NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Preston*, 2022 NSCA 66

Date: 20221103
Docket: CAC 511318
Registry: Halifax

Between:

Kyle James Preston

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: Section 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Anne A. S. Derrick
Appeal Heard:	September 28, 2022, in Halifax, Nova Scotia
Subject:	Criminal law. Sexual assault. Deference to trial judge's credibility findings and application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Post-incident text messaging. Sufficiency of reasons.
Summary:	The appellant was convicted in the Nova Scotia Supreme Court of sexual assault contrary to s. 271 of the *Criminal Code*. He testified that the sexual intercourse with the complainant was consensual. In a text exchange with the complainant some hours later, he had apologized for his conduct. On appeal he argued the trial judge used the complainant's text messages in their exchange to draw the prohibited inference that her testimony about not consenting to sexual intercourse was more likely to be true because it repeated what she had said in her text messages. He also argued the trial judge had convicted despite finding inconsistencies in the complainant's evidence and on the basis

of a flawed *W.(D.)* analysis. He said the trial judge's reasons did not adequately address the issues with the complainant's credibility.

Issues:

(1) Did the trial judge use the complainant's text messages to the appellant as prior consistent statements to bolster her credibility?

(2) Did the trial judge otherwise commit legal error in his credibility analysis, including his application of *W.(D.)*?

(3) Were the judge's reasons sufficient?

Result:

The appeal is dismissed. The trial judge properly used the complainant's text messages for context and not to support her credibility based on consistency. His focus was on the appellant's responses to the unambiguous statements by the complainant that he had sexually assaulted her. The trial judge explicitly referred to the appellant's responses to the complainant's texts as admissions. He compared the responses to other evidence which contradicted the appellant's trial testimony about why he had responded as he had in the text exchange. The trial judge identified inconsistencies in the evidence of both the complainant and the appellant. On the critical issue of consent to sexual intercourse he found the appellant was not credible. He properly applied *W.(D.)* and considered the whole of the evidence before deciding he was satisfied beyond a reasonable doubt that the appellant had sexual intercourse with the complainant without her consent. He provided factually and legally sufficient reasons for conviction and his credibility findings attract a high level of deference on appeal.

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Judges:	Farrar, Van den Eynden, Derrick, JJ.A.
Appeal Heard:	September 28, 2022 in Halifax, Nova Scotia
Written Release	November 3, 2022
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Farrar and Van den Eynden, JJ.A. concurring.
Counsel:	Matthew Ryder, for the appellant Timothy O'Leary, 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).

Reasons for judgment:

Introduction

[1] On June 25th, 2021, Kyle Preston was convicted in the Nova Scotia Supreme Court of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. *R. v. Preston*, 2021 NSSC 212 ("Trial Decision"). The trial judge, Justice Joshua M. Arnold, imposed a two-year sentence of imprisonment with twenty-four months' probation to follow. Mr. Preston filed a Notice of Appeal against conviction and was released on bail pending his appeal.

[2] The appellant testified at his trial that the sexual intercourse with the complainant, S.B., on August 4th, 2018, was consensual. S.B. testified it was not. A text exchange between S.B. and the appellant the next day was admitted into evidence. In it, the appellant apologized in response to S.B. excoriating him for his conduct the evening before.

[3] The trial judge was satisfied beyond a reasonable doubt the appellant had sexually assaulted S.B. He assessed S.B. as credible on the issue of consent and rejected the appellant's claim of consensual sexual intercourse. He found the appellant's responses to S.B.'s text messages amounted to admissions of guilt.

[4] The appellant says the trial judge committed errors of law in his credibility findings, provided insufficient reasons, and improperly relied on S.B.'s prior consistent statements to boot-strap her testimony. He is seeking to have this Court quash his conviction and enter an acquittal, or in the alternative, overturn his conviction and order a new trial.

[5] For the reasons that follow, I am satisfied the trial judge made none of the errors alleged by the appellant. There is no basis for the claim that his reasons were inadequate. I would dismiss the appeal.

The Evidence at Trial of the Encounter Between S.B. and the Appellant on August 4th, 2018

[6] In August 2018, S.B. and the appellant were both 19 years old. They did not know each other very well. They had spoken a few times at their work, a local recreation centre. S.B. left her employment at the centre in March 2018. The appellant was still working there on August 3rd, 2018, when he and S.B. connected over text and Snapchat.

[7] The text and Snapchat exchanges led to S.B. inviting the appellant over. S.B. testified she was bored. When the appellant suggested he come and get her so they could hang out, S.B. agreed. The trial judge found she had sent the appellant a Snapchat message that said either "Do you want to fuck?" or "We should fuck tonight". The Snapchat exchanges were not saved.

[8] S.B. testified she told the appellant before he arrived they were not going to have sexual intercourse, "straight up that I didn't want to". She claimed that she was menstruating, which she said was intended to deter him. The appellant denied that any such statements were made.

[9] The appellant arrived at S.B.'s house around 1:40 a.m. on August 4th, 2018. The trial judge noted there was some disagreement over what was said when S.B. got into his car.

[10] The appellant said he asked S.B. if she wanted to go for a drive. S.B. testified in direct examination that she suggested they hang around at her house but the appellant drove off with her instead. It was pointed out to her in cross-examination that in her statement to the police investigator, Cst. Rideout, she said: "So, I was like oh, sure, why not". S.B. explained her thought process at the time was "Sure, why not" and that she did not verbalize a response or object.

[11] After parking in an isolated location behind a local recreation centre, the appellant and S.B. spent some time looking at their phones. There was then a period of consensual touching and kissing. They agreed to move to the back seat where more touching and kissing occurred with the appellant on top of S.B. S.B. testified that the appellant pulled her leggings off prompting her to tell him she did not want to engage in sexual intercourse. She said she told the appellant just because her pants were off did not mean they were going to have intercourse. S.B. told the appellant "no" but he did not abandon his efforts to penetrate her. He was not wearing a condom. She said she pushed him off her, saying "no, like I told you no". Despite this, the appellant inserted his penis into S.B.'s vagina. She testified that: "I actually, I reached down and grabbed his penis and took it out of my vagina". The appellant persisted which S.B. said caused her to remove his penis two or three times.

[12] S.B. testified she was feeling scared because she hadn't been listened to: "It was something I didn't want to do". In addition to taking the appellant's penis out of her vagina, S.B. said she pushed on his chest and repeatedly said, "No. This

isn't happening tonight". She tried moving but was wedged into position in the back seat with her back to the car door and the appellant on top of her.

[13] S.B. explained when the appellant stopped penetrating her, she didn't "really say anything" and just wanted to get home. The appellant dropped her off and S.B. went inside. She was texting with her friend and then her aunt, D.C. In the morning she and the appellant had a text exchange.

[14] The appellant's evidence did not diverge significantly from S.B.'s description of their contact and sexual interactions prior to the sexual intercourse. He obtained S.B.'s address from her over Snapchat after they made plans to hang out together. He testified that she said "sure" when he asked her if she wanted to go for a drive. A brief period of the appellant and S.B. being on their phones was followed by mutual kissing and touching. The decision to move into the back seat was mutual: the appellant said he suggested it and S.B. agreed. The appellant testified S.B. removed her leggings with some help from him to get them over her ankles. He told her "no worries" when she said she was at the end of her menstrual cycle. The appellant then described how he and S.B. ended up having sexual intercourse. S.B. was underneath him, leaning on the door of the car. She was pulling on the waistband of his shorts which led to him removing them. S.B. started "guiding and rubbing" the appellant's penis toward her vagina. He responded by rubbing his penis on her inner thigh and on her vagina. In cross-examination the appellant acknowledged there were "no words". He testified that S.B. "guided" his penis into her vagina, not saying anything but "moaning from the pleasure of sex".

[15] The appellant testified that S.B. never said they would not be having sex, did not ask him to stop, did not try to push him off, and did not pull his penis out of her vagina. The appellant testified intercourse ended with him ejaculating on her right thigh.

[16] After the appellant and S.B. got dressed, he drove her home. He testified they remained seated in the car outside S.B.'s home for "a good 50 minutes to an hour", listening to music and talking about a range of topics. He told S.B. it was almost 4 a.m., he was really tired and wanted to get home before he fell asleep. He waited for S.B. to get into the house, checked a couple of messages on his phone, and left.

[17] Text messages from S.B. to a friend while the appellant was driving her home were sent shortly before 3 a.m. on August 4th. S.B. testified that on arriving

home, she went inside right away. She continued to text her friend and then messaged her aunt, D.C. Her aunt testified she received two calls from S.B. in the middle of the night, the first of which she missed. At 3:30 a.m. S.B. called again. This time D.C. answered the phone. S.B. was clearly upset. According to D.C., she was crying so much it was hard to understand what she was saying.

[18] S.B. testified that as soon as she got out of the appellant's car she started to cry. She went inside, sat on the couch and "tried to understand what had just happened". She "couldn't calm down" and cried "the whole rest of that night". She firmly disagreed with the appellant's evidence that they sat in his car for nearly an hour after arriving at her house.

[19] Once he got to his home, the appellant went to sleep, waking up around 11 a.m. at which time he noticed a text message from S.B. What followed was an exchange in which the appellant apologized in response to S.B.'s texts, including an accusation that he had "raped" her. The appellant testified at trial his responses to S.B.'s texts were fueled by a major anxiety attack causing him to take responsibility for something he had not done – had sexual intercourse with S.B. without her consent.

[20] The appellant described what had led him to believe S.B. was consenting to sexual intercourse. He referred to the consensual touching and kissing and S.B. guiding his penis into her vagina. He said the consent "started in the front seat…And it continued throughout". He testified it was S.B.'s actions that showed she was consenting and denied any pushing or admonitions to stop by S.B.

The Text Exchange Between S.B. and the Appellant

[21] The Crown's case against the appellant included screenshots of a text message exchange with S.B. on August 4th. S.B.'s texts were accusatory; the appellant's responses were contrite:

> **S.B.** Listen, tonight when I said no and that we weren't going to fuck I meant it. I didn't want too, and I asked you to stop multiple times and you didn't.
>
> So there isn't going to be a next time. I know I was teasing you but teasing you with sex was not my intention, I told you no and I meant it and that's not okay.
>
> **K.P.** I am sorry
>
> I made a mistake, And I own to it..

S.B. You can not rape someone and expect sorry to make everything okay

K.P. That hit me so hard.. I had no intentions on that, can I make it up to you, This is very serious to me

I'm beyond sorry.. I really am..

S.B. How could you make it up to me

K.P. To show you I'm a good person, and that last night wasn't me

S.B. Honestly you can't do anything to make this better

I told you no and to stop, and I even pushed you off of me multiple times and you didn't care

K.P. I feel like a monster..from the deepest part of my heart, I am sorry.

S.B. I bet you are sorry but that doesn't change anything

[22] In cross-examination, the appellant acknowledged he had not responded to S.B.'s texts with a denial of what she was saying. He said he was not in "the right mind frame" when he was replying to the texts:

> …I struggle really hard with anxiety and my anxiety takes over and I start blaming myself for everything, no matter what. And I never addressed anything in the text messages. I repeatedly said I was sorry and I felt really bad...

[23] The appellant agreed his responses to S.B.'s text messages did not make a lot of sense. He said he was "more or less just blaming myself the entire time and I'm just in a frenzy", which he clarified to mean he was extremely anxious when he read S.B.'s texts.

[24] Later in the cross-examination, it was put to the appellant that he had not denied S.B.'s accusations of rape nor had he asserted non-consensual sexual intercourse did not happen. The appellant responded:

> Yes. And I refer back to my mental health. Um, I – I apologize because, like I said, I blame myself and I just – I continued to blame myself, you know, I just want to de-escalate the situation and make things okay, 'cause my goal is to never intend to hurt somebody.

S.B. Did Not Provide All the Text Messages to Cst. Rideout

[25] When S.B. was cross-examined she acknowledged not providing screenshots of all the August 4th text messages to Cst. Rideout. She indicated she had sent a response to the appellant that there "isn't going to be a next time" when he messaged her to say he couldn't wait for the next time. S.B. did not provide his text

to Cst. Rideout. She testified she had fully intended to send Cst. Rideout all the messages between her and the appellant and only realized later she had not included this initial text. S.B. also had not provided Cst. Rideout with the text messages she and the appellant had exchanged before he came over, saying she did not view them as relevant as "they didn't have anything to do with what had went on that night, after he had picked me up".

Cst. Rideout's Interview with the Appellant in September 2018

[26] The voluntariness of the appellant's statement to police was admitted. He testified he went willingly when Cst. Rideout asked him to attend at the police station for an interview. "I wanted to talk to the police. I had nothing to hide, and I just wanted to be completely honest".

[27] In cross-examination the appellant agreed he was trying to be truthful when he gave his police statement. He also agreed that he understood the seriousness of the situation—he was being accused of sexual assault—and knew it was important to be accurate.

[28] In describing how the sexual activity with S.B. went from kissing and touching to intercourse, the appellant told Cst. Rideout:

> And so, then I just, like, kind of just make a move, just because it's like…you know, I felt like it's been a while and yeah, so, we just started having sex…

[29] Asked about this in cross-examination, the appellant said: "Ah, I went with the motion, which is what I intended to say and that's what I meant, was I was going with the flow". He told Crown counsel "there was no verbal conversation", it was "physical movements by [S.B.] that indicated what she wanted and what we were both consenting to".

[30] Cst. Rideout questioned the appellant at some length about the text message exchange with S.B. on the morning of August 4th. The appellant told him: "These text messages are really not good". He explained his responses to S.B.'s texts by saying to Cst. Rideout he had just woken up and was "extremely tired and I was a bit dazed as well". He said he then went back to sleep.

S.B.'s Interview with Cst. Dupre on August 15th, 2018

[31] Cst. Dupre was the first police officer to interview S.B. which he did on August 15th, 2018. He took notes, not an audio recording, and prepared a report of the interview. In cross-examination, it was put to S.B. that the report stated:

> Kyle vaginally penetrated her. [S.B.] screamed, punched, and pushed, trying to get him off her.

[32] S.B. disputed this description saying she had not said she had punched the appellant or yelled. She did not do so because she did not want "to escalate the situation".

[33] Cst. Dupre acknowledged in re-direct examination that his handwritten notes of the interview with S.B. did not contain the word "scream". Working from memory, he had written his report approximately twenty minutes after speaking with S.B. She did not review the report.

The Trial Judge's Reasons

[34] The trial judge thoroughly reviewed the evidence, particularly that of the main witnesses, S.B. and the appellant. He set out the legal and constitutional underpinnings of reasonable doubt and the presumption of innocence, discussed credibility and reliability and indicated his understanding of his task: "…I have to decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Mr. Preston sexually assaulted S.B."[1]

[35] At paragraph 56 of his reasons, the trial judge referenced the commentary about *W.(D.)*[2] in *R. v. Dinardo*,[3] noting how a case that turns on credibility is to be assessed:

> …What matters is that the substance of the *W.(D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

[36] The trial judge reviewed the law of consent and the essential elements of the offence of sexual assault. He conducted an analysis of the evidence in relation to the *actus reus* and *mens rea* of the offence. He assessed the credibility of S.B. and

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[1] Trial Decision at para. 38.
[2] *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [*W.(D.)*].
[3] 2008 SCC 24 at para. 23 [*Dinardo*].

the appellant, considering the issue of the appellant's credibility in relation to the whole of the evidence.

The Issues

[37] The appellant's Amended Notice of Appeal sets out the issues:

1. The trial judge erred in his credibility analysis of the complainant.
2. The learned trial judge did not provide sufficient reasons for his findings.
3. The learned trial judge erred in applying the *W.(D.)* test.
4. The learned trial judge erred in relying on the complainant's prior consistent statement to support and bolster her testimony.

[38] I will restate the issues as follows:

1. Did the trial judge use S.B.'s text messages to the appellant as prior consistent statements to bolster her credibility?
2. Did the trial judge otherwise commit legal error in his credibility analysis, including his application of the test from *W.(D)*.?
3. Were the trial judge's reasons sufficient?

Analysis

Issue #1 – *The Trial Judge's Use of S.B.'s Text Messages*

[39] The appellant argues the trial judge used S.B.'s text messages to draw the prohibited inference—that her testimony about not consenting to sexual intercourse with the appellant was more likely to be true because it repeated what she had said in her text messages. I am satisfied the trial judge did not make this error.

[40] The trial judge found the text exchange was significant to his assessment of the credibility of both S.B. and the appellant on the crucial issue of consent. The trial judge viewed the appellant's responses to S.B.'s text messages as admissions of guilt. He concluded this supported the credibility of S.B.'s testimony that she did not consent to sexual intercourse.

[41] There is nothing in the trial judge's reasons or the record to support a conclusion he relied on the text messages from S.B. for the impermissible purpose

of finding that repetition enhances credibility. And the trial judge's reasons read in the context of the trial record provide no support for the appellant's submission that the judge overcame his concerns about S.B.'s credibility by relying on what she said in her texts.

[42] In the course of the trial there were repeated reminders S.B.'s texts could not be used to support her credibility based on consistency. The trial record indicates the prosecution's purpose for introducing the text messages into evidence was clear – the appellant's responses to S.B. qualified as admissions. In a pre-trial brief, defence counsel acknowledged the texts were admissible as admissions, a hearsay exception. Prior to trial, defence counsel indicated they would likely call evidence "to offer an explanation for the apology and to show that the apologies are not true admissions and were not made with the intention of adopting the statements of allegations being made by the complainant as being his own". At trial the appellant testified to this effect—that his responses to S.B.'s texts were not an actual apology, they represented how he reacts in stressful situations, by blaming himself and taking responsibility inappropriately.

[43] Furthermore, the trial judge's understanding of the use that cannot be made of prior consistent statements is apparent from his treatment of a text exchange between S.B. and her friend while the appellant drove her home: "I am not considering any remarks in those texts messages from S.B. that could be described as prior consistent statements".[4]

[44] The judge used S.B.'s texts to the appellant for context. His focus was on the appellant's responses to the unambiguous statements made by S.B. He explicitly referred to the appellant's responses as admissions.[5]

[45] In his reasons, the trial judge first noted the appellant's explanation at trial for why he responded as he did to the texts. He then contrasted that testimony to what the appellant had told Cst. Rideout about his responses, noting that when asked the same questions the appellant had given "very different answers". The trial judge found the appellant's trial explanation to lack credibility. What the appellant said in his responses to S.B. castigating him for having sexual intercourse with her supported the credibility of S.B.'s testimony—that she had not consented to the intercourse. The trial judge's credibility findings attract considerable deference on appeal.

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[4] Trial Decision at para. 66.
[5] Trial Decision at para. 84.

[46] The trial judge's review of the relevant law relating to admissions as an exception to the hearsay rule demonstrates he was well aware of what the text messages constituted. He set out in detail the appellant's explanation in direct and cross-examination for his responses to S.B.'s texts. The trial judge noted that notwithstanding the seriousness of the accusations and the fact there was nothing confusing about the messages, the appellant was apologetic and admitted to making "a mistake". When S.B. directly accused the appellant of rape, he again apologized and offered to make it up to her.

[47] The appellant's evidence was that S.B. "guided" his penis into her vagina, willingly participating. In the text exchange with S.B. the next morning he was apologizing for the sexual intercourse he claimed at trial was consensual.

[48] The appellant's responses were an acknowledgement he had sexual intercourse with S.B. in circumstances where she had not consented, and that he knew there was no consent—"I made a mistake…" "…last night wasn't me"—which confirmed S.B.'s evidence about not having consented.

[49] It was perfectly legitimate for the trial judge to find S.B.'s evidence was made more credible "not because she had earlier accused the appellant of non-consensual intercourse, but rather because of the manner in which he responded to that accusation".[6]

[50] The Supreme Court of Canada in *R. v. Langan*[7] adopted the dissenting decision of Chief Justice Bauman in the court below.[8] The following observation by Chief Justice Bauman precisely captures the circumstances that apply here:

> **97** The messages can also be seen to have probative value based on their conversational nature. This distinguishes them from the statements typically excluded under the rule against prior consistent statements. Unlike a police statement, the complainant's texts were interacting with the accused's texts and could thus be assessed for credibility in that context. For example, had Mr. Langan responded with bewilderment or confusion to the complainant's texts about the assault, rather than admissions, this would have presented a much different picture for the trier of fact.

[6] *R. v. Singh*, 2021 BCCA 172 at para. 41.
[7] 2020 SCC 33.
[8] *R. v. Langan*, 2019 BCCA 467.

[51] The trial judge's rejection of the explanation given in evidence by the appellant for what he said to S.B. left him with recorded statements, which the parties agreed were accurate, from which he could draw inferences. Inferences drawn by the trial judge about the appellant's responses to the content and context of S.B.'s text were permissible.[9]

[52] The trial judge committed no error in his use of S.B.'s text messages. I would dismiss this ground of appeal.

Issue #2 –*The Trial Judge's Credibility Analysis and his Application of W.(D.)*

[53] The appellant also argues the trial judge's determination that S.B. was credible on the issue of consent failed to account for the inconsistencies he identified in her evidence. In the appellant's submission, the trial judge erred by proceeding, in the face of concerns about aspects of S.B.'s testimony, to find him guilty beyond a reasonable doubt. The appellant says his evidence was marginalized in the judge's flawed *W.(D.)* analysis.

[54] It is well established that credibility is a factual determination, entitled to significant deference on appeal unless palpable and overriding error can be shown.[10] A trial judge's credibility assessment is not to be disturbed unless it cannot be supported in any reasonable review of the evidence.[11]

[55] The trial judge identified inconsistencies in the evidence of both S.B. and the appellant. He viewed S.B. as having some credibility issues, notably in relation to four aspects of her evidence: that she did not volunteer in direct examination sending the appellant a Snapchat message "We should fuck tonight"; that she testified she was, in the trial judge's words, "reluctant" to go for a drive with the appellant; that she failed to provide police the initial text message exchange between herself and the appellant after she returned home; and that there was conflict between her testimony denying she screamed and punched the appellant and Cst. Dupre's report which claimed she had used these words in describing what happened.

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[9] *Ibid* at para. 93, per Chief Justice Bauman.
[10] *R. v. G.F.*, 2021 SCC 20 at para. 100 [*G.F.*]; *R. v. Gagnon*, 2006 SCC 17 at paras. 10-11.
[11] *R. v. Delmas*, 2020 ABCA 152 at para. 5; aff'd 2020 SCC 39.

[56] The judge found these features of S.B.'s evidence as having an "impact" on her credibility. Other "discrepancies" between S.B.'s evidence and CCTV footage from the recreation centre were regarded by the trial judge as insignificant.

[57] The trial judge's assessment of S.B.'s credibility indicates he did not simply accept the entirety of her evidence. He gave close attention to her testimony and identified what he did not accept. He then zeroed in on the "critical issue"—consent—and noted S.B.'s testimony that she did not consent to sexual intercourse. He described her evidence as "consistent and unshaken on this point". Details about August 4th that the trial judge critiqued in S.B.'s evidence did not undermine his view of her credibility on the issue of consent. This was a determination the trial judge was permitted to make, a determination that is entitled to deference on appeal.

[58] Had the trial judge convicted the appellant after simply finding S.B.'s assertions about her lack of consent to have withstood cross-examination, he would have committed reversible error. This is not what he did. The trial judge proceeded to assess the appellant's evidence. He found, "on the critical issue of consent", the appellant's credibility was "poor". He identified the basis for this assessment:

> …Of significance is the discrepancy between his initial statement to the police regarding how intercourse occurred, his explanation of why he sent the text messages in response to S.B.'s, and his testimony at trial on these same issues.[12]

[59] Referencing the content of the text exchange, the trial judge went on to describe how the appellant had apologized to S.B. and acknowledged making "a mistake" instead of denying S.B.'s serious accusations. The judge noted the appellant's statements to S.B. asserting the night before had been out of character for him—that he wanted to "make it up" to her and show her he was "a good person, and that last night wasn't me". He reiterated the appellant's words that he felt "like a monster" and was sorry "from the deepest part" of his heart. The trial judge then contrasted what the appellant had said in his evidence about apologizing to S.B. as an anxiety-induced reflex with what he had said to Cst. Rideout about his text responses.

[60] The trial judge found the appellant's credibility on the issue of consent was undermined by a combination of his statements in the texts with S.B. and his description to Cst. Rideout that sexual intercourse occurred as a result of him just

[12] Trial Decision at para. 72.

making “a move” because he “felt like it’s been awhile and yeah, so we just started having sex…” As the trial judge put it: “Mr. Preston said that in the midst of other consensual sexual activity, he essentially felt things had gone on long enough and ‘went for it.’[13]

[61] The trial judge concluded his credibility analysis by indicating that on the whole of the evidence he had no reasonable doubt the appellant had sexually assaulted S.B.:

> On the basis of all of the evidence presented at trial, I am convinced beyond a reasonable doubt that Mr. Preston had non-consensual vaginal intercourse with S.B. I am equally sure, and therefore convinced beyond a reasonable doubt, that there was no honest but mistaken belief in communicated consent in relation to the vaginal intercourse. S.B. consented to much of the sexual activity with Mr. Preston. However, she told him that she did not consent to vaginal intercourse. When he felt things had gone on long enough, despite S.B.’s lack of consent, he then had forced vaginal intercourse with her. Afterwards, when S.B. confronted him very clearly in writing via text about forcing non-consensual intercourse on her, Mr. Preston not only did not deny an accusation of rape, but apologized.[14]

[62] Although strict adherence to the *W.(D.)* formula is not required[15], the trial judge chose to consider the appellant’s evidence at each of the three steps. Ultimately, he assessed the appellant’s credibility against the whole of the evidence and found no reasonable doubt as to his guilt. This was the critical task he had to perform: he had to respect the substance of *W.(D.)*. Taking into account the evidence of what the appellant said to Cst. Rideout and his responses to S.B.’s texts, the trial judge rejected the appellant’s claim that he and S.B. had engaged in consensual sexual intercourse. His credibility determinations attract a high degree of deference on appeal. They disclose no palpable and overriding error.

[63] The trial judge’s use of the appellant’s responses in the text exchange with S.B., his credibility determinations overall, and his application of *W.(D.)*, were all undertaken without legal error. He focused on the principle of reasonable doubt as his central consideration. I find no basis for appellate intervention and would dismiss these grounds of appeal.

Issue #3 –*The Sufficiency of the Trial Judge’s Reasons*

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[13] Trial Decision at para. 91.
[14] Trial Decision at para. 97.
[15] *Dinardo*, *supra*, note 3 at para. 23.

[64] The appellant says the trial judge's reasons did not adequately address the issues with S.B.'s credibility. He asks how the trial judge could have found S.B. credible on the issue of consent where he noted flaws in her evidence that impacted her credibility.

[65] The Supreme Court of Canada has repeatedly emphasized that an allegation of insufficient reasons is to be reviewed on appeal using a functional and contextual approach. Reasons must be assessed with reference to the trial record. They must be factually and legally sufficient, explaining what the trial judge decided and why, and enabling a meaningful exercise of the right of appeal.[16] As indicated in *G.F.*, the Supreme Court expects adherence to the principles that structure appellate review of reasons:

> **76** Despite this Court's clear guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is findings of credibility that are challenged.

[66] The trial judge here did what was required. He went further than the trial judge in *R. v. Vuradin* who, keeping the fundamental issue of proof beyond a reasonable doubt as the central focus, accepted the complainant's evidence where it conflicted with the accused's evidence.[17] His reasons were upheld as sufficient with a unanimous Supreme Court of Canada stating, "No further explanation for rejecting the appellant's evidence was required".[18]

[67] The Supreme Court's statement in *Vuradin* is applicable here:

> **28** Here, the appellant was not believed. The Crown's case was considered with the appellant's denial in mind, and the trial judge concluded, as he was entitled to do, that his denial did not raise a reasonable doubt.

[68] The trial judge's reasons make it clear he directed his mind to "the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt".[19]

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[16] *G.F.*, supra note 10 at paras. 69-74; *R. v. Sheppard*, 2002 SCC 26 at paras. 28-33; *R. v. Braich*, 2002 SCC 27.
[17] 2013 SCC 38.
[18] *Ibid* at para. 19.
[19] *R. v. Slatter*, 2019 ONCA 807 at para. 110, Pepall, J.A., dissenting, rev'd 2020 SCC 36, adopting Justice Pepall's dissent.

[69] I would dismiss this ground of appeal.

Disposition

[70] There is no basis for finding the trial judge committed legal error in convicting the appellant of sexual assault. I would dismiss the appeal.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.