NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Gerrard*, 2021 NSCA 59

Date: 20210727
Docket: CAC 501626
Registry: Halifax

Between:

Andre Aaron Gerrard

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice M. Jill Hamilton; Bryson J.A. dissenting.
Appeal Heard:	June 3, 2021, in Halifax, Nova Scotia
Subject:	Criminal Law, *R. v. W.(D.)*, Credibility Assessment, Ability of Trial Judge to Alter Sentence.
Summary:	The appellant was convicted of thirteen charges of assaulting, threatening (including with firearms) and damaging property of Lisa Day, his common-law spouse, over almost eight years. He was sentenced to a global sentence of thirty months jail followed by two years probation. Shortly after imposing this sentence, the judge recognized it was an illegal sentence and changed his sentence to thirty months jail with no probation.
Issues:	1. Did the judge err in her application of the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742? 2. Did the judge err in assessing the credibility of Ms. Day? 3. Was the original global sentence of thirty months jail plus two years probation an illegal sentence? Was the judge *functus officio* when she attempted to rectify this error by deleting the probation period? If so, what sentence should be imposed?

Result: Appeal dismissed. The judge did not misapply *W.(D.)* by considering Ms. Day's evidence in isolation or shifting the burden of proof by picking a side. Nor did she err in how she assessed Ms. Day's credibility. She properly dealt with the evidence of whether Ms. Day had a motive to lie. She did not improperly use her determination that Ms. Day did not embellish her evidence or Ms. Day's delay in reporting to the police. The judge did err by imposing an illegal sentence and then changing it. We imposed a global custodial sentence of thirty months.

Bryson J.A. dissenting would have allowed the appeal because the judge relied on negative credibility findings to conclude that Ms. Day's evidence was reliable and assessed Ms. Day's evidence in isolation, concluding it raised no reasonable doubt, thereby shifting the burden of proof to the accused.

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Judges:	Bryson, Hamilton, Bourgeois JJ.A.
Appeal Heard:	June 3, 2021, in Halifax, Nova Scotia
Held:	Appeal from conviction dismissed, leave to appeal sentence allowed, appeal from sentence allowed, custodial sentence of thirty months substituted for original sentence, per reasons for judgment of Hamilton J.A.; Bourgeois J.A. concurring; Bryson J.A. dissenting.
Counsel:	Ian D. Hutchison, for the appellant Jennifer MacLellan, Q.C., for the respondent

Reasons for Judgment:

[1] The appellant, Andre Aaron Gerrard, appeals his conviction on thirteen charges related to repeatedly assaulting, threatening (including with firearms) and damaging the property of Lisa Day, his common-law spouse, over almost eight years. He also applies for leave to appeal and, if granted, appeals his sentence.

[2] He argues Judge Jean M. Whalen, of the Provincial Court of Nova Scotia, erred in the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and in making credibility findings. He also argues she imposed an illegal global sentence of thirty months jail followed by two years probation, contrary to s. 731(1)(b) of the *Criminal Code*, and when she attempted to rectify this error, she was *functus officio*.

[3] There is no dispute that if the judge made no error in applying *W.(D.)* and determining credibility, all elements of the thirteen offences were made out.

[4] I would dismiss the appeal from conviction, grant leave to appeal sentence, allow the sentence appeal and substitute a global custodial sentence of thirty months for the original sentence.

Judge's Decision

[5] Ms. Day and Cst. Wayne Tingley, an RCMP officer, were the only Crown witnesses. The appellant, his father, Theodore Gerrard, and Janice Deveaux, an acquaintance of Mr. Gerrard and Ms. Day, testified for the defence. In essence it was a "she said, he said" trial.

[6] The appellant and Ms. Day signed a legal separation agreement in October 2016. Ms. Day initially moved out of their home in January 2017, but returned from time to time until the Fall of 2017 when she gave her first of two statements to the police.

[7] In her 39-page oral decision, the judge outlined the applicable law in depth. She stated Mr. Gerrard was presumed innocent and the burden of proof was always on the Crown, who had to prove each essential element beyond a reasonable doubt.

[8] The judge recognized the need to apply the test in *W.(D.)* when assessing credibility. She quoted extensively from the decision of Judge Jamie Campbell, as

he then was, in *R. v. E.M.W.*, 2009 NSPC 33, (reversed 2010 NSCA 73; appeal allowed and conviction restored, 2011 SCC 31) including the following passages:

> 4) The criminal trial process is not about determining "what happened". When there are two diametrically opposed versions there is a natural inclination to resolve that issue by picking a side. Following that natural inclination deprives the accused person of the fundamental right to be presumed innocent unless his or her guilt has been proven beyond a reasonable doubt.
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> 5) The Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 provided guidance on how juries should be instructed to avoid doing just that.
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> 6) The *W.(D.)* (supra) jury instruction provides that if the evidence of the accused person is believed he or she should be acquitted. If the evidence of the accused is not believed, but still raises a reasonable doubt, he or she should be acquitted. Even if the evidence of the accused does not raise such a reasonable doubt, the person must be acquitted if a reasonable doubt is raised by the other evidence.
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> …
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> 29) In a case comment on **R. v. C.L.Y.**, [[2008] 1 S.C.R. 5] Professor Janine Bennett [*sic*–Benedet] points out that the process of assessing credibility is not a simple weighing of evidence.
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> > But the evidence should be assessed in light of any contradictory (or confirmatory) evidence led by the accused. This is not necessarily because of concerns about the burden of proof, since it is possible to believe the complainant without the next step of making a finding of guilt, but because the credibility of the complainant cannot be assessed solely on the basis of whether her evidence is internally convincing and consistent. The task of the trial judge is to synthesize the evidence from various sources on each element of the offence so as to make finding of fact on the whole of the evidence. The concurring justices warn that to do otherwise increases the risk that the trial judge may approach the accused's evidence looking for reasons to discount it. …

[9] The judge summarized the evidence of all of the witnesses, referring to much of the evidence outlined below.

[10] Ms. Day testified there were "a lot" of incidents of violence during the time she was with Mr. Gerrard: "I don't know, 50, more." She indicated several of these instances arose as a result of Mr. Gerrard's issues with her family, ex-husband and older children. In his evidence Mr. Gerrard agreed he had problems with these people. Ms. Day said the violence escalated once Mr. Gerrard went to court to

obtain a peace bond against her then sixteen-year-old son in January 2017. Mr. Gerrard agreed after that court appearance, “it was the end of our relationship”.

[11] Ms. Day gave evidence that, starting in the summer of 2009, Mr. Gerrard called her names (“whore/ugly fat bitch”) and grabbed her arms in anger leaving bruises, which she hid by wearing long-sleeved shirts. Mr. Gerrard agreed Ms. Day sometimes had bruises on her arms. He attributed these to everyday life and Ms. Day moving lobster pots. Ms. Deveaux testified she did not see any marks on Ms. Day, but agreed she did not see Ms. Day every day and that Ms. Day sometimes wore long-sleeved tops.

[12] Ms. Day testified that in 2013–2014, Mr. Gerrard sometimes kicked her legs while wearing boots with reinforced toes, leaving bruises, and threatened to kill her and burn her up in the house.

[13] She said Mr. Gerrard threw things at her. She said in 2011 or 2012 she went to the emergency department of the local hospital, where an x-ray was done, because the pain and swelling in her hand made her think a bone was broken as a result of Mr. Gerrard striking her hand hard with a hair straightener when she raised it to stop him from hitting her on the head.

[14] Ms. Day gave evidence it was common for Mr. Gerrard to damage her belongings when he was angry with her. She testified he damaged seven of her cellphones in a twelve-month period in 2016 and 2017; a bureau that belonged to her grandfather; a mirror and bedroom set; her Cruze and Rav 4 vehicles; the wall of her new home in March 2017; as well as her treadmill and tanning bed in the summer of 2017. Mr. Gerrard testified some of Ms. Day’s cellphones had been handed down to her older children and others were damaged by their young daughter. He said the damage to the tanning bed was an accident.

[15] Ms. Day testified significant violence followed the hearing in January 2017 when Mr. Gerrard sought a peace bond against her son, to stop her son from dating Mr. Gerrard’s niece. She said on that evening Mr. Gerrard grabbed her neck leaving a bruise; ripped her pajama top; hit her on the back of her head causing her glasses to come off and break; smashed her head into the dashboard of her car and later called her and threatened to kill her and her son. Mr. Gerrard said he did not want to raise their daughter in a community where her half-brother was dating a cousin.

[16] Ms. Day said that around March 2017, Mr. Gerrard hit her on the back of her head, pulled her hair, pushed her and threw some of her belongings down the steps when he was unhappy with the way she conducted a phone call with her father that Mr. Gerrard had insisted she make.

[17] Ms. Day testified Mr. Gerrard told her he damaged a front panel and broke the driver's window and the headlights of her Mercedes car when she failed to promptly respond to his instructions that she take a photo of her face and send it to him so he could confirm she was not wearing makeup. Ms. Day said Mr. Gerrard did not allow her to wear makeup unless she was with him because he believed the only reason she would wear makeup would be to attract other men. Mr. Gerrard denied putting restrictions on Ms. Day wearing makeup. He said he did not recall demanding she send him a photo immediately, but agreed it was something he may have said. He testified he accidently damaged the Mercedes when using the snowplow.

[18] Ms. Day gave evidence Mr. Gerrard phoned her repeatedly from morning to night during the summer of 2017, threatening to kill her by burning down her house or cutting her brake lines. She said the repeated calls caused her to lose her job. Mr. Gerrard acknowledged calling Ms. Day repeatedly at the end of their relationship, agreeing it could have been 100 calls a day—"Towards the end of our relationship I called quite a bit. It was foolish. It was ridiculous, yeah".

[19] Ms. Day described three separate instances where Mr. Gerrard had used firearms against her. In 2009, when Ms. Day returned home after an argument, Mr. Gerrard walked back and forth in front of a window of their home brandishing a gun to scare her. Another time, Mr. Gerrard held a gun to her head in their bedroom and said: "I could shoot you right now". In 2015 or 2016, he chased her out of their home, while loading a gun, and fired the gun when she got to the car.

[20] Cst. Tingley testified he seized seven rifles from the appellant's home and could only say for sure that one had a trigger lock on it. Mr. Gerrard testified eleven guns were seized and they all had trigger locks.

[21] Mr. Gerrard's defence was one of denial. He denied assaulting Ms. Day, threatening her, with or without a firearm, or intentionally damaging any of her property. He testified Ms. Day was lying, and that she went to the police in retaliation for his repeating a derogatory comment about Ms. Day to her older daughter:

> Yes, I made -- I told her a derogatory comment that I had heard about her mother. And it went right back to her mother and within 24 hours the police were at my door with a list of charges.

[22] He also testified that throughout their relationship Ms. Day threatened to take him to court, ruin his life and separate him from their daughter.

[23] Mr. Gerrard's father lived very close to the appellant and Ms. Day. He testified he never heard a gunshot coming from his son's house, but did hear shots fired by duck hunters coming from the direction of the ocean. He testified that while his son's house was being built, he stored seven or eight guns for his son under his bed with trigger locks. He testified he was not home all the time and was not certain his son stored all of his guns with him.

[24] After summarizing all the evidence, the judge considered Ms. Day's evidence. She found Ms. Day did not want to press charges, she simply wanted to be left alone. She found Ms. Day's explanation for differences in some details she provided to the police in her statements was plausible—she was "scared" what may happen to her if Mr. Gerrard lost his guns as a result of her going to the police and she did not want to find out if Mr. Gerrard would carry out his threats to harm her if she went to the police.

[25] The judge noted Ms. Day's evidence did not suggest she was motivated to lie or embellished her evidence:

> There's no evidence before me that she's motivated to lie or made previous false claims. Her second statement [to the police] was a result of a third party being interviewed. Her mention of two previous matters were as a result of questions by Mr. Hutchison [defence counsel during cross-examination], not something that she raised. There's no evidence before me she embellished her testimony. If she wasn't sure, she said so. Had she answered all questions with 100 percent certainty, it could certainly call into question the reliability of the evidence.

[26] The judge indicated she had to consider the evidence of Ms. Day and Mr. Gerrard in light of all the evidence, including each other's. She tentatively found Ms. Day's evidence reliable, recognizing that was not the end of the assessment:

> Regarding Ms. Day's evidence, no conclusion as to its credibility, reliability, believability, or its acceptance can be made until all of the evidence has been considered and it has been tested against all the evidence. I find that [*sic*] Ms. Day's evidence to be reliable but that does not end the matter. Reasonable doubt can be found in the Defendant's evidence, the police officer's evidence, or the

> two civilian witnesses's evidence, or the Complainant's evidence. Belief is not one of absolute certainty.

[27] Her comment at the end of this quote, that belief is not one of absolute certainty, responds to the analysis of Judge Campbell in paragraphs 33 to 39 of *E.M.W.* that she quoted in her reasons, about the fluidity involved in the assessment of credibility:

> 35) But trial judges rarely deal in such absolutes. Doubt and belief not only co-exist. They are necessarily complementary. They inform and test each other. It is rare for one to entirely displace the other. …

[28] The judge then considered the defence argument that there were inconsistencies in Ms. Day's evidence and a lack of independent confirmatory evidence, except for a couple of photos of Ms. Day's leg and head. She concluded the inconsistencies were not material.

[29] She reconsidered if Ms. Day was motivated to lie in light of Mr. Gerrard's testimony and found the evidence did not give rise to such an inference:

> There is no evidence to suggest Ms. Day's making all of these incidents up, except Mr. Gerrard who testified that Ms. Day says stuff when she gets mad. Is it possible Ms. Day made up a long list of incidents between her and Mr. Gerrard because she was mad? Perhaps. It is possible, but that suggestion does not raise a reasonable doubt. Is Ms. Day motivated to lie because as Mr. Gerrard testified, "She tried to hold stuff over my head. She said she'd take my daughter away."
>
> Ms. Day on several occasions said she just wanted Mr. Gerrard to leave her alone. She even stated she did not think Mr. Gerrard would physically hurt their daughter and the evidence suggests Mr. Gerrard has access to their daughter. There is nothing in the evidence that permits a reasonable inference to be made that Ms. Day was acting on a motive to lie about Mr. Gerrard.
>
> Her plausible explanations for not reporting to the police, her lack of embellishment, her reluctance to testify about other matters involving Mr. Gerrard all diminish the reasonableness of any inference that Ms. Day is being – is lying about these offences. I find no reasonable doubt in her evidence.

[30] The judge analyzed Mr. Gerrard's evidence noting it was "an unequivocal denial" and differed from Cst. Tingley's evidence in terms of the guns. She considered his testimony concerning the makeup incident, the damage to the cars, his problems with Ms. Day's older children, his temper, the cellphones, Ms. Day's testimony that he kicked her, the bruises on Ms. Day's arms and the number of

daily calls he made to Ms. Day in the summer of 2017 and concluded it did not raise a reasonable doubt:

> I have examined and tested Mr. Gerrard's evidence against Ms. Day's testimony and all the other evidence I heard and saw at trial. When tested it cannot be accepted as raising a reasonable doubt. It is not merely a matter of finding her version of events to be more believable; neither is it a matter of not accepting it, or just not believing the Defendant's evidence when it contradicts Ms. Day.
>
> It is the circumstances surrounding her disclosure, the contents of the disclosure, and the manner in which she related that disclosure that gives me confidence in the reliability of her evidence, even in light of Mr. Gerrard's denial. Ms. Day's evidence displaces any reasonable doubt.

[31] She then quoted from the case of *R. v. Jaura*, 2006 ONCJ 385:

> [20] In summary, it is my view that the case law establishes that, in a "she said/he said" case, the Rule is that **a trial judge can reject the evidence of an accused and convict solely on the basis of his acceptance of the evidence of the complainant, *provided* that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his acceptance of the complainant's evidence.**
>
> [21] Quite apart from case authority, there is ample reason to conclude that this must be the Rule. If it were otherwise, there would effectively be a legal corroboration requirement imposed in these cases and the undoing of years of reform in this area. Alternatively, the issue of guilt would turn on whether the trial judge could identify and articulate that little something extra over and above the complainant's evidence - that flaw in the accused's evidence or its presentation - that would become the additional crumb on which a conviction could be supported. Reasons for judgment would become an exercise in highly subjective nit picking of the accused's evidence, disingenuously disguising the real reason for its rejection. … [Emphasis in original]

[32] She concluded:

> The failure of Mr. Gerrard's evidence to raise a reasonable doubt is not because he denied the allegations. The level of confidence and the reliability of Ms. Day's testimony is sufficiently great that when Mr. Gerrard's evidence contradicted Ms. Day's, it cannot be accepted as raising a reasonable doubt. That level of confidence is not reached upon hearing Ms. Day's evidence but only after considering her evidence in light of all of the other evidence at the trial, including the evidence of Mr. Gerrard.

Issues

[33] The issues as raised by the appellant are:

(a) Did the judge err in her application of the test in *R. v. W.(D.)*?

(b) Did the judge err in assessing the credibility of Ms. Day?

(c) Was the original global sentence of two years and six months jail plus two years probation an illegal sentence? Was the judge *functus officio* when she attempted to rectify this error by deleting the probation period? If so, what sentence should be imposed?

Did the judge err in her application of the test in *R. v. W.(D.)*?

[34] As stated in *R. v. Coburn*, 2021 NSCA 1:

> [27] An allegation that a trial judge did not properly apply *R. v. W.(D.)*, [1991] 1 S.C.R. 742 raises a question of law and is to be reviewed on the standard of correctness.

[35] In *W.(D.)*, at pp. 757–58, the Supreme Court of Canada sets out the appropriate jury instruction in a case which depends on credibility:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, [[1988] 2 S.C.R. 345], at p. 357. [Emphasis in original]
>
> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> 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.
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of

> the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[36] The dangers *W.(D.)* addresses are the potential for simply comparing stories (picking a side) and for shifting the onus to the accused, *R. v. Vuradin*, 2013 SCC 38, para. 26.

[37] The appellant argues the judge made two errors in applying the *W.(D.)* test. He says she improperly assessed the credibility of Ms. Day first and in isolation, without considering his evidence and that of the other witnesses, thereby improperly marginalizing it. He also says the judge erred by impermissibly "picking a side" when assessing credibility by finding his testimony did not give rise to a reasonable doubt solely because she believed Ms. Day.

[38] The judge's lengthy recitation of the law in her reasons indicates she properly instructed herself on proof beyond a reasonable doubt, the presumption of innocence, the necessity to consider the evidence of each witness in the context of the evidence as a whole and the prohibition against a credibility contest.

[39] Her reasons indicate she applied this law and considered all of the evidence when she assessed the credibility of the evidence of both Mr. Gerrard and Ms. Day:

> [Mr. Gerrard's evidence] must be contrasted with the evidence of Ms. Day, Constable Tingley, Ms. [Deveaux] and [Mr. Gerrard's father]. …
>
> Regarding Ms. Day's evidence, no conclusion as to its credibility, reliability, believability, or its acceptance can be made until all of the evidence has been considered and it has been tested against all of the evidence. …
>
> I have examined and tested Mr. Gerrard's evidence against Ms. Day's testimony and all the other evidence I heard and saw at trial.

[40] She did not assess Ms. Day's credibility in a vacuum as argued by the appellant.

[41] Nor did she shift the burden of proof by "picking a side", by choosing which version of events she preferred. She did not reject Mr. Gerrard's testimony solely as a consequence of believing Ms. Day. Rather, as set out in the respondent's factum, she analyzed the problematic evidence in reaching her conclusion the defence evidence did not raise a reasonable doubt:

> 53. The trial Judge's [*sic*–Judge] summarized at length the testimony of Mr. Gerrard. She correctly noted the defence evidence consisted of denials and attacks on Ms. Day's credibility. She referenced how the evidence of [Mr. Gerrard's father] and Ms. Deveaux was neutralized on cross-examination. She detailed and addressed defence counsel's closing argument. She addressed the live issue advanced by the defence that Ms. Day had a motive to lie without requiring defence to prove it. The trial Judge detailed specific admissions made by Mr. Gerrard and where his evidence contradicted that of other witnesses. The trial Judge concluded that the evidence of Mr. Gerrard when examined against all of the evidence at trial did not raise a doubt. …

[42] Her reasons display no shift of the burden, abandonment of the presumption of innocence or misapplication of *W.(D.)*.

[43] There is no merit to this ground of appeal.

Did the judge err in assessing the credibility of Ms. Day?

[44] The standard of review as it applies to cases turning on credibility assessments was clearly set out in *R. v. S.S.S.*, 2020 BCCA 180:

> [24] **It is important to emphasize that while an appellate court is tasked with scrutinizing the reasons given by the trial judge, considerable deference is owed to the trial judge on issues of fact-finding and credibility assessment.** In *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) Doherty J.A. outlined the rationale for the limited role of an appellate court:
>
> > [46] Careful scrutiny of the trial judge's reasoning process is not … to be equated with re-trying the case. **An appellate court must always bear in mind the significant advantage enjoyed by the trial judge when it comes to assessing credibility. … A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial.** Nor can oral argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations: see *R. v. Francois* (1994), 91 C.C.C. (3d) 289 at 296 (S.C.C.).
>
> [25] In *R. v. Gagnon*, 2006 SCC 17 at para. 20, the Court recognized that the bases for credibility assessments are not always easy to express, and re-emphasized the need for appellate courts to give deference to the findings of trial judges:
>
> > **Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.** That is why this

> Court decided, most recently in [*H.L. v. Canada (Attorney General*), [2005] 1 S.C.R. 401], that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected. [Emphasis added]
>
> [26] The need for deference, however, does not mean that appellate review is abandoned altogether. Where a judge's reasons demonstrate an error of principle in the assessment of credibility, or show that credibility has been assessed arbitrarily or using irrelevant criteria, appellate intervention may be required.

[45] While this remains an accurate statement of the law, since then, the Supreme Court of Canada released several brief oral decisions (*R. v. Langan*, 2020 SCC 33; *R. v. Kishayinew*, 2020 SCC 34; *R. v. Slatter*, 2020 SCC 36; *R. v. Delmas*, 2020 SCC 39; *R. v. Mehari*, 2020 SCC 40, *R. v. W.M.*, 2020 SCC 42 and *R. v. Cortes Rivera*, 2020 SCC 44) reminding appeal courts of the considerable deference owed to findings of credibility made by trial judges.

[46] These Supreme Court of Canada decisions approved certain principles of law that were applied in the appeal court decisions that gave rise to them. A review of these underlying decisions reminds appeal courts that credibility findings are findings of fact not to be overturned in the absence of palpable and overriding error or an error in principle. It also reminds us to read the trial judge's reasons as a whole and in the context of the entire record.

[47] Some of those cases dealt with sufficiency of a trial judge's reasons, a concept related to deference. They remind us it is the trial judge who has the opportunity to hear and observe all of the witnesses and this fact "anchors the principle that when reviewing reasons for sufficiency, an appellate court should start from a stance of deference towards a trial judge's perception of the facts"; *Slatter*, 2019 ONCA 807, para. 118. They also remind us a trial judge's reasons with respect to credibility do not need to "describe every consideration", *Slatter (2019)*, para. 118; appellate review should not involve a "word-by-word analysis", *Delmas*, 2020 ABCA 152, para. 30; a trial judge does not need to "reconcile every frailty", *Slatter (2019)*, para. 118; or comment on every inconsistency, *Kishayinew*, 2019 SKCA 127, para. 76; and that it is not a requirement for a trial judge to explicitly state at the end of their credibility finding that the accused's evidence left them without a reasonable doubt. In addition, where a complainant's evidence conflicts with that of an accused and the trial judge gives reasons for accepting a complainant's evidence, it follows by necessity the trial judge rejected the accused's evidence where it conflicts with the accepted evidence of the

complainant. When this arises, a trial judge is not required to further explain why the accused's evidence was rejected, *Kishayinew (2019)*, para. 64.

[48] Recently in *R. v. G.F.*, 2021 SCC 20, the Supreme Court of Canada reasoned:

> [79] To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review: *Sheppard*, at para. 54. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at pp. 523-25. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated: *Sheppard*, at para. 46. An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity.
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> …
>
> [81] As *Slatter* demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt. But, as this Court stated in *Gagnon*, at para. 20:
>
> > Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.

> [82] Credibility findings must also be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between reliability and credibility. …

[49] Nonetheless, we must remember, appellate intervention may be required if a judge's reasons demonstrate an error of principle in the assessment of credibility or show credibility has been assessed arbitrarily or using irrelevant criteria.

[50] Under this ground of appeal, the appellant mentions insufficiency of reasons, but focusses his argument on three alleged errors. He says the judge erred in concluding Ms. Day's testimony was credible because she (1) used her finding that Ms. Day did not embellish her evidence as a makeweight to find her evidence was credible, (2) impermissibly considered if Ms. Day had a motive to lie and (3) improperly considered whether Ms. Day had a plausible explanation for her delay in reporting to the police.

[51] He argues these are the same types of errors the judge made in *R. v. Cooke*, 2020 NSCA 66, pointing to paragraphs 17, 34 and 35:

> [17] The Respondent properly concedes it was an error for the judge to rely on an absence of motive to lie in assessing the credibility of the complainant. Despite that concession, the Respondent asks us to conclude, on the entirety of the decision, that such a misstep was not fatal. The difficulty with the Respondent's suggestion is that we are left uncertain about what degree of weight, if any, the judge may have placed on that determination.
>
> …
>
> [34] While the judge did not find any troublesome credibility detractors in the complainant's evidence, the absence of them did not constitute the proper basis upon which the judge could then make positive findings of credibility and reliability: *R. v. Laing*, 2017 NSCA 69 at para. 68.
>
> [35] I am persuaded the judge's overemphasis on prohibitions against stereotypical thinking, to the detriment of the task of assessing credibility, combined with unsupportable positive credibility findings, amount to errors of law.

[52] The two cases are not alike; what constituted error in *Cooke* was not an error here, but rather the proper analysis of the way the argument and evidence unfolded. In *Cooke*, motive to lie was a neutral factor that the trial judge misused, not the burning issue raised by the defence in this appeal. Here the allegation of motive to lie was squarely before the judge as a result of Mr. Gerrard's testimony that Ms. Day made things up to get back at him—to fulfill Ms. Day's threat to keep him

away from their young daughter and to punish him for telling lies about her to her older daughter. The judge had to deal with this evidence.

[53] As set out in *R. v. Kiss*, 2018 ONCA 184, it is permissible for a judge to consider the absence of embellishment by a witness in determining if his or her evidence is not credible, but not as a makeweight in favour of the credibility of his or her evidence:

> [52] The trial judge would have erred if he treated the absence of embellishment as adding to the credibility of K.S.'s testimony. It is wrong to reason that because an allegation could have been worse, it is more likely to be true… . While identified exaggeration or embellishment is evidence of incredibility, the apparent absence of exaggeration or embellishment is not proof of credibility. This is because both truthful and dishonest accounts can appear to be without exaggeration or embellishment.
>
> [53] On the other hand, in my view, there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. As long as it is not being used as a makeweight in favour of credibility, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible. [References removed]

See also, *R. v. Johnston*, 2021 BCCA 34, paras. 112–113, (application for leave to appeal to Supreme Court of Canada filed May 6, 2021).

[54] In the face of a suggestion by the defence that a witness has a motive to lie, a judge can consider a complainant's reluctance to report offences to the police and to testify as factors supportive of the inference "that the complainant's version of events is accurate"; *E.M.W.*, para. 80.

[55] In the recent decision of *R. v. Swain*, 2021 BCCA 207, the British Columbia Court of Appeal provided a comprehensive summary of the state of the law on how trial judges may use a complainant's apparent lack of motivation to lie (or not):

> [28] From these cases, a number of largely consistent principles emerge. In some instances, an accused may seek to prove that a complainant has a particular motive to fabricate evidence. Proof of such a motive may substantially challenge the credibility of the complainant, which may be capable of raising a reasonable doubt. In other cases, the Crown may be able to prove, on the evidence, that the complainant has no motive to lie. Such a conclusion may serve as "a powerful

platform to assert that the complainant must be telling the truth": *Bartholomew* at para. 21; see also *Batte* at para. 120; *Ignacio* at para. 32.

[29] In most cases, however, the trier of fact will be provided no evidence of any motive to fabricate on the part of the complainant, but the evidence will fall short of actually proving that the complainant has no motive to fabricate: *L.L.* at para. 53; *John* at para. 93; *Bartholomew* at paras. 21–22; *Ignacio* at para. 32. The question becomes whether and how such an absence of evidence of motive can be considered by the trier of fact in assessing what is almost always the complainant's credibility.

[30] Notwithstanding some recent ambiguity in the case law (see e.g., *R. v. Cooke*, 2020 NSCA 66 at para. 17; *R. v. A.S.*, 2020 ONCA 229 at para. 59; *R. v. S.H.*, 2020 ONCA 34 at para. 11), it has been held that a trier of fact is entitled to consider an absence of evidence of motive to fabricate when assessing a complainant's credibility: see *L.L.* at para. 53; *R. v. Stirling*, 2008 SCC 10 at para. 12; *MacKenzie* at para. 34; *W.R.* at para. 18; and the clarifications provided in *Ignacio* at paras. 37–60. There are, however, certain risks arising from this consideration that must be avoided. These risks are often interrelated.

[31] First, the trier of fact must not equate the mere absence of evidence that a complainant has a motive to fabricate evidence with a proven absence of motive: see *Greif* at para. 41 and the other authorities referred to in that paragraph. The Crown must meet a high bar to prove an absence of motive to fabricate. For example, evidence that the complainant and the accused had a good relationship is insufficient, without more, to establish that the complainant had no motive to fabricate: *Ignacio* at para. 33; *Bartholomew* at para. 25; *John* at para. 94; *L.L.* at para. 45. The reason a high standard is required is the recognition that "[p]eople may accuse others of committing a crime for reasons that may never be known, or for no reason at all": *Bartholomew* at para. 22; see also *Ignacio* at para. 31; *M.S.* at para. 14; *Sanchez* at para. 25; *L.L.* at paras. 44, 53.

[32] Second, and for the same reason, the trier of fact must not consider that an absence of evidence of motive to fabricate, or even a proven absence of motive, conclusively establishes that the complainant is telling the truth: *R.W.B.* at para. 28; *Batte* at paras. 121, 125; *Mirzadegan* at para. 14; *Stirling* at para. 11. In other words, the trier of fact may consider the absence of evidence of a motive to fabricate as one of various factors in assessing the complainant's credibility and must not place excessive weight on it: *R.W.B.* at paras. 28, 48; *Ignacio* at paras. 47–58. In some cases, reliance on an apparent absence of motive to fabricate has been considered appropriate because it was "one of many" or one of "numerous" factors that were present in the court's assessment of credibility: *Ignacio* at para. 3; *L.L.* at para. 53; *O.M.* at para. 109.

[33] Third, the trier of fact must not reverse the burden of proof, which remains on the Crown to prove its case against the accused beyond a reasonable doubt. Specifically, the trier of fact must not look to an accused to explain why a complainant has made the allegations they have or be under any impression that

> the accused has an onus to demonstrate that the complainant has a motive to fabricate evidence in order to achieve an acquittal: *Greif* at paras. 39–41; *Stewart* at para. 26; *Batte* at para. 121; *M.S.* at paras. 15–16. Most notably, this issue has arisen where Crown counsel has inappropriately cross-examined the accused as to why the Crown's witnesses would fabricate their evidence: see e.g., *R. v. Ellard*, 2003 BCCA 68 at paras. 21–24; *R. v. Fierro*, 2013 BCCA 436 at paras. 22–32; *R. v. Roth*, 2020 BCCA 240 at paras. 84–89. As this Court explained in *Ellard*:
>
> > [22] The potential prejudice arising from this form of questioning is that it tends to shift the burden of proof from the Crown to the accused. It could induce a jury to analyze the case on the reasoning that if an accused cannot say why a witness would give false evidence against her, the witness's testimony may be true. The risk of such a course of reasoning undermines the presumption of innocence and the doctrine of reasonable doubt. The mind of the trier of fact must remain firmly fixed on whether the Crown proved its case on the requisite standard and not be diverted by the question whether the accused provided a motive for a witness to lie. …
> >
> > [Emphasis in original]
>
> [34] Whether the trier of fact has fallen into any of these errors will depend on the facts of the case, the submissions and positions of counsel, and the manner in which a judge raises and addresses the issue, either in their charge to the jury or their reasons for judgment.

[56] Thus, if a judge rejects the defence evidence of a motive to lie and concludes there was no other evidence of a motive to lie, his or her finding that there is an absence of evidence of a motive to lie may be used by the judge as one factor in assessing the complainant's credibility, subject to avoiding certain risks. The judge cannot (1) treat the absence of a motive to lie as being entirely dispositive of the credibility of the witness' evidence, (2) shift the burden of proof to the accused to prove there was motive to lie or (3) equate the mere absence of evidence of motive to lie with a proven absence of motive.

[57] In *Cooke*, this Court said:

> [17] The Respondent properly concedes it was an error for the judge to rely on an absence of motive to lie in assessing the credibility of the complainant. …

[58] As is to be expected in a case where both parties and the Court agree, there is no description in the reasons of how the judge misused the absence of motive to lie in that case.

[59] In this case, Mr. Gerrard's evidence that Ms. Day lied to the police and was lying in court in retaliation for his repeating a derogatory comment about Ms. Day

to her older daughter was central to the trial, as was his evidence that throughout their relationship Ms. Day would threaten to have him charged, take his daughter away and destroy his life.

[60] In light of Mr. Gerrard's evidence of Ms. Day's motive, it was appropriate for the judge to consider, as she did, whether it was reasonable for her to infer from the evidence that Ms. Day had a motive to lie.

[61] After summarizing all of the evidence, the judge considered the appellant's evidence about Ms. Day's credibility, including whether she had a motive to lie, and concluded:

> There is no evidence to suggest Ms. Day's making all of these incidents up, except Mr. Gerrard who testified that Ms. Day says stuff when she gets mad. Is it possible Ms. Day made up a long list of incidents between her and Mr. Gerrard because she was mad? Perhaps. It is possible, but that suggestion does not raise a reasonable doubt. Is Ms. Day motivated to lie because as Mr. Gerrard testified, "She tried to hold stuff over my head. She said she'd take my daughter away".
>
> Ms. Day on several occasions said she just wanted Mr. Gerrard to leave her alone. She even stated she did not think Mr. Gerrard would physically hurt their daughter and the evidence suggests Mr. Gerrard has access to their daughter. There is nothing in the evidence that permits a reasonable inference to be made that Ms. Day was acting on a motive to lie about Mr. Gerrard.
>
> **Her plausible explanations for not reporting to the police, her lack of embellishment, her reluctance to testify about other matters involving Mr. Gerrard all diminish the reasonableness of any inference that Ms. Day is being -- is lying about these offences.** I find no reasonable doubt in her evidence. [Emphasis added]

[62] It is the highlighted sentence in the above quote that the appellant impugns. Reminding myself (1) I am to read these words in light of the whole of the oral reasons and the record; (2) I am not to review the judge's reasons "on a word-by-word analysis"; (3) it is difficult "for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile various versions of events"; (4) a judge is presumed to know and apply the law; (5) where reasons are open to more than one interpretation, those consistent with the presumption of correct application are to be preferred and (6) appellate intervention may be required if the reasons demonstrate an error of principle in assessing credibility or show credibility has been assessed arbitrarily or using irrelevant criteria, I am satisfied the judge did not err by relying on lack of embellishment by Ms. Day as a makeweight in favour of

her credibility or use her reluctance to report to the police and testify improperly. She states she is not willing to draw the inference sought, that Ms. Day had a motive to lie. Her words are more reflective of her considering embellishment and reluctance in the context of finding Ms. Day was not "incredible", a permissible use, rather than as a makeweight.

[63] The fact the judge did not use the absence of the negative detractor of embellishment as a "makeweight in favour of credibility" distinguishes this case from *Cooke* where the Court points out, in paragraph 32, that the judge concluded "There are a number of [neutral factors] that support the complainant's version of events".

[64] Nor do her reasons indicate the judge erred in how she dealt with the evidence of whether Ms. Day had a motive to lie. The issue of motive to lie was placed firmly before her by the defence. The judge rejected Mr. Gerrard's evidence that Ms. Day had a motive to lie, concluded there was no other evidence she had such a motive and used that as a factor in assessing Ms. Day's credibility as she is permitted to do. There is evidence supporting her conclusions.

[65] The judge did not use her conclusion that there was no evidence of a motive to lie as being entirely dispositive of Ms. Day's credibility as she considered in some depth the whole of Mr. Gerrard's other evidence in her reasons. There is nothing in her reasons to suggest she shifted the burden of proof to require Mr. Gerrard to prove Ms. Day did not have a motive to lie or that she equated the mere absence of evidence of motive to lie with proven absence of motive. Nothing suggests she leapt to the conclusion that the complainant must be telling the truth.

[66] In addition to citing at length from *E.M.W.* as to the correct law to apply in assessing credibility, the judge also cited and relied on *Jaura* in her decision:

> [20] … **a trial judge can reject the evidence of an accused and convict solely on the basis of his acceptance of the evidence of the complainant, *provided* that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his acceptance of the complainant's evidence.** [Emphasis in original]

[67] She applied this statement of the law to her own analysis:

> The failure of Mr. Gerrard's evidence to raise a reasonable doubt is not because he denied the allegations. The level of confidence and reliability of Ms. Day's testimony is sufficiently great that when Mr. Gerrard's evidence contradicted Ms.

> Day's, it cannot be accepted as raising a reasonable doubt. That level of confidence is not reached upon hearing Ms. Day's evidence but only after considering her evidence in light of all of the other evidence at the trial, including the evidence of Mr. Gerrard.

[68] I would dismiss this ground of appeal.

Was the original global sentence of two years and six months jail plus two years probation an illegal sentence? Was the trial Judge *functus officio* when she attempted to rectify this error by deleting the probation period? If so, what sentence should be imposed?

[69] The appellant seeks leave to appeal his sentence. We grant leave if there is an arguable issue.

[70] He says the judge erred by initially imposing an illegal sentence of a period of probation in addition to a jail sentence of a total of two and a half years. Whether the first sentence the judge imposed was a legal sentence is a question of law reviewable for correctness.

[71] He also says the judge was *functus officio* when she attempted to correct her first sentence by deleting the period of probation. Whether the judge was *functus officio* when she purported to impose the amended sentence is a jurisdictional issue and a question of law reviewable for correctness, *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, para. 23.

[72] The Crown agrees, as do I, that the first sentence imposed was illegal and the judge was *functus officio* when she attempted to impose the amended sentence.

[73] The appellant asks that we substitute a probation order for the period of incarceration imposed, noting he was in custody since October 1, 2020 until he was released to a half-way house.

[74] I would grant leave to appeal, allow the appeal from sentence and substitute a custodial sentence of thirty months. This length of sentence is entirely justifiable on the facts of the case. Anything less would not reflect the prolonged, significant domestic abuse suffered by Ms. Day and the use of firearms in some of the offences. The aggravating domestic nature of the assaults and the need for denunciation and deterrence would go unrecognized if a sentence of only probation were substituted.

Conclusion

[75] I would dismiss the appeal from conviction. Further, I would grant leave to appeal, allow the appeal from sentence and substitute a custodial sentence of thirty months.

Hamilton J.A.

Concurred in:

Bourgeois J.A.

Dissenting reasons of Bryson J.A.:

[76] Respectfully, I dissent. The judge made the errors the appellant describes. They are the same errors made by the same judge criticized by this Court in *R. v. Cooke,* 2020 NSCA 66. They are:

1. Improperly using negative credibility findings to conclude that Ms. Day's evidence was reliable;
2. Finding Ms. Day credible and reliable in isolation, thereby marginalizing the evidence of the accused;
3. As a result of the foregoing, shifting the burden of proof to the accused.

[77] I agree with my colleague, Justice Hamilton, regarding the relevant legal principles. We part company concerning whether the judge properly applied them.

[78] In *Cooke,* the Court quoted from the trial judge:

> [32] The second aspect of the Appellant's objection to the judge's credibility assessments concerns positive credibility findings made by the judge. During the trial, defence counsel asked the judge to assess what had occurred, taking into account both the details and the lack of details in the complainant's evidence. The Appellant says rather than conduct that exercise, the judge instead relied on neutral factors to make positive credibility findings, which ultimately had a bearing on the outcome of the trial. The Appellant points to the following portions of the judge's decision:
>
> > ***There are a number of factors that support the complainant's version of events.*** These are ... excuse me. ***There are a number of factors that***

> ***support the inference that the complainant's version of the events is accurate.***
>
> […]
>
> Given the nature of the relationship between the two, her lack of disclosure to hospital personnel, her hesitancy to disclose to police initially, and the lack of [the complainant's] certainty regarding some things ***leads me to infer that [the complainant] is not lying about the events that took place on the night in question. I find no reasonable doubt in her evidence.***
>
> [Emphasis added]

[79] In this case, the judge did the same thing:

> With respect to Ms. Day's version of events, Mr. Hutchison certainly challenged her accuracy and memory. ***Are there any factors that I can consider which may support the reliability of this testimony?*** Firstly, I would say that ***there was a lack of animosity*** from Ms. Day. Although she agreed the relationship was toxic, she also stated that they did not fight all the time and it started out good. [*sic*] […]
>
> With respect to the details of the disclosure: when asked about giving statements to the police, ***her explanations were plausible***. […]
>
> ***There's no evidence before me that she's motivated to lie or made previous false claims***. Her second statement was as a result of a third party being interviewed. Her mention of two previous matters were as a result of questions by Mr. Hutchison, not something that she raised. ***There's no evidence before me she embellished her testimony.*** […]
>
> (Appeal Book: p. 46, lines 20, 21; p. 47, lines 1-5 and 10-12; p. 48, lines 20-21; p. 49, lines 1-4)
>
> [Emphasis added]

The judge used these negatives to conclude that Ms. Day's evidence was reliable.

[80] Although the judge stated the law correctly, she did not apply it:

> Regarding Ms. Day's evidence, no conclusion as to its credibility, reliability, believability, or its acceptance can be made until all of the evidence has been considered and it has been tested against all the evidence. ***I find that* [*sic*] *Ms. Day's evidence to be reliable but that does not end the matter.*** Reasonable doubt can be found in the Defendant's evidence, the police officer's evidence, or the two civilian witnesses's evidence, or the Complainant's evidence. Belief is not one of absolute certainty.

(Appeal Book: p. 49, lines 13-21)

[Emphasis added]

[81] The judge recognized that she must consider all the evidence but accepted Ms. Day's testimony without considering all the evidence.

[82] The judge made the same error here as in *Cooke*, by treating negative factors—factors that at best did not diminish the complainant's credibility—as positive by turning them into reasons to conclude that the complainant was credible and reliable.

[83] The judge then concluded that Ms. Day's evidence created no reasonable doubt:

> ***Her plausible explanations for not reporting to the police, her lack of embellishment, her reluctance to testify about other matters involving Mr. Gerrard all diminish the reasonableness of any inference that Ms. Day is being – is lying about these offences. I find no reasonable doubt in her evidence.***
>
> (Appeal Book: p. 50, line 21 to p. 51, line 5)
>
> [Emphasis added]

[84] In *Cooke*, this Court pointed out the danger of making positive findings of credibility based on neutral factors:

> [33] The Respondent asks us not to lose sight of the context in which the judge situated her reasons. The absence of detractors that might negatively impact the credibility of the complainant would make that evidence neutral, not automatically raise it to a level of "support" for "the complainant's version" as was stated by the judge in the above-noted passage. This confirms the judge was not simply inferring on matters of credibility, but was in fact making findings about credibility, despite labelling them as inferences.

See also: *R. v. Alisaleh*, 2020 ONCA 597 at ¶16.

[85] My colleague distinguishes *Cooke* by correctly noting that the defence raised some of the credibility issues in this case which prompted the judge to address them. Certainly the judge was invited to consider these arguments. The question is what use could be made of them. Rejecting defence allegations of fabrication or motivation to lie is not the same thing as using that rejection to find the complainant reliable. But that is precisely what the judge did in this case by

making positive credibility findings based on a rejection of the defendant's arguments, and then deciding there was no reasonable doubt in her evidence.

[86] In *R. v. Lake*, 2005 NSCA 162, this Court warned against marginalizing the evidence of the accused:

> [21] Second is the concern which arises here. ***The trial judge may discount the accused's testimony just because she has believed the Crown witnesses.*** The defence is neutered in the starting gate regardless of how the accused presents or testifies. The accused has not really been disbelieved. He has been marginalized. So it is impermissible to reject the accused's testimony solely as a consequence of believing the Crown witnesses. The trier of fact should address both whether the Crown witnesses are believed and whether the accused is disbelieved. This is the rationale for *W.(D.)'s* first question.
>
> [Emphasis added]

[87] The judge in this case did address the other evidence, *after* concluding the complainant was reliable and her evidence raised no reasonable doubt. As the Ontario Court of Appeal described in *R. v. Y.M.*, 71 O.R. (3d) 388, leave to appeal refused, [2004] S.C.C.A. No. 340, the effect of this reasoning process shifts the burden of proof:

> [30] The trial judge's statement "that for me to have made these findings of fact, I reject outright Mr. [M.]'s denials", suggests that he may have engaged in the following forbidden reasoning: ***I accept the evidence of the complainant A.G.; the appellant's evidence differs from A.G.'s evidence on material matters; therefore I do not believe the appellant's evidence. This reasoning is forbidden because it appears to shift the burden of proof onto the appellant to explain away the complainant's evidence.*** This court made the same point in *Strong* at para. 9:
>
> > In all these circumstances, a total rejection of his evidence to the point where it did not even leave a reasonable doubt without any explanation is unsatisfactory. In these circumstances, the absence of any explanation for rejecting totally the appellant's evidence strongly suggests that he was disbelieved because the complainants were believed. This approach ignores the burden of proof.
> >
> > [Emphasis added]

[88] This reversal of the burden appears in the judge's decision when she says:

> The failure of Mr. Gerrard's evidence to raise a reasonable doubt is not because he denied the allegations. ***The level of confidence and the reliability of***

> ***Ms. Day's testimony is sufficiently great*** that when Mr. Gerrard's evidence contradicted Ms. Day's, it cannot be accepted as raising a reasonable doubt. ***That level of confidence is not reached upon hearing Ms. Day's evidence but only after considering her evidence in light of all of the other evidence at the trial, including the evidence of Mr. Gerrard.***
>
> (Appeal Book: p. 55, lines 9 to 17)
>
> [Emphasis added]

[89] The second emphasized passage is incorrect. The judge had already decided that Ms. Day's evidence was reliable and raised no reasonable doubt. That premature conclusion cannot be later retrieved by a formulaic reference to "all the other evidence".

[90] To quote again from *Cooke*:

> [43] While the judge correctly reminded herself credibility was one aspect of the ultimate question of proof beyond a reasonable doubt, it would seem from the decision, read as a whole, she was searching for a way to justify her positive treatment of the complainant's evidence. ***It is reasonable to conclude that, in effect, the judge was suggesting the lack of bizarreness or exaggeration in the complainant's evidence helped to erase any reasonable doubt.*** The cumulative effect was to undermine the Appellant's right to a fair trial by effectively ***shifting the burden of proof to him to show how that evidence was bizarre, far-fetched or grossly exaggerated.***
>
> [Emphasis added]

[91] My colleague disagrees, quoting from the judge (¶39 of Justice Hamilton's decision). But with respect, correctly citing the law is no substitute for correctly applying it. What the judge said should be done and what she did were different things.

[92] The judge erred in law in her credibility analysis and shifted the burden of proof to Mr. Gerrard.

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

Bryson, J.A.