NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. J.H.S.*, 2007 NSCA 12

Date: 20070131
Docket: CAC 266318
Registry: Halifax

Between:

J.H.S.

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on publication: Pursuant to s. 486(3) of the *Criminal Code*

Judges:	Saunders, Oland and Fichaud, JJ.A.
Appeal Heard:	September 20, 2006, in Halifax, Nova Scotia
Held:	Appeal allowed and new trial ordered per reasons for judgment of Oland, J.A.; Fichaud, J.A. concurring; and Saunders, J.A. dissenting by separate reasons.
Counsel:	Joel E. Pink, Q.C. for the appellant Daniel A. MacRury, Q.C. for the respondent

Reasons for judgment:

[1] The appellant was tried before a judge and jury for sexual assault contrary to s. 271(1)(a) of the *Criminal Code*. The jury found him guilty and Justice Heather Robertson of the Nova Scotia Supreme Court sentenced him to four and a half years incarceration. The appellant appeals from conviction alone.

[2] In my view, the judge failed to properly instruct the jury on the application of reasonable doubt to the issue of credibility. I would allow the appeal.

Facts

[3] The complainant testified that the appellant sexually assaulted her over a number of years, until her early teens. Her mother lived with the appellant, as did the complainant and her sister. The acts of sexual assault the complainant alleged her stepfather committed included touching, fellatio, digital penetration, and eventually sexual intercourse.

[4] According to the complainant, her behaviour changed and she was "just out of control." Her mother testified that when the complainant was around nine or ten, she discovered that her daughter was cutting herself and she took her to the family doctor. She also said that when the complainant was about 13, she was getting into trouble. Her daughter was hanging around with a rough crowd that was breaking into houses and mailboxes. She was smoking, drinking, had a lot of problems with her teachers and the principal at school, and rebelled at everything. According to her sister, the complainant went from being "kind of a good little apple to a bad apple" as she got older. The sister described the relationship between her mother and the complainant as "very rocky," and living with them as "sheer chaos."

[5] There was no evidence that either the mother or the sister ever saw any improper behaviour between the appellant and the complainant. Two persons who had lived in the residence from time to time, over a number of years, gave evidence that they never witnessed anything untoward between them.

[6] The appellant denied any sexual activity with the complainant. His evidence was that it was after her biological father, who had come back into her life when

the complainant was 10 or 11, started rejecting her, that the complainant really got out of control. The appellant testified that it was definitely afterwards that she started cutting herself, not before as set out in the mother's evidence. The complainant was breaking the law and fought with everyone. According to the appellant, he told her that he and her mother were going to send her to a Catholic school. The third time he did so, the complainant went off stomping and crying. It wasn't very long afterwards when her mother confronted him with her daughter's allegations of sexual assault.

Issues

[7] The appellant raises more than one ground of appeal. In order to dispose of the appeal, I need only consider one of them, namely: whether the trial judge erred in law by failing to properly instruct the jury on how to reconcile the competing evidence of the witnesses in accordance with the principles set out in the case law and, in particular, *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

The charge to the jury

[8] The judge instructed the jury on the presumption of innocence and then charged the jury on reasonable doubt as follows:

> Now reasonable doubt. The Crown has a burden of proving each element of an offence to the standard of proof beyond a reasonable doubt. The burden of proof never shifts to the accused. A reasonable doubt is not an imaginary or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reasons and common sense. It is a doubt that logically arises from the evidence or the lack of evidence.
>
> Even if you believe the defendant is probably guilty, that is not enough. In those circumstances, you must give the defendant the benefit of the doubt and find him not guilty. This is because the Crown will have failed to satisfy you of the accused's guilt beyond a reasonable doubt. The standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.
>
> On the other hand, you must remember that it is virtually impossible to prove anything about human conduct to an absolute certainty. So let me repeat that for you.

> On the other hand, you must remember that it is virtually impossible to prove anything about human conduct to an absolute certainty. The Crown is not required to do so. Such a standard of proof is impossibly high. It must prove guilt beyond a reasonable doubt. If, at the end of a case, after considering all the evidence, you are sure that Mr. S. committed the offence with which he is charged, you should find him guilty, since you would have been satisfied of his guilt of that offence beyond a reasonable doubt. If, at the end of the case, based on all of the evidence or lack of evidence, you are not sure that Mr. S. committed the offence, you should find him not guilty of it.

[9] After addressing reasonable doubt, the judge proceeded to instruct the jury on various matters, including credibility. Her charge noted with regard to the appellant's evidence:

> Now Mr. S. did testify in this case. He gave you evidence in this trial. You had the opportunity to hear him state under oath what occurred. You should approach his evidence in the same way you would approach the evidence of any other witness, bearing in mind what I told you earlier about the credibility of witnesses. Please remember that you do not have to accept or reject all of the testimony of any witness, including Mr. S., including his. It is up to you whether you accept all of his testimony, part of his testimony or none of his testimony.

After observing that the identity of the accused was not an issue, she continued:

> The real issue in this case is whether the alleged events ever took place. It is for the Crown counsel to prove beyond a reasonable doubt that the events alleged in fact occurred. It is not for Mr. S. to prove that these events never happened. If you have a reasonable doubt whether the events alleged ever took place, you must find him not guilty.
>
> You do not decide whether something happened simply by comparing one version of events with another, or choosing one of them. You have to consider all the evidence and decide whether you have been satisfied beyond a reasonable doubt that the events that form the basis of the crime charged, in fact, took place.

The judge then reviewed the elements of the alleged offences and the witnesses' testimony. Before setting out the defence theory and the theory of the Crown, she told the jury:

> If upon all the evidence you have heard you are not satisfied beyond a reasonable doubt that Mr. S. committed these acts, you must find Mr. S. not guilty of sexual assault. If you are satisfied beyond a reasonable doubt that Mr. S. did commit these acts, complained of by L.M., you must find Mr. S. guilty of sexual assault.

[10] At the trial, the appellant was represented by different counsel. His trial lawyer then did not object to this charge. Indeed, after the jury asked a question pertaining to reasonable doubt, he asked the judge to re-read her charge on this standard of proof. She did so in essentially the same words as set out in ¶ 8 above.

[11] I see no error in the trial judge's instructions to the jury on reasonable doubt, except insofar as the instructions relate to the application of reasonable doubt to credibility under *W.(D.)*. Her charge and recharge substantially explain the standard of proof beyond a reasonable doubt, and comply with the principles and avoid the pitfalls set out in *R. v. Lifchus*, [1997] 118 C.C.C. (3d) 1 (S.C.C.) at ¶ 36 and ¶ 37. Instructions on reasonable doubt consistent with those principles will suffice, regardless of the particular words used by the trial judge: *Lifchus*, supra at ¶ 37.

[12] The appellant argues that the trial judge failed to instruct the jury on reasonable doubt as required in *W.(D.)*, and that her non-direction amounted to a misdirection. According to the appellant, the sum total of the judge's charge amounted to "Who do you believe the complainant or the Appellant?"

[13] In this case, while the complainant and the accused were not the only persons who testified at the trial, the evidence was such that the jury's assessment of the credibility of the complainant and of the respondent was clearly of great importance. In giving the opinion of the majority, Cory, J. in *R. v. W.(D.)*, supra stated at p. 409:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they *must* acquit the accused in two situations. First, if they believe the accused. Secondly, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole: see *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.); approved in *R. v. Morin*, *supra*, at p. 207.

> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> If that formula were followed, the oft-repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[14] The absence of this formulaic wording in a jury charge does not necessarily constitute reversible error. Cory, J. himself made this clear in *W.(D.)*, supra at p. 409:

> None the less, the failure to use such language is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply: *R. v. Thatcher*, *supra*.

[15] Where this is a case where credibility was a live issue, and the trial judge did not charge the jury expressly as suggested in *W.(D.)*, supra, it is necessary to consider whether she sufficiently reflected the essential principles underlying reasonable doubt <u>as they apply to credibility</u>, such that a reading of the charge as a whole does not raise a reasonable likelihood that the jury misapprehended the correct standard and burden of proof. See *R. v. Campbell*, (1995), 24 O.R. (3d) 537 (C.A.) at p. 2 and *R. v. Bertucci* (2002), 169 C.C.C. (3d) 453 (Ont.C.A.) at ¶ 9.

[16] In *R. v. Mah*, [2002] N.S.J. No. 349 (C.A.), the trial judge had not specifically instructed himself in terms of the *W.(D.)*, supra wording, nor had he stated that he had considered all of the evidence in light of the reasonable doubt standard. The description by Cromwell, J.A. for the court in *Mah*, supra as to the ultimate issue in a criminal trial at ¶ 41-42 remains instructive:

> The **W.D.** principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, **W.D.** describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. **W.D.** reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: see **R. v. Avetysan,** [2000] 2 S.C.R. 745; S.C.J. No. 57 (Q.L.) at 756. As Binnie, J. put it in **Sheppard,** the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.
>
> . . . the failure of the trial judge to use the language of Cory, J. in **R. v. W.(D.)** does not of itself constitute reversible error. The question is whether, upon consideration of the whole of the judge's decision, it is apparent that the judge did not apply the proper test or did not address "... his mind, as he was required to do, to the possibility that despite having rejected the evidence of the respondent, there might nevertheless ... be a reasonable doubt as to the proof of guilt": **Sheppard** at para. 65.

[17] A decision of a judge alone is reviewed on the basis that the judge is presumed to know the principles relating to reasonable doubt, as explained in *R. v. Lake*, 2005 NSCA 162 at ¶ 15. No such presumption applies in a jury instruction. While the *W.(D.)* phrasing is not a “magic incantation,” the trial judge’s instructions must get the message to the jury to satisfy the ultimate test – whether “the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply” (Cory, J. in *W.(D)*, supra at p. 409.)

[18] It is apparent from a review of the trial judge’s charge that, although it did not specifically instruct this, the jury would have understood that they must acquit the appellant if they believed his denial of any sexual activity with the complainant. Her charge impressed this through its identification of the real issue

as being whether the alleged events ever took place, combined with her exhortation that the Crown must prove beyond a reasonable doubt that they had in fact occurred. If the jury believed the appellant, they would have had a reasonable doubt and they would have known to acquit.

[19] It is also apparent that, contrary to the appellant's submissions, the trial judge did not call upon the jury to simply decide which of the complainant or appellant it believed. She did not put an express either/or proposition to the jury by, for example, instructing that, in order to render a verdict, they had to believe either the defence evidence or the Crown's evidence. Twice in her charge, she specifically warned the jury not to choose between competing versions of events.

[20] It is my respectful view that the trial judge failed to adequately instruct the jury as to how reasonable doubt applies to the issue of credibility as represented by Cory, J.'s second instruction in *W.(D.)*. The charge only instructed that probable guilt was not enough to meet the standard of proof beyond a reasonable doubt, that the appellant was to be given the benefit of the doubt, and they did not have to accept or reject all of the testimony of any witness including his, and that they were to consider all of the evidence. Nowhere did it provide any guidance as to how, in the event they were uncertain or unable to resolve the issue of credibility, they were to proceed with their deliberations. The charge failed to direct that if the jury did not believe the testimony of the accused but were left in a reasonable doubt by that evidence, they must acquit.

[21] *W.(D.)'s* second instruction stands for a discrete principle. The jury's disbelief of the accused's testimony does not exhaust the jury's function in the assessment of that testimony. The jury must still consider whether the accused's testimony leaves the jury with a reasonable doubt. This principle is not identical to *W.(D.)'s* third instruction – consideration of reasonable doubt from all the evidence that the jury accepts. The trial judge's instructions respecting reasonable doubt from all the evidence do not necessarily satisfy the principle embodied in *W.(D.)'s* second instruction.

[22] After carefully considering the charge as a whole, I am not persuaded that the jury would have appreciated that, even if they did not believe the respondent's testimony, but were left in reasonable doubt as to his guilt, either by his evidence or after considering it in the context of the evidence as a whole, they must acquit. The wording of the charge leaves open a reasonable likelihood that, in a case where

credibility was critical, the jury misapprehended the correct standard and burden of proof.

[23] However, defence counsel at trial told the judge that he had no objection to the jury charge. The argument that the charge was defective arose for the first time on appeal.

[24] The absence of an objection to a jury charge, while not determinative, is a matter deserving of consideration. In concluding that the jury had not been properly instructed, Lamer, C.J. for the majority in *R. v. Jacquard*, [1997] 1 S.C.R. 314 noted that defence had not commented on the alleged misdirection either following the charge or during a pre-address conference. He continued:

> ¶ 37 To point this out is not to say that a party waives its right of appeal on a jury charge misdirection by failing to raise the issue contemporaneously with the making of the charge. In *R. v. Arcangioli*, [1994] 1 S.C.R. 129, this Court made it quite clear that defence counsel's failure to object to a jury charge is not determinative, at least in the context of the applicability of the *Criminal Code's* curative provision. Although such a rule would act as a strong incentive for counsel to scrutinize the charge carefully and would inhibit counsel from deliberately failing to object to the charge as a matter of strategy, the Court has not lost sight of the fact that the jury charge is the responsibility of the trial judge and not defence counsel. Such a rule might also unequivocally prejudice an accused's right of appeal in cases where counsel is inexperienced with jury trials.
>
> ¶ 38 Nevertheless, defence counsel's failure to comment at the trial is worthy of consideration. In *Thériault v. The Queen*, [1981] 1 S.C.R. 336, although I dissented on unrelated grounds, Dickson J. (as he then was) expressed the proper view at pp. 343-44: "[a]lthough by no means determinative, it is not irrelevant that counsel for the accused did not comment, at the conclusion of the charge, upon the failure of the trial judge to direct the attention of the jury to the evidence". In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection.

[25] In *R. v. Boran* (1999), 174 N.S.R. (2d) 240 (N.S.C.A.) at ¶ 45, the Crown's summation to the jury in certain respects was described as "so replete with improprieties, as to be reckless." Experienced defence counsel had not sought any correction by the trial judge. In response to the Crown's argument that this

contributed to a strong indication that the jury charge was either a proper one or that any prejudice was trifling, Pugsley, J.A. for this court stated:

> ¶ 59 Mr. Boran's right of appeal on this issue is not waived because of his counsel's failure to make a timely objection. The jury charge is, however, the responsibility of the trial judge. (**R. v. Arcangioli (G.)**, [1994] 1 S.C.R. 129, per Major, J., at 142; **R. v. Jacquard (C.O.)**, [1997] 1 S.C.R. 314, per Lamer, C.J. at 338).

[26] As explained earlier, the jury charge here did not instruct the jury on how reasonable doubt applies to the issue of credibility. It failed to give directions in regard to the second instruction stipulated in *W.(D.)*, supra. In the result, the trial judge's non-direction in this regard amounts to a misdirection. In my respectful view, the error is of such a magnitude and significance that defence counsel's failure to object at trial cannot amount to a waiver of Mr. S.'s right to appeal on the jury charge, nor can it weigh heavily against allowing the appeal.

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

[28] I have had the benefit of reading the decision of my colleague, Justice Saunders. While it was not necessary for my disposition of the appeal to deal with other grounds of appeal respecting the admissibility of evidence of the "bad behaviour" of the complainant and, if properly admitted, the trial judge's instructions on the use that the jury could make of that evidence, I agree with my colleague's reasons and disposition of those grounds of appeal.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Saunders, J.A.

Dissenting reasons for judgment:

[29] The grounds contained in the notice of appeal filed by the appellant's trial lawyer (not his counsel on appeal) were refined and reorganized at the hearing. Mr. Pink's able argument focussed on three alleged errors:

(i) that the "bad behaviour" of the complainant evidence introduced by the Crown at trial was inadmissible;

(ii) that if the trial judge did not err in admitting the "bad behaviour" evidence, she failed to properly instruct the jury on the limited use to be made of it; and

(iii) that the trial judge erred by failing to properly instruct the jury as to the test set out in **R. v. W.(D.)** (1991), 63 C.C.C. (3d) 397 (S.C.C.).

[30] I am not persuaded that the impugned evidence was inadmissible, or that the trial judge erred in failing to instruct the jury as to the limited use that could be made of it, or that the trial judge misdirected the jury on the burden and standard of proof .

[31] In the reasons that follow, I will explain why I respectfully disagree with my colleague's analysis and disposition, and why I would dismiss this appeal.

(i) That the "bad behaviour" of the complainant evidence introduced by the Crown at trial was inadmissible

[32] I am not aware of any authority to support this submission. The cases relied upon are all referable to "similar fact evidence" or the familiar prohibition (with limited exceptions) against the introduction of "bad acts" or "bad character" evidence to show disposition or propensity on the part of the accused. Those restrictions, in my respectful view, have nothing to do with this case.

[33] The "bad behaviour" evidence now being challenged by the appellant is not reflective of his own conduct, but rather attaches to the behaviour of the complainant L.M.M.

[34] During her direct examination by the Crown Attorney the complainant had described how when she was 14 or 15 years of age she started "acting-out" and

"was doing all kinds of bad things trying to get somebody to listen to me." A few passages later in the transcript, the Crown Attorney pursued the complainant's earlier reference to "bad things." We see this exchange:

> Q. Can I ask you to tell us more about you doing . . . you describe it as bad things. When did this take place? Approximately how old?
>
> A. That was when I was, like 13, 14.
>
> Q. What were the bad things you were doing?
>
> A. I was breaking into houses. I was breaking into mailboxes. I was stealing things. I was out drinking. I was running away from my house. I was hitchhiking. I was just out-of-control. I had no respect for nothing.
>
> Q. Do you have an understanding of why you were doing that?
>
> A. I used to cut myself to make the pain go away. And yes, I know what it's from. . . . (inaudible) emotional hurt from what he has done to me. I don't know what to do with it, so I used to cut myself so that would bring me some pain so I would numb myself. After I cut myself, the relief of just the blade slicing your skin was . . . I don't know, it was relieving.
>
> Q. Did you understand what was going on, why you were doing these things?
>
> A. Not exactly. I just figured it was because of everything I went through.
>
> Q. When did you start having trouble with your mother and Mr. S. over not keeping rules or whatever or doing bad things?
>
> A. Well , I was always (pretty?) stubborn, not . . .
>
> (Underlining mine)

[35] Later the Crown Attorney asked the complainant's mother the following:

> Q. Uh-huh. Okay, can you continue and tell us about her personality over . . . over the years.
>
> A. Well, as she got older, she started to . . . when she was around nine or 10 years old, I discovered that she was cutting herself?

> Q. How did you discover that?
>
> A. She was in her room . . . she was changing . . . from a sweatshirt she was putting on a short-sleeved shirt and I seen the scars on her upper left. And on her shoulder words saying "I hate life." And I asked her about it and she wouldn't say too much.
>
> Then I took her to our family doctor, which was Dr. Kathy Colp at the time . . . that was her name, and we had discussed putting her into therapy. She wouldn't say anything to me. She wouldn't talk to me. She talked . . . she said a few things to Dr. Colp at the time, but I had to heave the office. She didn't want to talk with me there.
> (Underlining mine)

[36] I must first observe that none of this questioning drew any comment or objection from the appellant's then trial counsel. Neither was any objection made when the judge referred to the evidence in her charge to the jury. While not determinative, this is certainly a circumstance we are able to take into account on appeal. See, for example, **Theriault v. The Queen** (1981) 61 C.C.C. (2d) 102 (S.C.C.); **Jacquard v. The Queen** (1997) 113 C.C.C. (3d) 1 (S.C.C.); **R. v. Reddick**, [1989] N.S.J. No. 260 (C.A.); **R. v. Gagnon**, [2000] O.J. No. 3410 (C.A.); and **R. v. L.T.P.** 2000 BCCA 645.

[37] In view of the reliance placed upon such evidence by the defence at trial, it is hardly surprising that no objection was taken to its introduction. The defence used this evidence for two principal purposes: first, to discredit the complainant in the eyes of the jury by showing that she was untruthful in her explanation as to why and when she was cutting herself; and second, to portray the appellant as someone who supported her need for counselling, which would be inconsistent with someone who had sexually assaulted her.

[38] The appellant - through different counsel - now argues that the reference to the complainant's "self mutilation" was inadmissible. The present objection in this court to the evidence presented at trial of the complainant cutting herself is based on three submissions. First, the appellant citing **R. v. Béland & Phillips** (1988), 36 C.C.C. (3d) 481, and *McWilliams' Canadian Criminal Evidence*, at page 11-14, (11:20.50.10) says such evidence is "self-serving" and "offends the rule against oath-helping" which precludes a party from leading evidence whose sole purpose is to bolster the general credibility of a witness and therefore ought to have been

declared inadmissible. Second, the appellant says the evidence was highly prejudicial and ought to have been rejected. Third, the appellant contends that having admitted the evidence, the trial judge was obliged to give the jury a limiting instruction on the use to be made of such evidence.

[39] With respect, I reject each of these submissions. I will begin with a consideration of the appellant's argument that the complainant's testimony about cutting herself was inadmissible as being nothing more than "oath-helping."

[40] There is a difference between evidence that would be barred because it is introduced solely for the purpose of proving the truthfulness of the witness (oath-helping) and evidence that is introduced to lend credence to the witness' statement (corroboration). See, for example, **R. v. B.(F.F.)**, [1993] 1 S.C.R. 697 at ¶ 70; **R. v. B.(R.H.)**, [1994] 1 S.C.R. 656 at ¶ 28. As noted in *McWilliams*, supra at 11:20.50.10:

> The prohibition against oath-helping evidence is not absolute. The rule against oath-helping prohibits the admission of evidence whose sole purpose is to bolster a witness's general credibility; however, evidence about a specific "feature of the witness's behaviour or testimony" may be admissible.
> (Citations omitted)

[41] In *The Dictionary of Canadian Law*, 3rd ed, the definition for "oath-helping" is:

> 1. Evidence adduced to prove that a witness is truthful. It is not admissible. 2. The actual credibility of a particular witness is not generally the proper subject of opinion evidence. This is known as the rule against oath-helping.

[42] In D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 4th ed. (Irwin Law Inc., 2005), the authors describe the rule against oath-helping as follows at p. 177:

3.3) The Rule against Oath-helping

> *A properly qualified witness can provide general information relevant in judging the credibility of a witness, but is prevented by the rule against oath-helping from expressing an opinion about whether a particular witness is telling the truth.*

> "The rule against oath-helping prohibits the admission of evidence adduced solely for the purpose of proving that a witness is truthful." The rule exists because "[i]t is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence." Triers of fact can discharge their central function of deciding the ultimate issue of whether witnesses are providing accurate testimony without the need for the opinions of others about whether those witnesses are being truthful. It is not just that such opinions are superfluous or unnecessary. Even though laypeople are capable of assessing credibility, determinations of credibility are notoriously difficult. There is fear that if experts, or even laypersons familiar with witnesses, are permitted to express their opinions as to whether witnesses are telling the truth or furnishing accurate information, triers of fact might simply defer to those opinions rather than assessing credibility and reliability themselves.

[43] The prohibition against oath-helping arises out of a concern that the triers of fact must not subjugate their ultimate responsibility in deciding whether witnesses are providing reliable testimony, to the experience or opinions of experts, or lay persons, as to whether those witnesses are being truthful. In **R. v. B.(F.F.)**, supra, Iacobucci, J. speaking for the majority on this point, referred to the rule against oath-helping as follows:

> ¶ 70 . . . The rule against oath-helping prohibits a party from presenting evidence solely for the purpose of bolstering a witness' credibility before that witness' credibility is attacked. This type of evidence is of the sort that would tend to prove the truthfulness of the witness, rather than the truth of the witness' statements. It includes psychiatric evidence that the witness is likely to tell the truth in court (see, e.g., *R. v. Kyselka* (1962), 133 C.C.C. 103 (Ont. C.A.)), evidence of good character called solely to illustrate that a witness is likely telling the truth (see, e.g., *R. v. Clarke* (1981), 63 C.C.C. (2d) 224 (Alta. C.A.)) and polygraph evidence (see, e.g., *R. v. Béland,* [1987] 2 S.C.R. 398). . . .

[44] No such violation of the rule occurred in this case. There was no attempt by the Crown to introduce evidence from other witnesses as a way of bolstering the

truthfulness of the complainant. Rather, it is the complainant's testimony describing her own behaviour with which we are now concerned. For reasons I will now develop, there was no basis upon which the complainant's evidence could have been declared inadmissible.

[45] The appellant's attempted comparison between the complainant's testimony about her own "bad conduct," and the rules with respect to character/propensity evidence is misguided for two reasons. The first relates to the purpose of the rule against the "prohibited inference" involved in propensity reasoning; and the second relates to the rules allowing character evidence about the victim.

[46] Generally, the Crown is prohibited from calling evidence that proves that an accused is the type of person to have committed the offence in question. The "exclusionary rule" against the Crown leading bad character evidence is described by David M. Paciocco & Lee Stuesser in their text, *The Law of Evidence*, supra, at p. 47:

> As stated by the Supreme Court of Canada, "[i]t is trite law that 'character evidence [called by the Crown] which shows *only* that the accused is the type of person likely to have committed the offence in question is inadmissible.'" Moreover, to infer from admissible evidence that the accused may be guilty because he is the kind of person who would commit the offence is impermissible. This "prohibited inference" has been described as a "primary rule of exclusion," "one of the most deeply rooted and jealously guarded principles of our criminal law." Hence, it is not permissible in a burglary trial to prove that, because he has a history of burglary, the accused is the kind of person likely to have committed the burglary in question.

[47] The rational for limiting the Crown's use of bad character evidence against the accused is based on the belief that any accused should be tried for what they have done, not for who they are. The development of this rule is therefore a response to the prejudice caused to the accused from the prohibited form of propensity reasoning.

[48] The rule against propensity reasoning does not apply in this situation because any inference drawn by the jury from the complainant's own testimony about her "bad conduct" does not relate to the kind of person the accused is. The complainant's testimony may lead the jury to reason that the complainant has the

propensity, or disposition, to injure herself because of the abuse she endured at the hands of the accused. This type of reasoning is not, however, prohibited propensity reasoning under the rules concerning the admission of character evidence.

[49] The second reason that the appellant's argument is misplaced, relates to the law surrounding when character evidence about the victim is admissible. In **R. v. Diu**, [2000] O.J. No. 1770 (Ont. C.A.), Sharpe, J.A., at ¶ 39 to 41 explained it this way:

> [39] In general, the character of a victim of a crime is irrelevant and neither the accused nor the Crown may lead such evidence. . . .
>
> [40] There are, however, circumstances in which the character or disposition of the victim of a crime may be relevant. It has been found, in some cases, that evidence of the disposition of the deceased may be relevant to a charge of murder where the accused relies on self-defence. A useful starting point in this area is the judgement of Martin, J.A. in *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.). . . .
>
> [41] While not dealing with evidence of disposition in this precise context, *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.) at 327-8; *R. v. Sims* (1994), 87 C.C.C. (3d) 402 (B.C.C.A.) at 421; and *MacMillan v. R.*, [1977] 2 S.C.R. 824 at 827, 33 C.C.C. (2d) 360, confirm the basic point, explained by Martin J.A., that <u>there is no rule excluding evidence of the disposition of the deceased or a third party where such evidence is relevant, provided the trial judge concludes that the probative value of such evidence is not outweighed by its prejudicial effect</u>. (Underlining mine)

[50] Evidence about a victim's behaviour, traits, character or disposition will be admissible if it is relevant to some issue that falls to be decided by the trier of fact. This principle was articulated by the British Columbia Court of Appeal in **R. v. Sims** (1994), 87 C.C.C. (3d) 402 at p. 421:

> Evidence which is relevant to some issue before the court, and which is not excluded by any rule of evidence, is admissible. While the accused is protected by a rule of policy which excludes evidence of his or her character, except in certain well defined circumstances, <u>evidence of the character of third parties, including that of the alleged victim of a crime, is not the subject of any similar proscription</u>: see Regina v. McMillan (1975), 23 C.C.C. (2d) 160, 29 C.R.N.S. 191, 7 O.R. (2d) 750 (Ont. C.A.); Sopinka, Lederman and Bryant, The

> Law of Evidence in Canada (Toronto: Butterworths, 1990) at p. 467; Cross on Evidence, 7th ed. (London: Butterworths, 1990) at p. 327. Thus, if the character of the victim of an alleged crime is relevant to some issue before the court, evidence tending to establish that character is admissible.

[51] While most of the jurisprudence which considers when evidence can be lead about a victim's "disreputable conduct" or predisposition for violence arises in cases involving self-defence, as Doherty, J.A. explained in **R. v. Watson** (1996), 108 C.C.C. (3d) 310 (Ont. C.A.), "evidence pertaining to the victim's character is not limited to instances where self-defence is raised." at ¶ 6.

[52] In summary, there is no exclusionary rule that would disallow evidence describing the bad behaviour or character of the complainant, similar to that barring disreputable character evidence against an accused. Because there is no rule excluding the complainant's own evidence about her conduct, the test for admissibility will depend on relevance, and weighing probative value against prejudicial effect.

[53] A first step therefore is an assessment of whether the complainant's evidence about cutting herself was relevant. In **R. v. Watson**, supra, Doherty, J.A., speaking for the Court, explained the concept of relevance in relation to a victim's character at page 323 as follows:

> In *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.), La Forest J. (in dissent) at p. 416 described the significance of relevance to our law of evidence:
>
> > All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.
>
> In explaining what he meant by relevance, La Forest J. referred to *R. v. Morris* (1983), 7 C.C.C. (3d) 97 (S.C.C.), and then said at pp. 417-418.
>
> > It should be noted that this passage [from *R. v. Morris*] followed a general discussion of the concept of relevance in which *the court affirmed that no minimum probative value is required for evidence to be deemed relevant. The court made it clear that relevance does not involve considerations of sufficiency of probative value*. . . . A cardinal principle of our law of evidence, then, is that any matter

> that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, subject, of course, to the overriding judicial discretion to exclude such matters for the practical and policy reasons already identified. [Emphasis added.]

> While La Forest J. dissented in the result in *Corbett*, his discussion of the significance and meaning of relevance is consistent with previous and subsequent majority decisions of the Supreme Court of Canada: *R. v. Morris, supra, per* McIntyre J., at pp. 98-99, *per* Lamer J. (dissenting in the result) at pp. 105-106; *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.) at 389-392. Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.

[54] In my opinion, the impugned evidence of self-mutilation from the complainant, and her mother, was relevant to the defence and admissible for three purposes. First, it provided a basis for attacking the credibility of the complainant. Second, it explained what was happening in their household at the time, and how these parents were coping with their daughter's escalating behaviour including arranging medical appointments and other professional counselling for her. Third, it supported the appellant's explanation that the complainant's aberrant behaviour had nothing to do with any criminal conduct on his part.

[55] A careful review of the entire record, including the defence cross-examination of the complainant that spread over two days, confirms that the defence strategy was to test the memory of the complainant as to events she said occurred from the time she was a little girl; to show exaggeration and serious inconsistency in the several accounts she had given under oath, including repeated references during her cross-examination to earlier testimony given at a preliminary inquiry, and a first trial; and to establish the appellant's theory that the real reason she had cut herself was her feeling of rejection after a failed reconciliation with her biological father.

[56] Further, as Doherty, J.A. explained in **Watson**, supra, at p. 323 "relevance must be assessed in the context of the entire case and the respective positions taken by the Crown and the defence." Thus, in this case, the relevance of the evidence

that the complainant was "out of control" and cutting herself (after the alleged abuse, according to the Crown) must be assessed in the context of the parties' positions. Here, both of the parties at trial were clearly of the opinion that such evidence was relevant, albeit for different purposes. And so the only remaining question is whether the evidence ought to have been excluded because its prejudicial effect outweighed its probative value.

[57] In **R. v. Watson**, supra, Doherty, J.A. explained that admissibility is not determined solely on a finding of relevance. He said at p. 327:

> A finding that evidence is relevant does not determine its admissibility. Relevant evidence will be excluded if it runs afoul of a specific exclusionary rule, or if a balancing of its probative value against its prejudicial effect warrants its exclusion: *R. v. Corbett, supra*; *R. v. Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.) at 326; *R. v. Terry*, released May 30, 1996, at pp. 13-14 (S.C.C.) [now reported 106 C.C.C. (3d) 508 (S.C.C.) at pp. 518-9]. Where the evidence found to be relevant is offered by the defence in a criminal case, it will be excluded under the second of these exclusionary rules only where the prejudice substantially outweighs the probative value: *R. v. Seaboyer*, supra, at p. 391; *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 (S.C.C.) at 297.

[58] Given the way in which the evidence was relied upon by the appellant as buttressing their defence theory at trial, I cannot accept the submission that its probative value was outweighed by its prejudicial effect.

[59] Competence of trial counsel has not been challenged on appeal. The focus of questioning during cross-examination was clearly an attempt to persuade the jury that the complainant was untruthful and that her testimony - for example her references to the frequency of sexual assaults as happening "a couple of hundred times in a year" - was so bizarre as to be incapable of belief.

[60] The complainant's evidence concerning her own bad behaviour was put to the appellant who took the stand in his own defence, <u>by his lawyer on direct examination</u> as is evident in this exchange:

> A. The only real hard time that I noticed a change in L. was after her father come back into her life. And he started rejecting her and she . . . that's when she really got out of control. Before that she was . . . she had a problem with a . . . a little problem with taking, you know, like listening to what she was told to do and stuff. And after that she just went right out of control after he stopped . . . he had

stopped. He was coming . . . he would see them. He was doing all right for awhile, then he stopped coming just a few times and then as soon as she (sic) stopped coming, she started to act up. And then when he stopped coming altogether, she really got out of control. She really got hard to handle and everything.

Q. Okay. And what do you mean by that? What was going on?

A. Well, she was doing things that wasn't very nice. Like she was breaking the law. For one thing, she would break into mailboxes, break into homes, drinking a lot. She would . . . when she was younger, I'll give you an example, when she was younger, every now and then she would call and at least let us know where she was. When she got . . . then she would . . . she had the attitude I don't have to tell you where I am any time. And there was lots of times we had to go looking, and I mean looking for her, I mean, like for hours to find out where she was.

Q. Now was there anything else that you were concerned about in terms of L., her behaviour? Can you describe her behaviour?

A. Well, her behaviour, you know, mostly and what she was doing because she was on a path that wasn't good, you know, if she kept it up, she would end up doing destruction to herself or somebody else or end up in jail. And shortly after that, you know, like after she started cutting herself and like anything else, W. brought that to my attention and we did . . . then we decided we were going to have to get her some help.

Q. Okay.

A. Into counselling or something.

Q. So what was done?

A. Well, we decided we were going to send her to counselling. Okay? And W. made arrangements through her doctor, as far as I know now, that . . . who she made the arrangements through . . .

[61] This extract clearly reflects the defence strategy of presenting the appellant as a caring, interested step-father who joined with his wife in seeking counselling for the complainant when her behaviour went "out-of-control." When one carefully examines the context of how such tactics were employed at trial, the

complaint to this court that the impugned evidence ought not to have been admitted in the first place rings hollow.

[62] My assessment is reinforced by the fact that the appellant's trial lawyer emphasized the complainant's evidence concerning her own bad behaviour, both in her cross-examination, and in cross-examining the complainant's mother. These efforts were intended to cast doubt on the complainant's recollection of important dates, and more significantly, to link the complainant's talk of "cutting herself" to an unsuccessful attempt at reconciliation with, and ultimate rejection by, her biological father, thus having nothing to do with the alleged sexual abuse at the hands of the appellant. Connecting the complainant's testimony to hurting herself, with heartbreak over the rejection she experienced from her biological father, featured prominently in the appellant's trial lawyer's closing address to the jury:

> . . . because, as I said, it's more event-oriented such as when L. was mutilating herself, it was after C.M. came back into the picture. And, as I say, when you look at previous testimony, that's corroborated. . . .

[63] This strategy is repeated in the written "theory" the defence provided to the trial judge and which she read *verbatim* in her charge to the jury:

> **THE DEFENCE THEORY** - The defence theory is that L.M. became quite troubled after being re-introduced to her biological father, D.C.M., and became much more troubled after he ceased contact with her. She became involved with people who committed illegal acts, and as her behaviour escalated and became more extreme she had great difficulties at home.
>
> With Mr. S.'s last threat of sending her to a Catholic school, which L.M. took seriously, she made these false allegations against J.S. The first incident when L.M. was eight and a half, if it happened, was an innocent event. There is no corroborating medical evidence of sexual assault. No medical evidence of when L.M. cut herself, for that matter.

[64] From this record we see that the defence strategy was not to deny or object to the evidence of self-mutilation. Rather the timing and circumstances surrounding such conduct were relied upon by both the Crown and the defence, albeit for different reasons. These divergent positions were concisely described by the trial judge in her charge to the jury when reviewing certain inconsistencies in the testimony of witnesses.

> Again these are inconsistencies in testimony of witnesses. It is for you to decide how minor they are or how important they are in arriving at your decision, having heard all of the evidence.
>
> Another such issue arises with respect to whether W.H. decided to take L. to counseling at age nine or ten, or maybe 11, when she discovered she had self-mutilated and cut her arms, or whether she might have taken her to counseling at a time later at age 15 in 1999.
>
> You will recall that L.M. could not recall the earlier counseling session. Ms. H.'s evidence was that she sought counselling twice at the earlier age, and again later at the last disclosure of the abuse by L. to her.
>
> If you accept that Ms. H. could be correct and that self-mutilating could have occurred at the earlier time, this would pre-date L.M.'s meeting her biological father.
>
> You will recall that it was the accused evidence that L.M. is acting out with, rebellion and self-mutilating occurred at the time she met and saw her biological father, C.M. It occurred because he then rejected her and left her life. He suggests that this is the reason she needed counseling.
>
> You will recall that L.'s testimony that her bad behaviour and the acts of cutting herself were as the result of no one believing the things that were happening to her. A way to deal with the pain and the hurt. A way to deal with the frequent and escalating acts of alleged sexual abuse.

[65] In summary on this point, both the defence and the Crown relied upon the complainant's testimony of self-mutilation. That evidence was highly relevant to the appellant's theory that the complainant's aberrant behaviour, including self-mutilation, was a consequence of the rejection she felt from her biological father. Far from being "highly prejudicial" to the appellant, it was relied upon by the defence. To have ruled that such evidence was inadmissible - as the appellant with new counsel now suggests - would undoubtedly have triggered a complaint that the defence was denied the opportunity to make full answer and defence.

[66] The issue here is not unlike the situation confronted by the Ontario Court of Appeal in **R. v. Batte** (2000), 49 O.R. (3d) 321. There, defence counsel's reliance on the conduct of the complainants to attack their credibility at trial, prevented

(new) defence counsel from arguing on appeal that the evidence should not have been admitted.

[67] Like most sexual assault cases, the trial in **Batte** turned on the credibility of the complainants, two sisters who were teenagers at the time of the alleged abuse. They had had a long association with the accused, and continued to agree to spend time with him even though he continued to sexually assault them. Doherty, J.A., speaking for the Court, explained the defence position at trial as follows at ¶ 10:

> [10] The appellant chose not to testify. It was the position of the defence that none of the alleged abuse occurred. The defence relied on the conduct of the complainants throughout their long association with the appellant and argued that, as a matter of logic and common sense, that conduct was inconsistent with their claim that they were sexually abused in 1979. The defence also argued that the complainants had not shown any of the usual signs associated with sexual abuse and that the complainants' parents, with whom they were very close, had noticed nothing untoward at any time during the complainants' long association with the appellant. The defence contended that for some reason (two possibilities were suggested), the complainants had come to hate the appellant and had set out to "get him" by making false allegations in 1993, more than ten years after the alleged abuse had occurred.

[68] The jury in **Batte** heard evidence that the accused took the complainants to the Bahamas and raped them there, even though none of the charges alleged an offence in the Bahamas. The jury also heard evidence that the complainants went to live with the accused in New Brunswick, and that they were sexually abused there even though New Brunswick was beyond the geographical ambit of the indictment. The trial judge canvassed the admissibility of this evidence and counsel agreed that it was admissible, and that the defence had relied on it in earlier hearings. Therefore, the trial judge cautioned the jury that the accused was not being charged for those offences. On appeal, defence counsel resiled "from the position taken by counsel at trial for the appellant" and contended that the evidence was not relevant. Doherty, J.A. dealt extensively with this argument and dismissed it, see ¶ 85-91:

> [85] <u>On appeal, Mr. Wright resiles from the position taken by counsel at trial for the appellant and contends that none of this evidence was admissible</u>. I am somewhat uncertain as to the exact nature of his submission. Mr. Wright may be submitting that the jury should have heard nothing about events involving the appellant and the complainants that were outside of the place and dates set out in

the indictment. If this is his contention, it amounts to a submission that evidence which was vital to the defence should not have been admitted. The defence at trial was that the complainants' conduct towards the appellant over many years was entirely inconsistent with their allegations of sexual abuse made some ten years after the fact. The long-term relationship between the appellant and the complainants was a mainstay of the defence position from the start to the end of the trial. Counsel argued that the complainants' willingness to go to the Bahamas with the appellant, the fun they had with him in the Bahamas, their determination to move to New Brunswick to join the appellant, and their desire to stay there for a long time, belied any suggestion that they had been abused by the appellant during the time frame covered by the indictment.

[86] The defence also used the complainants' evidence of the sexual activities in the Bahamas and New Brunswick for a second purpose. It argued that their evidence defied belief. For example, the defence elicited evidence from D.S.D. that she had sexual intercourse with the appellant one last time in New Brunswick before she returned home in March 1981, even though by that time she hated the appellant, was anxious to go home, and wanted nothing more to do with him or his horses. No doubt, the defence hoped that the jury would find that at least some of the complainants' evidence concerning the sexual activities in the Bahamas and New Brunswick was untrue and would conclude that the complainants' evidence going directly to the allegations in the indictment was tainted by those falsehoods and should not be believed.

[87] The evidence of the trip to the Bahamas and the "New Brunswick" evidence was crucial to the defence and could not have been excluded without gutting the defence.

[88] Alternatively, Mr. Wright may be submitting that the defence was entitled to elicit evidence of the events in the Bahamas and in New Brunswick, but that the Crown could not elicit evidence of the sexual misconduct which occurred in those venues or which was beyond the time frame in the indictment. On this submission, the jury was entitled to hear about the long-term relationship between the appellant and the complainants, and all the fun the complainants had in the Bahamas and New Brunswick, but not about the sexual abuse.

[89] There is no merit to that position. If the defence chose to rely on evidence of the trip to the Bahamas and the "New Brunswick" evidence to support its position that the relationship between the complainants and the appellant was entirely inconsistent with any abuse during the relevant time frame, the complainants had to be allowed to describe the events which occurred in those places and shed light on the nature of their relationship with the appellant. The defence could not choose to put a fact in issue and then argue that evidence which was probative on

> that issue should be excluded because it involves allegations of misconduct by the accused. The rules of evidence do not permit the accused (or the Crown) to present a one-sided version of events to the trier of fact: *R. v. Mills,* supra, at pp. 719-20 S.C.R., pp. 363-64 C.C.C. This jury could not hope to arrive at the truth regarding the nature of the relationship between the complainants and the appellant if the complainants' description of that relationship was censored so as to completely distort their version of the nature of that relationship.
>
> [90] It is now well established that evidence of discreditable conduct [See Note 8 at end of document] by an accused is admissible if its probative value to a fact in issue outweighs its potential prejudicial effect: *R. v. Arp*, [1998] 3 S.C.R. 339 at p. 363 and 368-69, 129 C.C.C. (3d) 321 at pp. 340 and 344-45; *R. v. B. (L.)* (1997), 35 O.R. (3d) 35 at p. 42, 116 C.C.C. (3d) 481 at p. 489 (C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 524. The position advanced by the defence at trial will be an important consideration in determining the facts in issue and will assist in assessing the potential probative value of the discreditable conduct evidence: *R. v. B. (L.)*, supra, at pp. 68-69 O.R., p. 515 C.C.C. In this case, the defence position made the case for the admission of the accused's sexual activity with the complainants in the Bahamas and New Brunswick overwhelming.
>
> [91] In holding that the evidence was properly admissible, in the light of the position advanced by the defence, I do not suggest any criticism of the conduct of the defence at trial. The close, long-term, ongoing relationship between the complainants and the appellant during and after the alleged assaults and their willingness, if not determination, to be in his company, afforded support for the defence position that the assaults did not occur. It was tactically appropriate, if not essential, for the defence to make the relationship between the complainants and the appellant during and after the time frame in the indictment a central feature of the case. It was also reasonable for the defence to rely on the complainants' evidence concerning the sexual activity in the Bahamas and New Brunswick in an effort to undermine the overall credibility of the complainants. The fact that the evidence did not have that effect on this jury cannot condemn the strategy as inappropriate, nor can it open the door in this court to an attack on the admissibility of the evidence that ignores the manner in which the entire trial was conducted. The evidence was admissible.
> (Underlining mine)

[69] I too would hold that L.M.M.’s testimony in this case was admissible as being highly relevant and crucial to the appellant’s theory of the case. It permitted the appellant to attack the complainant’s credibility and it provided support for the defence position - entirely plausible - that the sexual assaults never happened. To have excluded such evidence would have gutted the defence. Considering the

strategies adopted by the defence in relying upon such evidence, its probative weight outweighed any prejudicial effect.

[70] Before leaving this first ground of appeal, I would also reject the appellant's collateral argument that in order for the complainant's testimony concerning self-mutilation to have been admissible, the Crown was obliged to call expert evidence to relate that behaviour to her allegations of frequent and escalating acts of sexual abuse. In my view the evidence of the complainant's bad behaviour did not require the opinion of an expert to legitimize its admissibility. See, for example, **R. v. D.D.**, [2000] S.C.C. 43; and **R. v. N.(R.A.)** (2001), 152 C.C.C. (3d) 464 (Alta. C.A.).

[71] In **R. v. Meisner** (1992), 110 N.S.R. (2d) 270 (C.A.) this court considered a case where the complainant was allowed to testify before a jury as to her conduct after the alleged sexual abuse. She described her poor grades in school as well as suffering from stomach cramps, nightmares and emotional problems after the alleged abuse. In that case the trial judge had refused to permit the Crown to call a social worker to testify that the complainant's symptoms were consistent with her having been sexually abused. The Crown appealed. Hallett, J.A., speaking for the court dismissed the appeal saying at ¶ 3:

> [3] The appellant asserts that the trial judge was in error in refusing to allow a social worker to testify that these symptoms were consistent with the complainant having been sexually assaulted. The trial judge concluded that the opinion evidence would not be helpful to the jury. Considering the fact that the jury had already heard the evidence of the complainant respecting physical and emotional problems subsequent to the alleged sexual assault, we are of the opinion that the sole purpose, in this case, for adducing the evidence of the expert was to bolster the credibility of the complainant and the evidence was properly excluded.

[72] Similarly, in **R. v. O.B.**, [1995] N.S.J. No. 499 (C.A.), defence counsel did not challenge, and neither the trial judge, nor this Court on appeal disallowed the complainant's evidence about her conduct after the alleged sexual assaults. Roscoe, J.A. referred to the complainant's evidence at ¶ 6:

> The complainant testified that she has had a life of trouble and turmoil, marked with feelings of worthlessness, and addiction to cocaine, and periods of time when her children were taken into care by child welfare agencies.

[73] And so both **Misener**, and **O.B.**, supra, provide illustrations of cases where the complainant's evidence about her own aberrant behaviour, said to have developed after the alleged sexual abuse, was introduced without any "supporting" evidence from expert witnesses. In fact, as we see in **Meisner**, supra, an attempt to introduce and rely upon "supporting" expert evidence may well persuade a trial judge that such opinion evidence is inadmissible, as being nothing more than oath-helping.

[74] I would treat the complainant's testimony about cutting herself - which are entirely factual events not requiring a medical confirmation - as being admissible to show "part of the family dynamics in which the alleged offences occurred" and that it was proper to leave to the jury the issue of whether those acts arose out of abuse, or the complainant's estranged relationship with her biological father. This was precisely the approach taken by the British Columbia Court of Appeal in **R. v. G.R.V.** [1996] B.C.J. No. 894 (C.A.) when, in dismissing an appeal from conviction, the court ruled that it was not necessary to have expert testimony or special instructions before adducing evidence of that particular complainant's aberrant behaviour including the fourteen year old's use of alcohol and drugs and frequently running away from home for long periods of time.

[75] For all of these reasons I see no merit to any of the appellant's various submissions that the complainant's testimony concerning her own bad behaviour was inadmissible.

(ii) <u>That if the trial judge did not err in admitting the "bad behaviour" evidence, she failed to properly instruct the jury on the limited use to be made of it</u>

[76] I have already explained that since there is no rule excluding the admission of a complainant's own testimony about his or her behaviour, the assessment of whether such evidence ought to go before a jury is dependant upon its relevance, and whether its probative value outweighed its prejudicial effect. I have reviewed in considerable detail the reasons why this evidence was highly relevant to the appellant's defence at trial. In my opinion, based upon my review of the prevailing authorities, as well as defence counsel's reliance upon the evidence at trial to support their theory of the case, the prejudicial effect of such testimony did not outweigh its probative value.

[77] In these circumstances there was no obligation on the trial judge to provide the jury with any kind of limiting instruction. This was not a case where evidence of the appellant's own discreditable conduct was introduced to show his disposition or propensity. Obviously in such instances a warning against the misuse of propensity reasoning, as well as a clear instruction on its proper use, is typically triggered.

[78] Here, the defence and the Crown relied upon the complainant's evidence of self-mutilation as going to her credibility, and in her charge to the jury the trial judge addressed these two positions. She reminded the jury that both parties had relied upon the evidence for different reasons and she instructed the jury about using the evidence in assessing credibility, and in deciding guilt based on the whole of the case. Finally, the trial judge read the respective theories of the defence and the Crown which of course reflected the importance each theory attached to the complainant's testimony. In her charge, the trial judge was obliged to fairly and accurately present the theories of both the Crown and the defence, and the evidence that related to their respective positions, thus providing the jurors with a balanced and helpful outline of the issues they were obliged to decide. In my view she did just that.

(iii) <u>the trial judge erred by failing to properly instruct the jury as to the test set out in R. v. W.(D.) (1991), 63 C.C.C. (3d) 397 (S.C.C.).</u>

[79] I see no merit to this ground of appeal. The first point to be made is that we are dealing with a conviction following trial by jury. With respect, the statements of this Court in **R. v. Mah**, [2002] N.S.J. No. 349 and **R. v. Lake**, 2005 NSCA 162 which involved appeals from convictions in judge alone trials, are not particularly relevant to our analysis.

[80] Here, the standard of review is not whether the trial judge applied the proper legal principles when assessing credibility and deciding guilt beyond a reasonable doubt, but whether the trial judge's charge, when read as whole, demonstrates that the burden of proof and the standard of proof were sufficiently clear to the jury. As Mr. Justice Cory observed in **W.D.**, supra, at page 409:

> None the less, the failure to use such language is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any

misapprehension as to the correct burden and standard of proof to apply: *R. v. Thatcher***,** supra.

[81] In **R. v. S.(W.D.)**, [1994] 3 S.C.R. 521, Cory, J. affirmed that the **W.D.** procedure was not meant to be followed "word for word as some magic incantation."

[82] It should be noted that after charging the jury the judge asked counsel whether they had any submissions. Neither expressed any comments or concern. Some two hours after beginning their deliberations the jury returned with a question seeking further clarification of the concept of reasonable doubt. The judge sought and obtained advice from counsel out of the presence of the jury and then re-charged them on the question they had asked. The jury then continued its deliberations for another three hours before retiring to a hotel for the night. They returned the next morning to continue their deliberations, ultimately reporting a guilty verdict later in the day. No objection has been taken to the adequacy of the judge's re-charge on reasonable doubt.

[83] Having read the judge's charge as a whole, I am satisfied that the jury could not have been left under any misapprehension as to the proper burden and standard of proof to apply. The trial judge's charge bore repeated references to the necessary fundamental principles, including:

- that the accused was presumed innocent

- that the burden of proof never shifted to the accused

- that the Crown was obliged to prove all essential elements of the case beyond a reasonable doubt

- that the jurors were <u>not</u> to choose between competing versions of events

- that the jurors were the sole decision-makers in deciding whether to accept any witness' testimony, including the accused's, in whole, in part, or not at all

- that the jurors were obliged to consider all of the evidence in deciding whether the appellant's guilt had been proved beyond a reasonable doubt.

[84] Looking at the entire charge, this jury was given clear instructions that its verdict could not be based on a choice or preference between the complainant's and the accused's evidence, but would have to depend on their unanimous view at the end of the case and on the whole of the evidence whether they were left with any reasonable doubt as to the guilt of the appellant. See, for example, **R. v. Lifchus**, [1997] 3 S.C.R. 320; **R. v. Sheppard**, [2002] 1 S.C.R. 869; **R. v. Campbell**, [1995] O.J. No. 1828 (C.A.); and **R. v. Boucher**, [2005] S.C.J. No. 73.

[85] I would therefore dismiss this last ground of appeal.

Conclusion

[86] For all of these reasons I would dismiss the appeal.

Saunders, J.A.