided as he did.

[46] I would dismiss this ground of appeal.

Third Issue: Second Prong of W.(D)

[47] J.S.'s factum summarizes his submission:

> 28. It is clear from theses two passages [quoted above, paras. 14-16] that after rejecting the Appellant's evidence, the Trial Judge went on to accept the Complainant's evidence and found that it proved the offences beyond a reasonable doubt. In doing so, the Trial Judge simply chose the Complainant's version of events over the Appellant's, which the principles in *W.D.* specifically forbid. The Trial Judge failed to asked [*sic*] himself, whether despite rejecting the Appellant's evidence, did it still raise a reasonable doubt? This constitutes an error requiring appellate intervention.

[48] In *R. v. J.H.S.*, [2008] 2 S.C.R. 152, the Nova Scotia Court of Appeal had set aside a conviction for sexual assault on the basis that the trial judge had not adequately charged the jury on the second prong of *W.(D.)*. The Supreme Court of Canada allowed the appeal and restored the conviction. Justice Binnie for the Court said:

> [11] As to the second question, some jurors may wonder how, if they believe *none* of the evidence of the accused, such rejected evidence may nevertheless *of itself* raise a reasonable doubt [Justice Binnie's italics]. Of course some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.
>
> …
>
> [14] In the present case Oland J.A. agreed that the trial judge did not "call upon the jury to simply decide which of the complainant or the [the accused] it believed" (para. 20). Nevertheless, in her view:
>
> > The charge only instructed that probable guilt was not enough to meet the standard of proof beyond a reasonable doubt, that the appellant was to be given the benefit of the doubt, and they did not have to accept or reject all of the testimony of any witness including his, and that they were to consider all of the evidence. Nowhere did it provide any guidance as to how, in the event they were uncertain or unable to resolve the issue of credibility, they were to proceed with their deliberations. <u>The charge failed to direct that if the jury did not believe the testimony of the accused but were left in a reasonable doubt by that evidence, they *must* acquit.</u> [Justice Oland's italics; Justice Binnie's underlining]
>
> In my view, with respect, the reasoning of the majority brushes uncomfortably close to the "magic incantation" error. At the end of the day, reading the charge as a whole, I believe the instruction to this jury satisfied the ultimate test formulated by Cory J. in *W.(D.)* as being whether "the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply (p. 758).
>
> …

> [16] In my view, the trial judge got across the point of the second *W.(D.)* question without leaving any realistic possibility of misunderstanding. As stated, she told the jury:
>
> > It is for the Crown counsel to prove beyond a reasonable doubt that the events alleged in fact occurred. It is not for [the accused] to prove that these events never happened. If you have a reasonable doubt whether the events alleged ever took place, you must find him not guilty [Binnie J.'s emphasis]

[49] Similarly, in *Vuradin, supra*, Justice Karakatsanis for the Court said:

> [27] In the result, the trial judge rejected the appellant's testimony. In *Boucher* [*R. v. Boucher*, [2005] 3 S.C.R. 499] Charron J. (dissenting in part) stated that when a trial judge rejects an accused's testimony, "it can generally be concluded that the testimony failed to raise a reasonable doubt in the judge's mind" (para. 59). …

To the same effect: *R.E.M., supra*, para. 56, per McLachlin C.J.C. for the Court.

[50] In *R. v. Wanihadie*, 2019 ABCA 402, the *per curiam* Decision said:

> [28] In the passages quoted above, the trial judge covered the majority of the content of the *W(D)* test. The only portion she did not expressly state is the second step: "Second, if you do not believe the testimony of the accused but are left in reasonable doubt by it, you must acquit": *W.(D.)* at 758. This complaint is answered by *R. v. Ryon*, 2019 ABCA 36 (C.A.) at paras. 36-38:
>
> > [36] … As Binnie J. observed in *[R v] JHS* [2008 SCC 30] at para 11: "some jurors may wonder how, if they believe *none* of the evidence of the accused, such rejected evidence may nevertheless *of itself* raise a reasonable doubt." [Binnie J.'s italics]
> >
> > …
>
> [29] That middle ground is where a trier of fact is not "able to select one version in preference to the other", as Cory J. put it in *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 533; … Here the trial judge clearly did not believe Wanihadie's evidence. She was not in a state of indecision or uncertainty. Therefore, her failure to advert to the second branch of *W.(D.)* does not constitute reversible error.

[51] Here Judge Burrill's reasons fully appreciated the tenets of reasonable doubt (above, paras. 9 and 16). He said he "considered all the evidence that has been presented at this trial" which includes J.S.'s testimony, and "if his evidence leaves me in a state of reasonable doubt then I must also find him not guilty". The judge

found “I do not believe his denials and I reject his denials”. From this I deduce J.S.’s evidence did not leave the judge with a reasonable doubt.

[52] The reasons satisfy the requirements from the authorities. I would dismiss this ground of appeal.

Conclusion

[53] I would dismiss the appeal.

Fichaud J.A.

Concurred:

Farrar J.A.

Derrick J.A.