NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. W.B.G.*, 2024 NSCA 24

Date: 20240306
Docket: CAC 524989
Registry: Halifax

Between:

W.B.G.

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	November 30, 2023, in Halifax, Nova Scotia
Subject:	Assessment of credibility; Sexual offences against young victims; Judicial Notice; Misapprehension of evidence; Uneven scrutiny
Statute Considered:	*Criminal Code*, R.S.C. 1985, c. C-46
Cases Considered:	*R. v. Jackson*, 2019 NSSC 202; *R. v. Stanton*, 2021 NSCA 57; *R. v. G.F.*, 2021 SCC 20; *R. v. R.W.B.*, [1993] B.C.J. No. 758; *R. v. Delmas*, 2020 ABCA 152; *R. v. Dinardo*, 2008 SCC 24; *R. v. Gagnon*, 2006 SCC 17; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. R.E.M.*, 2008 SCC 51; *R. v. Kishayinew*, 2019 SKCA 127; *R. v. A.M.*, 2014 ONCA 769; *R. v. Kotio*, 2021 NSCA 76; *R. v. Abbey*, 2009 ONCA 624; *R. v. P.N.*, 2021 NSCA 68; *R. v. Mehari*, 2020 SKCA 37; *R. v. Radcliffe*, 2017 ONCA 176; *R. v. J.M.S.*, 2020 NSCA 71; *R. v. M.(J.)*, 2021 ONCA 150; *R. v. Doodnaught*, 2017 ONCA 781; *R. v. W.(R.)*, [1992] 2 S.C.R. 122.
Summary:	In December 2022, the appellant was convicted of two counts each of sexual interference, invitation to sexual touching, sexual exploitation and sexual assault contrary to sections 151, 152, 153 and 271 of the *Criminal Code*, R.S.C. 1985,

c. C-46. The appellant was subsequently sentenced to a period of six years incarceration.

The complainant was between 10 and 15 years of age when the conduct giving rise to the convictions occurred. During this timeframe the complainant was residing with the appellant and his wife on a part-time basis and working in his farming business. She testified the sexual abuse started with touching over her clothes and kissing, then progressed to mutual sexual touching including oral sex. The complainant described the sexual contact between herself and the appellant to have continued on a regular basis over a period of five years.

The trial was not lengthy. The Crown's only witness was the complainant. The appellant's wife was the only witness for the defence. The trial judge found the complainant to be credible and the evidence and arguments advanced by the appellant to have not raised a reasonable doubt as to his guilt.

Issues:

(1) Did the trial judge commit a reviewable error by accepting evidence adduced by the complainant that was in the nature of expert opinion evidence, and thereafter relying upon the evidence in assessing her credibility?

(2) Did the trial judge commit a reviewable error by reversing the onus of proof onto the appellant in a way which resulted in a miscarriage of justice?

(3) Did the trial judge commit a reviewable error by taking judicial notice of certain facts and relying on that notice to make adverse findings against the appellant?

(4) Did the trial judge commit a reviewable error by misapprehending the complainant's evidence in a way which resulted in a miscarriage of justice.

Result: The appeal is dismissed.

The trial judge did not improperly admit expert opinion evidence, nor rely on it in assessing the complainant's credibility.

The trial judge did not reverse the onus of proof onto the appellant in any of the ways he asserted. None of the appellant's complaints resulted in a shifting of the burden to demonstrate his innocence.

The trial judge did not inappropriately take judicial notice of certain facts, nor rely on it to make adverse findings against the appellant. All of the trial judge's findings were available to him on the evidence before him.

The appellant failed to demonstrate the trial judge misapprehended the complainant's evidence.

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Appellant

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His Majesty the King

Respondent

Restriction on Publication: ss. 486.4 and 486.5 of the *Criminal Code*

Judges:	Farrar, Bourgeois and Scanlan, JJ.A.
Appeal Heard:	November 30, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Farrar and Scanlan, JJ.A. concurring
Counsel:	Michael Curry, for the appellant Glenn Hubbard, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

Mandatory order on application

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

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

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

. . .

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

[1] In December 2022, the appellant, W.B.G., was convicted of two counts each of sexual interference, invitation to sexual touching, sexual exploitation and sexual assault contrary to sections 151, 152, 153 and 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. The appellant was subsequently sentenced to a period of six years incarceration.

[2] The complainant, A.S., was between 10 and 15 years of age when the conduct giving rise to the convictions occurred. During this timeframe A.S. was residing with the appellant and his wife, Ms. G., on a part-time basis and working in his farming business. She testified the sexual abuse started with touching over her clothes and kissing, then progressed to mutual sexual touching including oral sex. The complainant described the sexual contact between herself and the appellant continued on a regular basis over a period of five years.

[3] The trial was not lengthy. The Crown's only witness was the complainant. The appellant's wife was the only witness for the defence. Supreme Court Justice Pierre L. Muise found the complainant to be credible and the evidence and arguments advanced by the appellant did not raise a reasonable doubt as to his guilt.

[4] The appellant now appeals to this Court. He says the trial judge made a number of errors which led to a miscarriage of justice, and seeks a new trial. For the reasons to follow, I would dismiss the appeal.

Overview of the Trial Evidence

[5] The trial was held over three days in September, 2020. I do not intend to review all the testimony, but to put the allegations of error in context, I will begin with a summary of the evidence adduced at trial. Certain aspects of the evidence will be discussed in more detail when addressing the appellant's arguments raised on appeal.

The complainant's direct evidence

[6] The complainant was born in April, 2003, making her 19 at the time of trial. Her father died when she was six. The complainant's mother eventually remarried and they moved in with her step-father. The step-father was convicted of sexual

offences against a minor, and Community Services directed the complainant could no longer live in the house if he was present.

[7] As a result of her step-father's conviction, the complainant started living with several different neighbours when she was 10 or 11 years of age. This included staying with the appellant and Ms. G. When the complainant first began staying with the couple, it was mostly on the weekends, and with another neighbour during the week.

[8] As she got older, the amount of time the complainant spent at the appellant's home increased to include periods of time during the week. The complainant spent five years living part-time with the appellant and Ms. G. The appellant was in his forties during this timeframe.

[9] When staying with the appellant, the complainant slept on a couch in the main floor living room. The appellant and Ms. G. slept upstairs in the only bedroom.

[10] When she was younger, the complainant would have nightmares and ask to sleep in bed with the appellant and Ms. G. She testified it was there the appellant first began to touch her. The complainant said the contact began with cuddles, extending to kisses on her neck and lips, and then the appellant would touch her "butt" and "boobs". The complainant advised Ms. G. was asleep when this contact occurred. She testified the appellant touched her in the same fashion when she was sleeping on the downstairs couch. The complainant said that as she got older, she stopped having nightmares and stopped sleeping in the appellant's bed.

[11] The complainant began working for the appellant in his farm operation. She started off picking berries and apples, moving on to mowing orchards, organizing pickers and loading trucks. The complainant worked year round, and would help split wood in the winter. She often accompanied the appellant in his truck when he was making deliveries for the farm.

[12] The complainant worked on the appellant's farm in […], which had been owned originally by his father, and also went to the appellant's farm in [...]. The complainant said the sexual touching progressed when she was working. It involved the appellant licking her vagina and breasts, putting his finger in her vagina and anus, and her fellating him. She testified:

> It was multiple places. Sometimes it would happen in the house at the farm in [...]. Sometimes the touching would happen at his mother's house at the farm in [...]. I would go with him to deliver wood and apples, and it would happen in whatever vehicle we were in. Sometimes he would take me on 4-wheeler rides up trails into the woods and it would happen in the woods.
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> . . .
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> Every time that I would go or be in a vehicle with him alone I – it happened a lot that way. So, if I knew that I was going to deliver something, wood, apples, whatever with him, I would suspect that it was going to happen. Any time anybody was around there was grabbing or something sexual of that nature, so I guess any time that we were alone.

[13] The complainant further testified the nature of the sexual touching would depend on how "safe" they felt:

> It depended on how safe we felt. I know at […] there were multiple times that were both completely undressed, because nobody normally went into the house and he would lock the door. In vehicles it would just be my pants down and sometimes – or at W.B.G.'s house it would just be his hand in my pants or my hands in his pants.

[14] The complainant testified she voluntarily participated in the sexual touching that took place and sometimes initiated it[1]. She said she was in love with the appellant at the time, and he had told her he felt the same towards her. The complainant testified the appellant had told her he suffered from depression, and that before she came into his life, he had planned to "stop living". He told the complainant that if he ever went to jail, there would be no point in him living.

[15] The complainant testified when she was 13 or 14, she was interviewed at school by a RCMP officer and a social worker about the nature of her relationship with the appellant. At that time she denied there was anything inappropriate happening between them. The complainant testified the appellant had told her that should she ever be questioned, she was to say their relationship was parental in nature. The complainant also refused to let police review the messages on her cellphone because she did not want them to discover inappropriate texts between herself and the appellant.

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[1] The complainant, given her age, was unable to legally consent to any type of sexual contact with the appellant.

[16] The complainant testified she would regularly delete inappropriate texts between herself and the appellant so no one would discover them. She did this to protect the appellant.

[17] The complainant testified the appellant would make comments about her body and would grab her or touch her over her clothes. This would sometimes happen at the appellant's house. The complainant said there were occasions when she thought Ms. G. may have seen the touching based on her reaction. Ms. G. would appear angry and get in an argument with the appellant shortly thereafter. The complainant said Ms. G. had asked her if anything was going on between her and the appellant.

[18] The complainant began spending less time with the appellant and Ms. G., and stopped working on the farm. Eventually she completely stopped staying with them. After she turned 16, she was able to live with her mother and step-father again.

[19] The complainant testified she came to realize the appellant did not love her and that the sexual behaviour was wrong. To cut ties with the appellant, she erased him as a contact from her cellphone and deleted all of the texts and messages from him. She said she eventually felt safe enough to tell people what had happened to her. Prior to going to the police, the complainant testified she told her boyfriend, her counsellor and a teacher what occurred between herself and the appellant.

The complainant's cross-examination

[20] The complainant attended church with Ms. G. each Sunday, and asked her to participate in her baptism. The complainant agreed Ms. G. paid for riding lessons, directed her in Christmas and Easter musicals and helped with science projects.

[21] She acknowledged there were occasions when she would ask to stay additional days with the appellant and Ms. G.

[22] The complainant was unable to give a specific date on which any of the alleged incidents of sexual misconduct took place, but said she could give a general timeframe.

[23] The complainant testified she went with the appellant and Ms. G. to a resort in Cuba. The room they stayed in had two beds. The beds were pushed together, and she slept beside Ms. G. The complainant agreed she was not alleging any type of physical touching occurred when the three of them were sleeping in the pushed together beds. She agreed the same opportunity for inappropriate touching in the bed existed in Cuba, as it had when she slept in the G.'s bed in Canada. The complainant testified the appellant, during the trip to Cuba, had made inappropriate comments about her body when she was wearing a bathing suit.

[24] The complainant acknowledged she told the police and social worker who interviewed her in 2016, that she viewed Ms. G. to be like a mother, and the appellant to be like a father. She agreed she had told the police at that time nothing inappropriate was happening between herself and the appellant.

[25] She confirmed she had actively deleted text messages off her cell phone to protect the appellant. Later, she deleted messages because she wanted to stop contact with him. The complainant no longer owned the cell phone she had when first interviewed by the RCMP in 2016, or the one she had when she reported to police in 2019. The complainant denied the suggestion she had intentionally deleted text messages from her cellphone in order to ensure the appellant could not challenge her version of events.

[26] The complainant agreed she had sent Bible verses to the appellant via text message, and she, Ms. G. and the appellant had regularly read the Bible together.

[27] She attended at the RCMP detachment to provide a statement regarding the inappropriate touching in June, 2019. She recalled that sometime prior to going to police in 2019, she had discussed the allegations against the appellant with a friend she had met at church, A.M. The complainant confirmed that A.M. had died prior to trial.

Ms. G.'s direct examination

[28] Ms. G. testified she was married to the appellant for 22 years, and they dated for 5 years before that. They have never been separated.

[29] Ms. G. identified a number of photographs depicting the inside of her home, including the bedroom she shares with the appellant. She testified a nightlight had

been installed in the bedroom because the complainant had nightmares when she first started staying with them and would come upstairs and sleep in their bed. Ms. G. testified there is a step down into the bedroom.

[30] Ms. G. testified she met the complainant when tending to her horses. The complainant lived nearby and would help with chores. The complainant asked to visit her at home and she agreed. The complainant also asked to stay at Ms. G.'s home overnight, and she did.

[31] When the complainant was around 11, she started staying at the G. home on weekends, and occasionally during the week. The complainant typically slept on the couch in the living room, but did sleep with Ms. G. and the appellant on occasion. This happened when the complainant had nightmares. Ms. G. estimated this happened a dozen times, and the first few times, the complainant slept between her and the appellant. The other times, the complainant would have slept on Ms. G.'s side of the bed, with Ms. G. in the middle beside the appellant. Ms. G. testified the complainant was never invited to sleep in the G.'s bed, but always asked to do so.

[32] Ms. G. testified the complainant was a needy person and wanted her attention most of the time, and was jealous of the time she spent with her own family and friends. Ms. G. said she and the complainant spent a lot of time together, with the horses, at church activities and doing other activities including shopping.

[33] Ms. G. denied any type of inappropriate sexual contact had occurred when the complainant was in the bed with her and the appellant. Ms. G. said she was a light sleeper and would know if such activity was taking place. She also testified that the top plank on the step in her bedroom was loose and makes a sound when stepped on. She would certainly wake up if anyone stepped on it. Ms. G. further testified she had not seen the appellant touch the complainant in an inappropriate manner.

[34] Ms. G. testified the appellant had a cellphone when the complainant was staying with them, but it had broken and was "not around anymore". She explained it had been broken when it fell from the top of her vehicle.

Ms. G.'s cross-examination

[35] Ms. G. confirmed the complainant had stayed with her and the appellant for a period of about five years. She stopped staying with them prior to her 16th birthday.

[36] Ms. G. said by the time the complainant was 13 or 14, she was working on the farm. Ms. G. confirmed that on occasion the complainant would accompany the appellant in his truck to do deliveries or other work related tasks.

[37] Ms. G. testified when the appellant's cellphone was broken, the complainant was still staying with them. She testified he got another cellphone. When asked by Crown counsel where that cellphone is, Ms. G. then testified she wasn't "a hundred percent sure" the appellant had gotten another cellphone, explaining she doesn't pay attention.

[38] Ms. G. said she was certain that each and every time the appellant would have gotten out of bed, she would have woken up. She insisted because she is a light sleeper that she would not have ever remained asleep if he had gotten out of bed.

The Submissions at Trial

[39] The complainant's credibility was the essential issue for determination. Before canvassing their respective submissions, I note that both parties referred the trial judge to *R. v. Jackson*, 2019 NSSC 202 as setting out the relevant legal principles and considerations in undertaking his credibility analysis.

[40] In his submissions to the trial judge, the appellant's counsel said the complainant's credibility was impaired because:

- She was unable to identify a single date on which any of the purported incidents of sexual contact between her and the appellant had occurred. The appellant said this failure to identify a date took away his ability to investigate the allegations – "You can't confirm, you can't deny, you can't verify";

- She could not recall the content of any of the alleged inappropriate text messages exchanged between herself and the appellant, other than one in which he allegedly told her not to let the "cop" see her cellphone. The appellant argued this was entirely self-serving, and because she had deleted all the messages from her cellphone, those could not be retrieved to confirm or deny her allegations. This should impact negatively on her credibility;

- Her narrative expanded over the course of her testimony. The appellant pointed to the complainant adding she had discussed with her mother and friend, A.M., the nature of the allegations against the appellant. The appellant further argued A.M. had died, and could not be called upon to confirm or deny the complainant's evidence. The complainant's late disclosure of these additional persons she supposedly told about the allegations strategically prevented the defendant from testing the truthfulness of her testimony;

- A pattern developed in her responses to counsel's questions, whereby her answers could not be independently verified or investigated by the defence. The appellant said this should raise concerns regarding her truthfulness;

- Her manner of testifying was concerning in that she was hesitant to answer questions, took an inordinate amount of time to respond and was strategic in her answers;

- What might at first appear to be the complainant "making an admission against interest"[2] which may serve to enhance her credibility, the Court ought to look at her statements more carefully. The appellant argued the complainant admitting she had been untruthful when interviewed by police in 2016 was not indicative of her credibility, but rather, she was forced to be honest because she knew the appellant could challenge her about what she had said at that time. She only told the truth because she knew she would be caught out by the appellant otherwise;

[2] The appellant was not using the term "admission against interest" in the sense of an exception to the hearsay rule, but rather was referencing one of the credibility factors articulated in *Jackson*.

- She testified the appellant and his wife went to church, read the Bible and that she texted him Bible verses. The appellant argues this description is very difficult to reconcile with the sexual allegations being made against him; and

- She testified no sexual touching took place when she was sleeping with him and his wife in Cuba, yet she had agreed the same opportunity existed there, as it did when she had slept in their bed at home. The appellant argued this evidence was entirely inconsistent with the complainant's prior testimony that the sexual contact occurred every time the appellant had the opportunity to be alone with her.

[41] In sum, the appellant argued the trial judge should find the complainant to be lacking in credibility. He said the complainant was fabricating the allegations of sexual misconduct and strategically presenting her testimony in such a way that he had no meaningful way of challenging its veracity.

[42] The Crown argued the complainant was credible and any hesitation in her responses was due to her wanting to be sure about the question and to be accurate in her reply. The Crown noted her manner of testifying remained the same in direct and in cross-examination. Further, the Crown said it was not unusual given her age and the nature of the offending for the complainant to have been unable to provide a specific date when the sexual touching happened.

[43] With respect to the evidence of Ms. G., the Crown argued that even if it was accepted, it did not serve to contradict the complainant in any significant aspect. The trial judge was encouraged to be mindful that as the appellant's wife, Ms. G. had a clear personal and financial interest in the outcome of the case. The Crown argued Ms. G.'s evidence was overstated, notably in relation to her insistence she would have awoken on every occasion the appellant would have left their bed, and she was testifying as an advocate.

[44] The Crown, using the factors set out in *Jackson*, argued the complainant was credible, whereas Ms. G. had some concerning aspects to her testimony.

The Trial Judge's Reasons

[45] The trial judge rendered an oral decision on December 6, 2022 and subsequently provided a written reasons (2022 NSSC 398).

[46] The trial judge recognized the matter before him depended "entirely on the assessment of the credibility and reliability of the witnesses". The trial judge first turned to an assessment of the complainant's evidence. In undertaking a review of the complainant's testimony, the trial judge explicitly addressed the concerns raised by the appellant in his submissions.

[47] With respect to the appellant's assertion the complainant's inability to remember a single date impaired her credibility and was a strategic means of preventing him from responding to the charges, the trial judge said:

> [65] In addition, A.S. was frank and straightforward about the inability to recall a specific time or date. When it was suggested to her that she could not say it happened during Christmas or on a birthday, she responded that she had thought Defence counsel meant a certain month or a certain day. She added at one point when it was asked, that she could give a generalized idea, but could not give a certain day. At a second point when it was asked, she indicated she could only give a timeframe and year, not a specific date. Defence counsel did not pursue what generalized idea she could give, nor what timeframe she could give.
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> [66] Further, in ***R. v. W.(R.)***, [1992] 2 S.C.R. 122, McLachlin J, as she then was, citing Wilson J in **B.(G.)**, emphasized that, with regard to "events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she's testifying".
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> [67] It is understood that children may not have the same concepts of time and place as adults.
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> [68] In this case, there are no inconsistencies. A.S. was clear and forthright that she did not recall specific dates or times. She did not try to guess. She volunteered that she could give generalized time frames, but those were not explored.
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> [69] Considering that she was around 11 when the activity first started and that there were allegedly a very large number of incidents between then and when she had not yet turned 16, it is understandable that she would not be able to give a specific date or time. It in no way appeared to be engineered to prevent Mr. G. from being able to seek an alibi as was suggested to her in questioning.

[48] The trial judge considered whether the complainant's deletion of text messages between herself and the appellant negatively impacted upon her credibility. He accepted her explanation for why she had deleted her text messages during the two relevant time frames:

> [81] Similarly, in the circumstances that at the time she was in love with Mr. G., her evidence that she would delete messages and calls that were too frequent or had odd timing, and generally anything she thought would raise concern, made sense. At the time, she would not have wanted people to be suspicious and look into what was happening between her and Mr. G.
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> . . .
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> [93] Her explanation for why she deleted messages from Mr. G. after she stopped having contact with him made sense. She explained that she did not want to have anything to do with him anymore and did not plan to ever see him again. Deleting him off of her phone was her way of getting him out of her life.

[49] Regarding her inability to remember the specific contents of the text messages, other than one that was allegedly self-serving, the trial judge reasoned:

> [76] Her evidence regarding why she did not initially tell the police what was happening evoked clear emotion in her and made sense. She explained that her ex-brother-in-law was dating a [….] at the time. That made Mr. G. nervous. He was suspicious someone would report them. So, he had had discussions with her regarding what she would do or say if it ever happened that she was interviewed about it. Her plan was to say that Mr. G. was a father figure and nothing inappropriate was happening. It was strictly a parent -like relationship. She added that he had also texted her not to let "the cop" have her phone. She explained the [….] used to take her phone at night so that she would sleep. The only reasonable inference to be drawn from that is that "the cop" being referred to, was the person dating A.S.'s ex-brother-in-law.
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> [77] Mr. G. submitted it did not make sense that that is the only text she would remember. However, having someone refer to your ex-brother-in-law's girlfriend as "the cop", when she was not a police officer, is something that could reasonably be expected to stick in your mind.
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> [78] Further, after it was suggested to her that Mr. G. had texted her Bible verses, she did say that it triggered her memory and she could remember that at trial. It is also reasonable for one to remember something after a tickler like that. It does not indicate any feigned lack of memory or effort to evade or deceive.

[50] The trial judge's reasons demonstrate he considered the appellant's concern regarding the expansion of the complainant's evidence in terms of disclosing the alleged abuse. The trial judge addressed the appellant's claim that the complainant adding she told her mother and her friend A.M. in the course of her testimony, should impact negatively on her credibility, and was another example of her strategically preventing the defence from challenging her veracity:

> [49] Mr. G. pointed to internal inconsistencies in A.S.'s evidence relating to prior disclosure of the abuse.
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> [50] He submitted that her narrative on that expanded from direct examination to cross-examination.
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> [51] It is true that, on cross-examination, she added having told A.M. about the abuse.
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> [52] However, when the Crown first asked if she had told anybody prior to telling the police she responded that she recalled telling M.C., who she was seeing at the time, as well as her psychologist/counsellor and her English teacher.
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> [53] Later, still on direct examination, she indicated she remembered more and asked if she could add to the answer she gave earlier. She explained that she had initially answered based on who she specifically talked to about the physical sexual abuse. However, she also remembered calling her mother because she was upset and anxious about everything going on and asked her mother to meet her at the home of a neighbour with whom she was staying. She told her mother that maybe Mr. G. liked her too much. That was after the first time the police spoke to her and before she went to the RCMP herself and spoke to them a second time.
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> [54] The Defence had the opportunity to question A.S.'s mother about that because they had subpoenaed her and she appeared. However, it indicated that it did not want to question her and she was released from having to testify.
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> [55] It did question A.S. about when she first disclosed that she had told her mother that she thought Mr. G. liked her too much. It was suggested to her that it was on the Sunday evening immediately preceding the trial when she was speaking with the Crown Attorney. Her response to that was that she was at the home of J. and M. before she went to the neighbour's house to speak to her mother. J. and M. knew she was going to talk to her mother about something regarding Mr. G. that upset her. She does not remember if she told them what she had said to her mother or if she only told them that her mother knew why she was upset. She could not recall if she told anyone before that Sunday night.
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> . . .

> [61] Her adding Mr. M. as a subject of her disclosure does have a negative impact on the assessment of the credibility and reliability of the evidence. However, considering the circumstances as-a-whole, and the fact that there is no other element of the disclosure issue impacting credibility or reliability, the impact is relatively minimal.

[51] With respect to the appellant's assertion the complainant's manner of testifying demonstrated a strategic evasiveness, the trial judge found:

> [17] I agree with the Crown that A.S. generally gave her evidence in a straightforward and un-evasive manner. Most of the frequent long pauses preceding her responses appeared to arise from her efforts to ensure she clearly understood the question and from thinking to ensure she provided complete and accurate answers. It did not appear that she was pausing because she was hesitant to answer or trying to formulate a strategic answer, as suggested by the Defence.
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> [19] The remainder of the pauses were obviously because she was trying to contain expressions of emotions that were welling up, such as by fighting back crying. None appeared to arise from being hesitant to answer a question.
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> [21] If she did not understand a question, she said so. If she was uncertain about a question, she asked for it to be repeated. If she could not recall the information being asked for, she said so. However, once she understood the question, and was clear on what was being asked, as long as she remembered the information being requested, she answered the question directly. She did not attempt to evade it by talking about points unrelated to the question.
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> [22] Her assertions regarding not remembering seemed genuine. They did not appear engineered to evade answering. There was no pattern as to the types of things she did not remember that would suggest her lack of memory was feigned to avoid answering certain types of questions.

[52] The trial judge considered the appellant's argument that the complainant's admissions she lied to the police and social worker when first questioned in 2016, and that she had deleted text messages should not be viewed as "admissions against interest" enhancing her credibility:

> [113] Mr. G. argued that A.S.'s admissions against interest in relation to points that the Defence could challenge her on do not enhance her credibility. He gave as examples her admitting she had given the police a different version at an earlier time and agreeing she destroyed the text messages.

> [114] There is no indication she would not have admitted telling the police a different story even if, for some reason, it could not be challenged. She made that admission without hesitation. It is unclear how the Defence could have challenged her if she denied having deleted the text messages, as neither her phone nor that of Mr. G. were available anymore, and there was no evidence regarding text activity having been secured from any service provider.
>
> [115] In addition, A.S. readily made a myriad of admissions against interest, on points of many levels of importance. She simply answered what was put to her.

[53] The various "admissions against interest" made by the complainant which were found to enhance her credibility were explained by the trial judge as follows:

> [41] A.S. slept on the couch downstairs.
>
> [42] However, she would join the G.'s in their bed in the middle of the night when she would wake up with nightmares. A nightlight was installed so that she could see when she was walking into their bedroom. There was a step down as you entered the bedroom.
>
> [43] At least at times, after Mr. G. got up, which was sometimes very early in the morning, such as 3 or 4 AM, A.S. would go up and join Ms. G. in bed and sleep the rest of the morning with her. It is noteworthy that A.S. volunteered that information, unprompted, even though it had the effect of reducing opportunities for Mr. G. to have touched her in a sexual manner while she was in her bed. That indicates she was not trying to buttress her allegations against Mr. G.
>
> . . .
>
> [108] When A.S. volunteered that she believed she was in love with Mr. G. at the time, it was obviously difficult for her to do so. It was obvious because she clearly was fighting back strong emotions. In doing so, she made a significant admission against personal interest. She could have gone through the whole trial avoiding that, but she did not.
>
> [109] Similarly, when she was asked how frequently during the five-year period Mr. G. put his finger in her vagina, she responded that it was whenever he got the opportunity to do so and added, unprompted, while holding back tears, that later on she would ask him to do it. That was obviously a statement that was difficult for her to make, and one that was against her personal interest. Yet she volunteered it.
>
> [110] She also testified that, apart from when the activity first started and she was feeling anxiety around it, she would want to participate in the sexual activity,

> and, while it was happening, she felt like she was in love with him romantically. Those are, once again, clear admissions against personal interest.
>
> . . .
>
> [112] She was asked whether anyone set any rules or boundaries for her up to 2016. She responded there were times when she was advised not to do something. She continued, unprompted, stating "but at the end of the day I usually got to do what I wanted". It was followed up with a suggestion that she was very independent, and she agreed. Those responses clearly show a readiness to make admissions against interest.

[54] After completing his assessment of the complainant's credibility and the appellant's challenges to it, the trial judge turned to the only other witness, Ms. G. With respect to the Crown's submission Ms. G. was evasive in aspects of her evidence, the trial judge noted:

> [121] Ms. G. also generally gave her evidence in a straightforward, un-evasive fashion.
>
> [122] However, when Defence counsel put to her that there was a suggestion in the evidence that she may have witnessed Mr. G. put his hands on A.S. above her clothing and, she, herself, responded by shaking her head and laughing, Ms. G.'s first response was that she did not recall "doing that". She did not answer the other part of the question. She was brought back to it and responded that she did not recall Mr. G. putting his hands on A.S. in a sexual manner. That suggests that she did see him put his hands on A.S. However, there was no description of the nature of that contact for the Court to assess whether or not it was of a sexual nature.
>
> [123] As submitted by the Crown, her manner of answering appeared to be engineered to evade addressing that thorny question. It stands in stark contrast to many other points in her evidence where she was adamant that certain things never occurred.
>
> [124] I have already noted the portion of her evidence that was consistent with that of A.S. and the portion that was inconsistent with it.
>
> [125] On cross-examination, Ms. G. was asked whether Mr. G. got another phone after his fell off the van and was destroyed. She answered, without hesitation, "yes". The Crown, with a follow-up question, asked where that phone was. She immediately changed her answer to not being sure if he got another phone after because she was not paying attention.

> [126] That answer was clearly inconsistent. In addition, it did not appear to make sense that she would not know whether her husband had acquired another phone. Her change of answer appeared to be engineered to attempt to cut off any possibility that the Crown might seek to access that phone in some fashion.

[55] The Crown had argued Ms. G.'s testimony demonstrated she was framing her evidence in order to advocate for the appellant. The trial judge agreed and explained:

> [130] Ms. G is Mr. G.'s wife of 22 years, preceded by five years of cohabitation, and, as such, clearly has an interest in the outcome of the proceedings. She testified that she was aware that jail time was a potential consequence of a conviction of the within charges.
>
> [131] When the Crown suggested she would do anything to avoid him going to jail, her response was that she would not lie about it. She did not say she would not minimize or exaggerate.
>
> [132] In that regard, she agreed she had not provided any statement to the police. Of course, she had no obligation to do so. However, if she was confident of his innocence, it would have been her opportunity to share information supporting it.
>
> [133] Her personal interest in the outcome of this proceeding shone through in many of her answers. It revealed that she was testifying as an advocate. For example, she was asked on cross-examination whether there were times that A.S. and Mr. G. went for deliveries and it was just the two of them in the vehicle. She answered, "yes", but added, unprompted, "for a specific reason, to deliver". That reason was clearly part of the questioning leading up to the answer. Therefore, there could be no purpose to include it other than to somehow try to attenuate the impact, on the issue of opportunity, of A.S. and Mr. G. being alone with each other for such extended periods of time. She added that as an advocate for Mr. G.
>
> [134] She agreed that she had reviewed, in the Crown disclosure, what A.S. and her mother had to say. She had discussed the case with Mr. G. and they had talked generally about what she was going to say.
>
> [135] Consequently, she had plenty of opportunity to plan and engineer her evidence.

[56] The trial judge, as argued by the Crown, found Ms. G.'s evidence she would always wake up if A.S. had come into bed, or if the appellant had left, to be unrealistic and negatively impacted her credibility:

[136] Ms. G. testified that she was pretty certain that A.S. had never slept on Mr. G.'s side of the bed because she would have woken up if A.S. was in the room and would know. She did not expressly acknowledge the possibility that she might not have woken up. However, it is at least implied in her answers that she was "pretty" certain, and, from a practical point of view, the possibility makes sense. If she did not wake up, she would obviously not have the ability to observe whether A.S. did lay on Mr. G.'s side of the bed.

[137] When Ms. G. was asked whether she ever witnessed any inappropriate touching in the bedroom, she responded that she never witnessed any. She did not believe it happened in bed. She stated she was a light sleeper so she would have noticed any motion or movement.

. . .

[139] Her evidence on that point presented as being exaggerated to buttress her point that she would have noticed any inappropriate touching that occurred.

[140] Similarly, she testified that the step leading to the bedroom was loose and made noise if someone stepped on it, which would "always" wake her up. With respect, she would only know whether someone stepping on the step would wake her up if she indeed woke up. Any time that she did not wake up, she would not know that someone had stepped on the step. So, it does not make sense that she could positively state that it would always wake her up.

[141] She acknowledged it was possible for someone to step over the step. However, she added, unprompted, that she did not know why they would. An obvious reason is to avoid her waking up, out of respect, if nothing else. Then, on cross-examination, she used the Crown's question about someone being able to step over that step to further alienate the possibility of it happening. Her answer, at that point in her testimony, was that she could not. That was not directly responsive to the question. It was somewhat evasive and engineered for an advocacy purpose.

. . .

[143] Her refusal to acknowledge even a possibility that A.S. could have entered their bed through the night, or that Mr. G. could have touched A.S. inappropriately in their bed, without her knowing, presented as an unreasonable refusal to make an admission against interest. For reasons noted, it is unreasonable to conclude that she could be certain on those points.

[144] She even refused to acknowledge that it was possible for Mr. G. to leave their bed without her knowing. She said that was because she never woke up with him not there. That would not explain a situation where he would return to the bed before she woke up, particularly considering the practicalities of life, including

> there being times when one would be more exhausted than others. Her complete denial of that possibility did not appear reasonable.
>
> [145] These were examples of a tendency to exaggerate or embellish to protect Mr. G. by diminishing, or eliminating, opportunity for him to commit some of the alleged acts.

[57] The trial judge also noted Ms. G.'s testimonial demeanour changed between direct examination and cross-examination:

> [142] As cross-examination by the Crown progressed, she, at times, took on a defensive attitude and tone. For the most part, it reflected itself in the tone of her voice. . .

[58] After considering the testimony of the two witnesses and the submissions of the defence and Crown, the trial judge concluded:

> [152] In my legal career there are relatively few witnesses who have left me with the impression and confidence that they were being as truthful and accurate as they possibly could be, without any concern for whether or not it portrayed them in a negative light. A.S. is one of those witnesses.
>
> [153] For the reasons I have discussed at length already, the evidence of Ms. G., and the points argued by Mr. G., have not shaken that impression and confidence.
>
> [154] I accept completely the evidence of A.S. regarding sexual acts by Mr. G.
>
> [155] There is nothing on the whole of the evidence which raises a reasonable doubt that he committed the offences alleged.
>
> [156] Therefore, I find him guilty of all eight counts on the indictment.

Issues

[59] On June 27, 2023, the appellant filed a Notice of Appeal challenging his conviction and set out 11 grounds of appeal. In his written and oral submissions the appellant distilled his complaints into four issues:

1. The learned trial justice committed a reviewable error by accepting evidence adduced by A.S. that was in the nature of expert opinion evidence, and thereafter relying upon the evidence in assessing credibility;

2. The learned trial justice committed a reviewable error by reversing the onus of proof onto the appellant in a way which resulted in a miscarriage of justice;

3. The learned trial justice committed a reviewable error by taking judicial notice of certain facts and relying on that notice to make adverse findings against the appellant; and

4. The learned trial justice committed a reviewable error by misapprehending the evidence of A.S. in a way which resulted in a miscarriage of justice.

Legal Principles

[60] In *R. v. Stanton*, 2021 NSCA 57 at para. 67, Justice Derrick set out the legal principles relevant to appeals where credibility is a pivotal consideration:

- The focus in appellate review "must always be on whether there is reversible error in the trial judge's credibility findings". Error can be framed as "insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict" (*R. v. G.F.*, 2021 SCC 20, para. 100).

- Where the Crown's case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant's evidence be tested in the context of all the rest of the evidence (*R. v. R.W.B.*, [1993] B.C.J. No. 758, para. 28 (C.A.)).

- Assessments of credibility are questions of fact requiring an appellate court to re-examine and to some extent reweigh and consider the effects of the evidence. An appellate court cannot interfere with an assessment of credibility unless it is established that it cannot be supported on any reasonable review of the evidence (*R. v. Delmas*, 2020 ABCA 152, para. 5; upheld 2020 SCC 39).

- "Credibility findings are the province of the trial judge and attract significant deference on appeal" (*G.F.*, para. 99). Appellate intervention will be rare (*R. v. Dinardo*, 2008 SCC 24, para. 26).

- Credibility is a factual determination. A trial judge's findings on credibility are entitled to deference unless palpable and overriding error can be shown (*R. v. Gagnon*, 2006 SCC 17, paras. 10-11).

- Once the complainant asserts that she did not consent to the sexual activity, the question becomes one of credibility. In assessing whether the complainant consented, a trial judge "must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant..." (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 61)[3].

- "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…" (*Gagnon*, para. 20).

- The exercise of articulating the reasons "for believing a witness and disbelieving another in general or on a particular point…may not be purely intellectual and may involve factors that are difficult to verbalize…In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization" (*R. v. R.E.M.*, 2008 SCC 51, para. 49).

- A trial judge does not need to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence (*R.E.M.*, at para. 56).

- "A trial judge is not required to comment specifically on every inconsistency during his or her analysis". It is enough for the trial judge to consider the inconsistencies and determine if they "affected reliability in any substantial way" (*R. v. Kishayinew*, 2019 SKCA 127, at para. 76, Tholl, J.A. in dissent; upheld 2020 SCC 34, para. 1).

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[3] In the present instance, given the complainant's age, the issue of consent does not arise.

- A trial judge should address and explain how they have resolved major inconsistencies in the evidence of material witnesses (*R. v. A.M.*, 2014 ONCA 769, para. 14).

[61] The Supreme Court of Canada has also provided direction to appellate courts regarding the assessment of trial judge's reasons, and has cautioned against parsing those reasons in a search for error. In *G.F.*, Justice Karakatsanis wrote:

> [76] Despite this Court's clear guidance in the 19 years since *Sheppard* [*R. v. Sheppard*, 2002 SCC 26] 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 the findings of credibility that are challenged.

[62] Further, appellate courts must not impugn a trial judge's findings because their reasons demonstrate they may have erred:

> [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.**
>
> (Emphasis added)

[63] I will now turn to the appellant's allegations of error.

Analysis

ISSUE 1 - The learned trial justice committed a reviewable error by accepting evidence adduced by A.S. that was in the nature of expert opinion evidence, and thereafter relying upon the evidence in assessing credibility

[64] If the trial judge admitted and relied upon inadmissible expert evidence, that would bring his credibility assessment into question. In *R. v. Kotio*, 2021 NSCA 76, Justice Van den Eynden explained the relevant standard of review as follows:

> [46] I am mindful of the deference owed to a judge's credibility assessment. These principles were recently canvassed by this Court in *R. v. Gerrard*, 2021 NSCA 59 at paras. 44 to 48, and *R. v. Stanton*, 2021 NSCA 57 at paras. 65 to 69. However, this ground of appeal raises the question of whether the judge erred in admitting and relying upon opinion evidence from Ms. Witherbee which was outside the scope of her qualifications. That is a question of law which engages a standard of correctness (see *R. v. Fedyck*, 2018 MBCA 74 (affirmed in 2019 SCC 3), *R. v. Dominic*, 2016 ABCA 114 and *Housen v. Nikolaisen*, 2002 SCC 33).

[65] In his submissions, the appellant argues the inappropriate expert opinion evidence arose in the following exchange:

> **Crown**: [A]s a result of the relationship that you had with W.G.B. over the five years that you described has there been any impact on you in terms of psychologically, emotionally, physically?
>
> . . .
>
> **Complainant**: I find that I'm more susceptible to manipulation with other people. I am – after these things have – has happened I found myself more anxious, depressed. That's how I would say it impacted me. Sometimes I have trouble with physical touch.
>
> . . .
>
> I have trouble remembering things, as in my brain sometimes will block things out due to any nature of me being triggered about the trauma, but like eventually it comes back. So, sometimes I remember things at a different – different times where I wouldn't have – it wouldn't have been at the front of my – or I wouldn't have maybe remembered at that time of talking about something.

[66] The appellant says the trial judge relied on the above evidence "to support a medical diagnosis which A.S. claimed was causally related to the alleged offences and used the reliance to bolster her credibility and reliability". The appellant says the trial judge concluded the complainant's memory deficits were caused by the alleged sexual offences. This lead to the trial judge using inappropriate circular

reasoning: "because the offences occurred, the complainant had memory issues, which supports the offences occurred".

[67] The appellant points to the following passage from the trial judge's reasons as demonstrating the above errors:

> [72] A.S. testified about the impacts of the sexual activity she described. One of the impacts was that she sometimes has trouble remembering things because her brain will sometimes block things out. Sometimes she remembers things at different times. That is also a factor to consider in assessing her evidence, particularly where she remembered evidence she had not previously remembered.

[68] With respect, I am not satisfied the complainant's evidence was in the nature of expert opinion evidence or that the trial judge treated it as such. Further, I do not agree the trial judge used the impugned evidence in any improper fashion. In reaching this conclusion, I note:

- The complainant's evidence was not expressing an expert opinion. She was testifying about matters within her personal knowledge, namely, how she felt and her observations regarding the functioning of her own memory. In *R. v. Abbey*, 2009 ONCA 624, Justice Doherty explained the distinction between testimonial evidence and expert opinion evidence as follows:

> > [71] It is fundamental to the adversary process that witnesses testify to what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts. Expert opinion evidence is different. Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases. Consequently, expert opinion evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on the balance of probabilities: Paciocco & Stuesser at pp. 184, 193; S. Casey Hill et al., *McWilliams' Canadian Criminal Evidence*, 4th ed.,

looseleaf (Aurora, Ont.: Canada Law Book, 2009), at para. 12:30.10.

- It is clear from the record that the Crown, in eliciting the complainant's evidence, did not intend for it to be used to establish a medical diagnosis or as expert opinion evidence. The Crown explicitly said so, making this clear to the trial judge;

- The complainant's supposition that the functioning of her memory was caused by the sexual trauma she experienced was not adopted by the trial judge. The impugned passage shows the trial judge reciting the complainant's evidence. The reasons do not demonstrate he made a causal determination. It was essential for the trial judge to address the complainant's memory given it was a key defence argument as to why her credibility was impaired;

- I do not read the passage highlighted by the appellant as the trial judge using the complainant's memory deficits to enhance her credibility. Rather, he was properly cautioning himself her evidence needed to be carefully examined in assessing her credibility due to her professed memory deficits. Although the appellant clearly places a different meaning on the trial judge's words, this Court must assume the trial judge correctly approached his task (*G.F.*, at para. 74);

- Given the trial judge made no causal link between the complainant's memory issues and the purported trauma, there is no merit to the appellant's complaint of circular reasoning.

[69] For the above reasons, I would dismiss this ground of appeal.

ISSUE 2 - The learned trial justice committed a reviewable error by reversing the onus of proof onto the appellant in a way which resulted in a miscarriage of justice

[70] The appellant asserts the trial judge improperly reversed the burden of proof in several ways. He summarizes his argument in relation to this complaint of error in his factum:

> [25] It is the respectful position of the Appellant that the learned trial justice erred by shifting the onus of proof to the Appellant and required him to disprove the alleged acts occurred.
>
> The learned trial justice did so in three ways:
>
> 1. The learned trial justice allowed the complainant to offer testimony, which was akin to a victim impact statement, and accepted the offences alleged occurred.
>
> 2. The learned trial justice applied a different level of scrutiny to the Appellant's evidence than was applied to that of the Complainant; and
>
> 3. The learned trial justice drew an adverse inference against the [A]ppellant because he did not call evidence which was also attainable by the Crown Prosecutor.

[71] There is no dispute regarding the standard of review engaged in this Court's assessment of this issue. In *R. v. P.N.*, 2021 NSCA 68, Justice Farrar noted:

> [49] Whether the trial judge effectively shifted the burden of proof is a question of law reviewable on a correctness standard. (*R. v. J.A.H.*, 2012 NSCA 121, at para. 7)

The "Victim Impact Statement"

[72] This argument returns to the complainant's evidence about the impact of the sexual contact between herself and the appellant. In his written submissions, the appellant asserts:

> [33] . . .By allowing testimony akin to a Victim Impact Statement, the learned trial justice effectively accepted the offences alleged had occurred during the trial proper, and the Appellant was required to dispel this accepted proposition. By doing so, the learned hearing justice reversed the onus and the Appellant was required to disprove the allegations. . .

[73] The appellant's argument is unconvincing. It is premised on the view that by permitting such evidence, the trial judge must have concluded during the complainant's testimony an offence had been committed and was satisfied of the appellant's guilt beyond a reasonable doubt. The trial judge is presumed to know the law – including the foundational premise that a determination of guilt cannot be made until the trial, including submissions, has concluded. There is no basis in his

reasons upon which this Court can determine the judge made such a fundamental error.

[74] Further, the trial judge's lengthy reasons, in which he set out the evidence and assessed each of the defence arguments, demonstrate he had not reached a conclusion of guilt during the complainant's testimony.

Differing Levels of Scrutiny

[75] The appellant says the trial judge committed legal error by applying a different level of scrutiny to the evidence he adduced as compared to that of the Crown. In advancing this argument, the appellant submits the trial judge made similar errors to those in *R. v. Mehari*, 2020 SKCA 37, which resulted in a conviction being set aside and a new trial ordered. He asks this Court to follow the same approach, explaining in his factum:

> [35] In ***R v. Mehari***, 2020 SKCA 37, 387 C.C.C. (3d) 147, the Saskatchewan Court of Appeal granted an appeal of the accused and ordered a new trial because the trial judge erred by applying a more stringent level of scrutiny to the evidence given by the accused than she applied to the evidence of a complainant in [a] sexual assault trial.
>
> [36] Particularly important to the present case, the trial judge acknowledged there were many gaps in the complainant's recollection about details of the offence, and found the accused was a poor witness and ruled he sounded rehearsed.
>
> (***R v. Mehari*** – Book of Authorities, Tab 6, Paragraphs 20 and 22)

[76] The appellant's reliance on *Mehari* is misplaced and his review of that case's history is incomplete. A closer look demonstrates that in a dissenting judgment, Justice Leurer rejected the claim of uneven scrutiny, concluding:

> [127] A trial judge does not commit the legal error of uneven scrutiny simply because, when all things are considered, she or he reaches the sometimes difficult, and always unwelcome, conclusion that an accused is a "poor witness" whose testimony is not to be believed.
>
> [128] With respect, none of the examples offered by Mr. Mehari provide the type of conclusive evidence that the case law demands in order to say that the trial judge in this case actually applied a different level of scrutiny to his evidence than to the evidence of the Crown. Here, the trial judge considered all of the witnesses'

> demeanours and the *content* of each witness's testimony, both in chief and under cross-examination. On the key issues, the trial judge identified where there were gaps in memory and what may explain them. In short, the trial judge fulfilled her legal duty of applying even scrutiny to all of the evidence she received.

[77] On subsequent appeal to the Supreme Court of Canada, the Court agreed with the dissenting justice that the trial judge's reasons did not demonstrate legal error in her assessment of the evidence (2020 SCC 40). The matter was remitted to the Court of Appeal to determine the outstanding grounds of appeal left unanswered by the majority. The Court of Appeal, on rehearing, dismissed the appeal, upholding the conviction (2021 SKCA 26). *Mehari* is of no assistance to the appellant.

[78] It is useful to consider the relevant legal principles. In *R. v. Radcliffe*, 2017 ONCA 176[4], Justice Watt, in considering a claim of uneven scrutiny, stated as follows:

> [23] First, as the appellant recognizes, this is a difficult argument to make successfully. The reasons are twofold. Credibility findings are the province of the trial judge. They attract significant appellate deference. And appellate courts invariably view this argument with skepticism, seeing it as little more and nothing less than a thinly-veneered invitation to re-assess the trial judge's credibility determinations and to re-try the case on an arid, printed record: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 59; *R. v. George*, 2016 ONCA 464, 349 O.A.C. 347, at para. 35.
>
> [24] Second**, to succeed on an uneven scrutiny argument, an appellant must do more than show that a different trial judge assigned the same task on the same evidence could have assessed credibility differently**. Nor is it enough to show that the trial judge failed to say something she or he could have said in assessing credibility or gauging the reliability of evidence: *Howe*, at para. 59.
>
> [25] Third, to succeed on the argument advanced here, **the appellant must point to something, whether in the reasons of the trial judge or elsewhere in the trial record, that makes it clear that the trial judge *actually* applied different standards of scrutiny in assessing the evidence of the appellant and complainant**: *Howe*, at para. 59; *George*, at para. 36.
>
> [26] Fourth, in the absence of palpable and overriding error, there being no claim of unreasonable verdict, we are disentitled to reassess and reweigh

[4] Leave to appeal refused, [2017] S.C.C.A. No. 274.

> evidence: *George*, at para. 35; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20.
>
> (Emphasis added)

[79] Further, Justice Watt succinctly identified what does not constitute uneven scrutiny justifying appellate intervention:

> [28] I begin with the obvious. The mere fact that the trial judge accepted the evidence of the complainant and rejected that of the appellant in concluding that guilt had been established beyond a reasonable doubt does not move the yardsticks on an argument based on uneven scrutiny.

[80] In *R. v. J.M.S.*, 2020 NSCA 71, this Court found that a trial judge responding to the particular submissions advanced by the parties at trial did not amount to an uneven scrutiny of evidence. Justice Fichaud explained:

> [38] Judge Burrill dealt with the Defence's detailed submissions on [the complainant's] credibility with a detailed analysis. He also set out and considered the Crown's single but, in the Crown's view, cogent submission on [the accused's] credibility. He concluded with a finding that accepted the Crown's point. That finding reflects no palpable error and suggests no unreasonable verdict. Credibility is the trial judge's province. It is not for an appeal court to reassess from the transcript's dry ink.
>
> [39] The submissions by the Crown and Defence presented the Judge with different levels of detail and suggested different degrees of cogency. The Judge considered the submissions as they were presented. That, in itself, does not offend the rule against significantly different levels of scrutiny. I would dismiss this ground of appeal.

[81] It also bears comment that in *G.F.*, the Supreme Court of Canada questioned whether a claim of uneven scrutiny should even be considered an independent ground of appeal:

> [99] **This Court has never ruled on whether "uneven scrutiny" of Crown and defence evidence is an independent ground of appeal**: *R. v. Mehari*, 2020 SCC 40. It was described by the Court of Appeal for Ontario in *R. v. Howe* (2005), 192 C.C.C. (3d) 480, at para. 59, as a common argument "on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments". In the last decade, provincial appellate courts have dealt with uneven scrutiny extensively and stressed that it is a notoriously

difficult argument to prove: *Howe*, at para. 59; *R. v. Kiss*, 2018 ONCA 184, at para. 83 (CanLII); *R. v. Wanihadie*, 2019 ABCA 402, 99 Alta. L.R. (6th) 56, at para. 34; see also *R. v. J.M.S.*, 2020 NSCA 71; *R. v. C.A.M.*, 2017 MBCA 70, 354 C.C.C. (3d) 100, at para. 54; *R. v. K.P.*, 2019 NLCA 37, 376 C.C.C. (3d) 460. Credibility findings are the province of the trial judge and attract significant deference on appeal: *R. v. Aird (A.)*, 2013 ONCA 447, 307 O.A.C. 183, at para. 39; *Gagnon*, at para. 20. As explained by Doherty J.A.:

> It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.
>
> (*Howe*, at para. 59)

[100] I have serious reservations about whether "uneven scrutiny" is a helpful analytical tool to demonstrate error in credibility findings. **As reflected in the submissions here, it appears to focus on methodology and presumes that the testimony of different witnesses necessarily deserves parallel or symmetrical analysis.** In my view, the focus must always be on whether there is reversible error in the trial judge's credibility findings. Even in *Howe*, Doherty J.A. ultimately chose to frame the uneven scrutiny argument slightly differently: para. 64. Rather than say that the appellant had demonstrated uneven scrutiny of the evidence, Doherty J.A. explained that the essential problem in the trial judge's reasons was that he had "failed to factor into his assessment of [the complainant's] credibility his finding that she deliberately lied on important matters in the course of testifying in reply": para. 64. In appellate cases that have accepted an uneven scrutiny argument, there was some specific error in the credibility assessments: see, e.g., *Kiss*, at paras. 88-106; *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111, at paras. 37-43; *R. v. Willis*, 2019 NSCA 64, 379 C.C.C. (3d) 30, at paras. 55-62; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107, at para. 54. As shown in *Howe*, uneven scrutiny easily overlaps with other arguments for why a trial judge's credibility findings are problematic. It is therefore unsurprising to see uneven scrutiny tacked on to arguments like insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict.

(Emphasis added)

[82] I have carefully reviewed the record, notably the Crown and defence submissions. I am satisfied the trial judge's reasons demonstrate he responded to the specific arguments advanced by each party, but also applied, as he was requested to do, the factors articulated in *Jackson* when assessing the witnesses' credibility. As is apparent from his reasons, some of those factors applied to the complainant and some did not. Some factors were more cogent to the assessment of Ms. G.'s evidence than others.

[83] The assessment of credibility does not require a trial judge to apply a "parallel or symmetrical analysis" to the evidence of every witness. A gap in the memory of one witness may be of no consequence to their credibility, but a gap in the memory of another may give rise to concern based on the context of the matter before the court. Similarly, an inconsistency in the evidence of one witness may be seen as highly problematic by a trial judge, but a demonstrated inconsistency in the evidence of another may be viewed as being inconsequential. Such findings do not demonstrate a trial judge applying uneven scrutiny to the evidence, but rather, making credibility findings based on the entirety of the circumstances before them.

[84] Further, appellate courts should be cautious in applying a requirement of "evenness" in a trial judge's approach to assessing the credibility of witnesses, as some aspects of the assessment, such as tone of voice, intonation and body language, are invisible on appellate review. As noted in *G.F.*, "in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial".[5]

[85] I am satisfied the trial judge's reasons do not demonstrate an uneven scrutiny of the Crown and defence evidence. Rather, the trial judge is responding to the specific arguments made in relation to particular aspects of each witness' testimony, as he was asked, and is expected, to do.

[86] The above being said, I do have concern with one aspect of the trial judge's assessment of Ms. G.'s credibility, notably her failure to provide a statement to police:

> [132] In that regard, she agreed she had not provided any statement to the police. Of course, she had no obligation to do so. However, if she was confident of his

[5] Para. 81.

> innocence, it would have been her opportunity to share information supporting him.

[87] Ms. G., as rightly noted by the trial judge, was not obligated to provide the police with a statement. Her not having done so should not have been used as a factor in assessing her credibility or as demonstrating uncertainty about the innocence of her husband.

[88] However, I do not see this aspect of the trial judge's reasons as being material to his overall assessment of Ms. G.'s credibility, or as undermining his eventual conclusion regarding that of the complainant. The trial judge provided ample other reasons to support his view that Ms. G.'s evidence ought to be carefully scrutinized, and why it did not serve to impair the complainant's credibility or raise a reasonable doubt as to the appellant's guilt.

Drawing of Adverse Inferences

[89] The appellant argues the trial judge improperly reversed the burden of proof by drawing an adverse inference against him because he failed to call evidence which was also available to the Crown. He says this occurred in two respects:

- The trial judge drew an adverse inference due to the defence not calling the complainant's mother at trial, and

- The trial judge drew an adverse inference because the defence did not produce a record of the text message exchanges with the complainant.

[90] Considering the record and in particular the defence argument advanced at trial, I am satisfied the trial judge did not draw adverse inferences against the appellant. I will explain.

[91] As discussed earlier, at trial the appellant launched a full frontal attack against the complainant's credibility. His assertion was that not only was she making false allegations, but she was being strategic in the presentation of her evidence in order to hamstring his defence. The appellant had argued:

- Contrary to what the complainant alleged, there were no inappropriate text messages. The complainant had purposefully deleted the contents of her cell phone so he would be unable to challenge her on this point;

- The complainant made a last-minute disclosure that she had discussed the allegations against him with her mother. The timing of the complainant's late disclosure that she had spoken with her mother was intentionally aimed at preventing him from being able to investigate and potentially challenge her evidence.

[92] The trial judge's reasons were responsive to these submissions. He clearly considered the appellant's arguments but declined to accept them. In particular, the trial judge concluded there was insufficient evidence to support the appellant's assertion the complainant's deletion of the text messages had deprived him of the ability to challenge her on the contents:

> [94] Mr. G., in argument, suggested that the text messages were deleted as a convenient way of foreclosing the chance for police or the Defence to investigate them. Her explanation refutes that. In addition, it is noteworthy that Mr. G.'s cell phone was also destroyed. Ms. G. explained that it went missing one afternoon, and the next morning Mr. G. told her he might have to put it on top of the van when he was changing his shirt the previous day. There was no real ability to cross-examine Ms. G. on whether he may have intentionally placed it there so that it would be damaged to the point of preventing recovery of information, which ended up being the case. In addition, there was no evidence regarding any attempt being made to obtain records of the text conversations from Mr. G.'s service provider. Ms. G. testified that, to her knowledge, no such attempt was made.

[93] Further, the trial judge considered, but rejected the appellant's assertion he was unable to challenge the veracity of the complainant's late disclosure that she had raised concerns about him with her mother:

> [53] Later, still on direct examination, she indicated she remembered more and asked if she could add to the answer she gave earlier. She explained that she had initially answered based on who she specifically talked to about the physical sexual abuse. However, she also remembered calling her mother because she was upset and anxious about everything going on and asked her mother to meet her at the home of a neighbour with whom she was staying. She told her mother that maybe Mr. G. liked her too much. That was after the first time the police spoke to her and before she went to the RCMP herself and spoke to them a second time.
>
> [54] The Defence had the opportunity to question A.S.'s mother about that because they had subpoenaed her and she appeared. However, it indicated that it did not want to question her and she was released from having to testify.

[94] The above comments do not demonstrate the trial judge drew adverse inferences against the appellant. Put in proper context, the trial judge was responding to the appellant's arguments as to why the complainant ought to be found lacking in credibility. The trial judge was assessing the factual underpinnings of the appellant's claim that the complainant was strategically manipulating her evidence. He found the appellant's assertions he was prevented from challenging the complainant's testimony to be lacking an evidentiary foundation. This is not an adverse inference nor a reversal of the burden of proof.

[95] For the reasons set out above, the appellant has failed to demonstrate the trial judge improperly reversed the burden of proof. There was never an obligation placed on the appellant to establish his innocence. I would dismiss this ground of appeal.

ISSUE 3 - The learned trial justice committed a reviewable error by taking judicial notice of certain facts and relying on that notice to make adverse findings against the appellant

[96] In *R. v. J.M.*, 2021 ONCA 150, Justice Brown set out the substantive principles relating to judicial notice at para. 31:

> (i) Judicial notice is the only exception to the general rule that cases must be decided on the evidence presented by the parties in open court: David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) ("Paciocco"), at p. 573;
>
> (ii) Judicial notice involves the acceptance of a fact or state of affairs without proof: *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 54; Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) ("Sopinka") at §19.16;
>
> (iii) Facts judicially noticed are not proved by evidence under oath; nor are they tested by cross-examination: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48;
>
> (iv) Since judicial notice dispenses with the need for proof of facts, the threshold for judicial notice is strict: *Find*, at para. 48; and
>
> (v) Judicial notice applies to two kinds of facts: (a) those that are so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons (*R. v. Mabior*, 2012

> SCC 47, [2012] 2 S.C.R. 584, at para. 71; *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at p. 128; Sopinka, at §19.18); and (b) those that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy *(Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 238; Sopinka, at §19.16). The sources may include both large bodies of scientific literature and jurisprudence: *R. v. Paszczenko*, 2010 ONCA 615, 103 O.R. (3d) 424, at paras. 65-66.

[97] The appellant argues the trial judge improperly took judicial notice of the state of Cuban resorts and prisons, and used it to make adverse findings against him.

[98] Before looking at the trial judge's reasons, it is helpful to put the significance of the evidence relating to the Cuba trip in context - it was another attempt by the appellant to call into question the complainant's credibility. The appellant argued the complainant saying nothing of a sexual nature happened while she and the G.'s were in Cuba was inconsistent with her allegation that sexual contact would happen between them whenever there was an opportunity. She had agreed opportunity had existed there. Further, the appellant said the complainant readily admitting nothing had happened in Cuba was consistent with her pattern of only making admissions when she knew her evidence could have been challenged.

[99] In his reasons, the trial judge noted:

> [100] Mr. G. submitted it did not make sense that there were no allegations of sexual touching in Cuba as there would have been opportunity. In relation to the suggestion of opportunity in Cuba, A.S. explained that the Cuba trip happened later on and there was a time when she didn't stay in their bed anymore. So, the stuff happening there would not have been the same. She wasn't sleeping in their bed at home with them at the time of the Cuba trip. When she was pressed again with a similar question, being that the same opportunity existed in Cuba, she responded "yes".
>
> [101] However, there was no specific evidence about what opportunity presented itself in Cuba. A.S. did testify that, though no physical sexual contact occurred in Cuba, Mr. G. did make comments to her about her body. Therefore, there was some opportunity for at least that to occur. However, it is noteworthy that the G.'s did not have a suite in Cuba. Otherwise, it would not have been necessary to put the beds together. That made it such that they were sharing a fairly confined space. Once outside of their room, they would have, for the most part, been amongst other guests, thus naturally limiting opportunity.

> [102] In addition, there was testimony from A.S. regarding Mr. G. making comments suggesting he did not think he would be able to withstand a Canadian prison. Consequently, it would make sense that he might be even more concerned about a Cuban prison.
>
> [103] For these reasons, it does make sense that no sexual touching occurred in Cuba.

[100] The appellant calls into question three statements from the above passage. I am satisfied none demonstrate error:

- *"[I]t is noteworthy that the G.'s did not have a suite in Cuba. Otherwise it would not have been necessary to put the beds together. That made it such that they were sharing a fairly confined space."* – The evidence was that the parties were staying in a room with two beds. It was open to the trial judge to infer the accommodations did not have separate bedrooms, but rather, was a more confined space. This is not an instance of judicial notice, but rather a permissible common sense inference drawn based on the evidence;

- *"Once outside of their room they would have, for the most part, been amongst other guests, thus naturally eliminating opportunity"* – The evidence demonstrated the parties were vacationing at a resort. There was no evidence elicited that other people were present, but common sense and life experience permitted the trial judge to take judicial notice that outside their room, the complainant and appellant would be amongst others at the resort. Given the complainant had testified the sexual contact between herself and the appellant occurred when they were alone, it was certainly open to the judge to conclude opportunity was eliminated when outside the confines of their room; and

- *"Consequently, it would make sense he might even be more concerned about a Cuban prison."* - The trial judge made no reference to the condition of Cuban prisons in his reasons. The evidence established the appellant lived and operated a business in Canada. Further, the complainant had testified that in relation to the sexual touching occurring in Nova Scotia, the appellant had told her he would rather die than go to prison. There was nothing improper with the trial judge inferring, based

> on the evidence, that the appellant would be even less enthused about being incarcerated in a foreign country further away from his home and work. This is not an instance of improper judicial notice, rather the trial judge drawing an available inference based on the evidence before him.

[101] There is no demonstrable error in the above passages. The trial judge was assessing whether the complainant's assertion regarding the absence of sexual touching while in bed with the G.'s in Cuba impaired her credibility. The trial judge was aware the appellant viewed this as a significant inconsistency in the complainant's evidence. Having given the appellant's argument due consideration, the trial judge found the complainant's credibility was not negatively impacted by this evidence. This was a finding open to the trial judge to make based on the entirety of the evidence adduced.

[102] For the above reasons, I would dismiss this ground of appeal.

> *ISSUE 4 - The learned trial justice committed a reviewable error by misapprehending the evidence of A.S. in a way which resulted in a miscarriage of justice*

[103] The appellant says the trial judge misapprehended the complainant's evidence in multiple ways. Before considering his arguments, it is helpful to set out the legal principles. Justice Watt explained in *R. v. Doodnaught*, 2017 ONCA 781:

> [71] A misapprehension of evidence may involve a failure to consider relevant evidence; a mistake about the substance of evidence; a failure to give proper effect to evidence or some combination of these failings: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218. **To succeed before an appellate court on a claim of misapprehension of evidence, an appellant must demonstrate not only a misapprehension of the evidence, but also a link or nexus between the misapprehension and the adverse result reached at trial**.
>
> [72] To determine whether an appellant has demonstrated that a misapprehension of evidence has rendered a trial unfair and resulted in a miscarriage of justice, an appellate court must examine the nature and extent of the misapprehension and its significance to the verdict rendered by the trial judge in light of the fundamental requirement of our law that a verdict must be based exclusively on the evidence adduced at trial. **The misapprehension of evidence must be at once material and occupy an essential place in the reasoning process leading to the finding of guilt**: *Morrissey*, at p. 221.

> [73] The standard set for misapprehension of evidence to warrant appellate reversal is stringent. **An error in the assessment of the evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground**: *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 56.
>
> [74] Where an appellant alleges a misapprehension of evidence, an appellate court should first consider the unreasonableness of the verdict rendered at trial. A verdict may be unreasonable because it is one that could not have been reached by a properly instructed trier of fact acting reasonably, or because it can be seen from the reasons of the trial judge that the verdict was reached illogically or irrationally, in other words, due to fundamental flaws in the reasoning process: *Sinclair*, at paras. 4, 44.
>
> [75] Where an appellant succeeds in establishing that a verdict is unreasonable, an appellate court will enter an acquittal. On the other hand, where the appellate court is satisfied that the verdict is not unreasonable, the court must determine whether the misapprehension of evidence occasioned a miscarriage of justice. An appellant who shows that the error resulted in a miscarriage of justice is entitled to a new trial: *Morrissey*, at p. 219.
>
> (Emphasis added)

[104] The appellant argues the trial judge misapprehended the evidence by concluding the complainant had made "statements against interest". In his factum, the appellant explains:

> [77] The learned trial justice classified the testimony of A.S. as statements against her interest and in doing so misapprehended the evidence. A statement against interest is usually applied as a concept granting an exception to the hearsay rule. Here, the learned trial justice applied the concept without definition, but appears to rely on the statements to say that A.S. testified to embarrassing facts, so she was more likely to be telling the truth. It is the respectful position by the Appellant that the inference these statements are embarrassing or against A.S.'s interest is an inference which is not borne out by the evidence. For the learned trial justice to then rely on that inference to increase A.S's credibility is an error.

[105] The trial judge was encouraged by the appellant and Crown to apply the factors in *Jackson* in his credibility assessment. One of those factors is whether the witness was "capable of making an admission against interest". Indeed, the appellant identified two "admissions against interest" made by the complainant, but argued they were not genuine, and instead were strategic on her part. The trial

judge did what the parties asked, including giving consideration to the import of the statements identified by the appellant. As already noted, the concept of an "admission against interest" as used by the parties in their submissions and repeated by the trial judge was not being used in the context of an exception to the rule against hearsay evidence.

[106] An embarrassing concession or one that may reflect adversely on a witness' credibility, is not confined to a particular type of statement. It can be something a witness says that has the potential for them to be viewed in a bad light, such as admitting to being dishonest, having behaved poorly or having been complicit in the offences charged. It can also be a statement voluntarily given, that would support an opposing party's case or strengthen their credibility. How a concession impacts a witness' credibility, if it does, will depend on the particular circumstances before the court, and is a determination best made by the trial judge.

[107] As set out earlier in these reasons, the trial judge set out various aspects of the complainant's evidence that he viewed as being statements against interest. There was an ample evidentiary basis for the trial judge's conclusion that certain aspects of her testimony served to enhance her credibility. The appellant's argument is an invitation for this Court to displace the trial judge's credibility assessment with our own, which is contrary to the deference owed to him. I decline to do so.

[108] The appellant submits the trial judge's failure to find the complainant's inability to specify a single date upon which an incident of sexual touching occurred as problematic, also amounted to a misapprehension of evidence. He writes in his factum:

> [84] On cross-examination, counsel for the Appellant questioned A.S., asking for a single date on which the alleged offences occurred. A.S. testified she could not recall any specific dates. Had A.S. provided one date over the 5 years which make up the period of the allegations, the Appellant would have had the opportunity to determine whether an alibi or some other affirmative information was available. The Appellant respectfully submits this is why A.S. was so adamant nothing happened in Cuba, it would have given a specific time for the Appellant to investigate. The vague nature of the evidence provided by A.S. and her lack of memory resulted in the Appellant being denied those opportunities.

[109] It is clear from his reasons the trial judge was attuned to the significance the appellant placed upon the complainant's inability to provide a date for any of the

incidents of sexual touching. It is not a misapprehension of evidence, however, for the trial judge to have concluded the lack of a specific date did not negatively affect the complainant's credibility. The trial judge simply declined to accept the appellant's view of the import of the evidence.

[110] Furthermore, the trial judge's conclusion was one that was available to him. The complainant testified to numerous incidents that occurred with regularity over a period of four years. When the sexual touching was taking place, the complainant was voluntarily participating, and was in love with the appellant. From this an inference can be drawn that it was part of her "normal" experience, and accordingly, she would have no reason to remember a particular date. I see no reason to interfere with the trial judge's assessment of the evidence.

[111] The appellant also argues the trial judge's failure to recognize important inconsistencies in the complainant's evidence gives rise to a misapprehension of evidence. He explains in his factum:

> [85] The learned trial justice agreed with the Crown submission that there was a noteworthy lack of prior inconsistent statements. The Appellant respectfully submits this finding is not consistent with the evidence of trial. On the contrary, despite the claims of ill-memory, the Appellant was still able to point out a number of inconsistent statements on points which went to the heart of the trial.

[112] The appellant points to three instances where the complainant provided inconsistent statements in her evidence. He says the trial judge's failure to give effect to them in his credibility analysis constitutes a misapprehension of evidence:

- The complainant was inconsistent with respect to whether she vomited while giving her police statement in 2016;

- The complainant was inconsistent in her evidence regarding who she had told about the sexual conduct; and

- The complainant's late in the day evidence regarding her disclosure to A.M. was inconsistent with her earlier testimony.

[113] With respect to the first purported inconsistency, the complainant testified on cross-examination that she had viewed the video statement she had provided to

the RCMP. She agreed that in the video, she did not vomit. The appellant's counsel then attempted to impeach her as follows:

> Q. Do you recall telling [S.W.] – do you know who [S.W.] is, when I say that?
>
> A. Yes.
>
> Q. And who was [S.W.]?
>
> A. [S.W.] was my counsellor at the […] hospital.
>
> Q. Okay. And do you recall telling [S.W.] – and if you'd just bear with me, I just want to get the actual –bear with me for one moment. Sorry, I thought I had my finger on that. Here it is. Yeah. That you had attended the – that you—
>
> ". . . spoke with the RCMP and Department of Community Services the day prior and gave them her statement. She reported that it was incredibly difficult and threw up on the floor at one point because of her anxiousness."
>
> Do you recall telling [S.W.] that?
>
> **A. I do not.**
>
> Q. Okay. I'll come back to that. Is that something that you think you would have told [S.W.]?
>
> A. I feel like I would have told him that if I did in fact get sick at some point throughout.
>
> Q. So, you're saying you wouldn't have made that up?
>
> A. No, I wouldn't have just said that I threw up.
>
> (Emphasis added)

[114] On re-direct, the Crown sought clarification on this point:

> Q. . . .You were asked questions about whether or not you threw up during your police statement. Do you remember being asked those questions by Mr. Cuming?
>
> A. Yes.

> Q. Do you recall whether you threw up at all during the time of your police statement, whether during the police statement or around that time?
>
> A. I remember feeling nauseous, but I don't remember if I threw up or not.

[115] I am not satisfied there was a demonstrable inconsistency in the complainant's evidence. The complainant did not recall having told her counsellor, as suggested to her by the defence, that she had vomited. However, the appellant did not establish she had ever made such a statement to the counsellor.

[116] From the record, it is unclear what counsel was basing this representation on – perhaps the counsellor's written notes, or a "can say" statement from the Crown disclosure, from the preliminary inquiry, or maybe some other source. The appellant made no effort to introduce the statement purportedly made to the counsellor into evidence. The complainant cannot be found to have made an inconsistent statement if proof of the statement being uttered had not been placed before the court. The trial judge cannot be faulted for failing to consider an inconsistency that had not been properly established.

[117] With respect to the second inconsistency, regarding who the complainant had told about the sexual conduct, the appellant asserts in his factum:

> [88] A.S. was only able to recall detailed facts which were either innocuous or aided her account. The Appellant is of the respectful submission the most impactful inconsistent statements were regarding who, if anyone, she told about the alleged offences. **Originally A.S. testified she could not remember telling anyone about what was going on. Later, A.S. was able to recall telling her mother that the Appellant liked her too much.**
>
> [89] This spontaneous memory assisted A.S. because it provided testimony that she had reported something about the offences in the past, closer to the time of the allegations, which added to her credibility.
>
> (Emphasis added)

[118] The above complaint relies on an apparent misreading of the trial transcript. The complainant never testified she could not remember telling anyone about what was going on between herself and the appellant. To the contrary, she testified she had told her counsellor, a teacher and her boyfriend prior to her reporting the offences.

[119] The third inconsistency is in a similar vein and relates to the complainant's testimony that she had told A.M. about the sexual touching. The appellant writes:

> [92] For the first time, and in contradiction to her earlier statements, A.S. testified she told [A.M.] about the allegations, confirmed [A.M.] had passed, and that she knew the Appellant could not question [A.M.] as to whether or not that was true.
>
> [93] A.S. built on this contradiction later in her testimony by adding she told [A.M.] about doing physical stuff with the Appellant, and she knew he did not tell anyone about it because she remembered him telling her he would take it to his grave. Again A.S. demonstrated she could remember a specific, beneficial piece of information which conveniently did not allow for the Appellant to refute the assertion. By not weighing this obvious inconsistency against A.S. by [*sic*] the learned trial justice erred.

[120] There is no merit to this argument. Contrary to the appellant's assertion, it is clear the trial judge considered the complainant's late in the day disclosure of her conversation with A.M. He agreed with the appellant that it had a negative impact on the complainant's credibility. However, considering the circumstances as a whole, the trial judge found the impact to be "relatively minimal". This does not constitute a misapprehension of evidence on the trial judge's part.

[121] The appellant returns to the deleted text messages in arguing the trial judge misapprehended the evidence. His argument is set out in his factum as follows:

> [94] Through the testimony, many questions were asked about text messages between A.S. and the Appellant. A.S. testified there were inappropriate messages, but she could not remember specific messages except one which was the Appellant texting her to not provide her telephone to a parent of one of her friends referred to as "the cop". The Appellant's respectful position is this is too convenient. The only message which A.S. remembered benefited her, and this was accepted by the learned trial justice and a reasonable inference is drawn the learned trial justice felt the Appellant was somehow coaching A.S.
>
> [95] A.S. also admitted she had deleted any messages before the police or her mother could review them, forgoing the opportunity to investigate the truth of these allegations.
>
> [96] This failure to recall, combined with her admitted destruction of evidence, again prevented the Appellant from being able to effectively defend the allegations and it is the respectful position of the appellant this destruction of evidence was incorrectly weighed by the learned trial justice.

[122] The same argument was made to the trial judge. However, the trial judge accepted the complainant's evidence as to why she had deleted the text messages from her cell phone, and specifically that it was not done for a nefarious purpose. As well, the trial judge accepted as truthful the complainant's evidence she could recall the specific content of only one of the messages. Further, and as discussed earlier, there was no evidence adduced at trial that supported the appellant's assertion the deletion of the text messages had prevented him from investigating and challenging the complainant on the contents.

[123] The appellant has not demonstrated a misapprehension of evidence, but rather, his argument amounts to a request for this Court to make different findings of fact and replace the trial judge's credibility determination with our own. That is not our function.

[124] Finally, the appellant argues the trial judge erroneously applied inconsistent lines of reasoning to assess the complainant's credibility and in doing so misapprehended the evidence. Specifically, it is submitted the trial judge found the complainant to demonstrate a level of maturity regarding her insight as to the nature of her relationship with the appellant, but then used her being a child to excuse inconsistencies in her evidence.

[125] The appellant's argument is based on an erroneous "either/or" proposition. A witness testifying as to events which occurred in childhood may demonstrate maturity in certain respects but may also struggle in other regards. There is no fixed expectation regarding how such witnesses should present. As noted by Justice McLachlin in *R. v. W.(R.)*, [1992] 2 S.C.R. 122:

> **26** It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and

> location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[126] The trial judge found the complainant demonstrated maturity in eventually realizing the inappropriate nature of her relationship with the appellant, and her decision to stop working on the farm. This would not preclude him from considering that the complainant was describing events which had taken place between the ages of 10 and 15, and to assess her evidence accordingly. In any event, I am not satisfied the trial judge improperly dismissed inconsistencies in the complainant's evidence because of her age. Rather, his reasons show that where genuine inconsistencies were found, the trial judge provided reasons why they did, or did not, impact upon the complainant's credibility.

[127] I would dismiss this ground of appeal.

Conclusion

[128] I am not satisfied the trial judge permitted and then relied on expert evidence to support the complainant's credibility or to infer the appellant's guilt. I am further satisfied the trial judge did not reverse the onus of proof.

[129] The appellant has failed to demonstrate the trial judge applied uneven scrutiny to the evidence, or that he improperly relied on judicial notice to draw adverse inferences against him.

[130] Finally, none of the appellant's complaints of a misapprehension of evidence are borne out on the record before this Court.

[131] The trial judge reviewed the evidence of the two witnesses. He carefully responded to the arguments advanced by the Crown and the appellant. He paid particular attention to the appellant's submissions as to why he should find the complainant lacked credibility. The trial judge found the complainant to be credible and accepted her evidence regarding the incidents of sexual touching. He concluded Ms. G.'s evidence and the arguments advanced by the appellant did not raise a reasonable doubt as to his guilt. These are conclusions which were readily available to the trial judge on the record before him.

Disposition

[132] For the reasons above, I would dismiss the appeal.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Scanlan, J.A.